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DECISIONS OF THE SUPREME COURT,
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Savy v Attorney-General

Karunakaran J
19 March 2010 Supreme Court Civ 371 of 2008

Unjustified detention – damages

The plaintiff was apprehended by police officers and was made to spend 39 hours in a cell. The police did not give the plaintiff any reason for his detention. The police were at all times acting as préposés of the Government of Seychelles. The plaintiff claimed damages against the Government of Seychelles under three heads: nominal damages for fault, compensatory damages for infringement of a constitutional right, and exemplary damages. The defendant did not challenge liability.

HELD

1. Unlawful detention not only amounts to fault, it also amounts to a legal injury. The injury relates to the right to liberty. This injury attracts nominal damages upon proof of such unlawful detention, irrespective of whether any special damage or loss suffered can be shown.

2. Compensatory damages for a breach of the constitutional right of liberty ought to be commensurate with the nature, duration and the degree of deprivation of liberty including the loss of consortium and amenities of life.

3. The object of exemplary damages is to punish defendants for oppressive or arbitrary behaviour or condemnable acts and to deter them and others from

repeating the behaviour. This includes oppressive or arbitrary behaviour.

4. Exemplary damages must be awarded in moderation.

Judgment: Damages of R 25,000 awarded.

Legislation cited
Civil Code, arts 1149(2), 1382
Constitution of Seychelles, art 18(10)

Cases referred to
Canaya v Government of Seychelles (2000) SLR 143
Evenor v Government of Seychelles (2001) SLR 147
Lajoie v Government of Seychelles Const 1/1999 (unreported)

Foreign cases noted
Broome v Cassell & Co Ltd [1972] AC 1027
Rookes v Barnard [1964] AC 1129
Takitota v Attorney-General (Bahamas) [2009] UKPC 11

Elvis CHETTY for the plaintiff
Kisnan LABONTE for the defendant

Judgment delivered on 19 March 2010 by

KARUNAKARAN J: This is a delict claim based on an alleged unlawful arrest and detention by police officers, who were acting in their capacity as préposés of the Government of Seychelles. The plaintiff claims a sum of R 100,000 from the defendant for damages resulting from the said unlawful arrest and detention. Indeed, this action is pursued against the Government of Seychelles on the basis of its vicarious liability for the acts of its servants.

It is the case of the plaintiff that on Saturday 31 May 2008 at

around 7 pm while he was driving his pickup truck on the public road in town, some members of the Seychelles Police Force stopped and arrested him. He was then taken to the Central Police Station where according to the plaintiff, he was illegally, unlawfully and unjustifiably detained in a cell for about 39 hours for no valid reason. After such detention, he was released only at 10 am on Monday 2 June 2008. The plaintiff avers that the members of the police force were, at the material time, acting within the scope of their employment with the Government of Seychelles which is therefore vicariously liable in damages for the fault committed by its servants, the police officers. The plaintiff further avers that the police officers did not take any statement from him nor did they commence any investigation against him before or during or after the said arrest and detention. Moreover, the police did not at any time give any reason for the detention. They did not even mention to him any complaint made by anyone at the time of arrest or soon thereafter. The plaintiff also avers that after his release and until today, no charges have ever been filed against him. The plaintiff's father and mother also testified in support of the plaintiff's claim as to the unlawful detention on the alleged date, time, duration and place. Besides, one Ms Edwige Committant (PW3) who was a passenger in the plaintiff's pickup truck at the material time also testified corroborating the evidence of the plaintiff in all necessary particulars as to time, place and circumstances under which the police stopped and arrested the plaintiff while he was driving his pickup truck on the public road. In the circumstances, the plaintiff prayed this Court for a judgment in his favour awarding damages against the defendant in the sum of R 100,000 with interest and costs.

After the close of the case for the plaintiff, State counsel Mr Labonte submitted that the defendant was not denying liability for the reason, though deplorable, that the police do not have any official record of the detention of the plaintiff, either in the Occurrence Book or in any other record or register of

detainees maintained at the Central Police Station. Hence, Mr Labonte candidly admitted liability continuing the good tradition of the Attorney-General's chambers and invited the Court to determine only the issue as to quantum of damages payable to the plaintiff, in the light of the evidence adduced by the plaintiff in support of his claim in this matter.

I carefully analysed the entire evidence on record and the relevant circumstances surrounding the unlawful arrest and detention of the plaintiff by the police officers. On the strength of the unchallenged evidence on record, I find that the members of the Seychelles Police Force arrested the defendant at around 7 pm on 31 May 2008 and kept him under detention in a cell at the Central Police Station until 10 pm on 2 June 2008. Moreover, I find that there was no lawful justification for such arrest and detention of the plaintiff having regard to all the circumstances of the case. Besides, the police did not inform or give any reason, let alone a valid or plausible reason as to why he was arrested and detained, for such a relatively long period in solitary confinement. The most deplorable part of the entire episode, as I see it, is the dereliction of duty or, to say the least, the failure of the officer in charge of the Central Police Station to maintain a proper register or record of detainees, particularly, that of the defendant, who had been kept in police custody almost for two days without official record and having no regard for the rule of law. The State also impliedly concedes that this makes the arrest and detention not only unlawful but also condemnable for lack of official record.

I will now proceed to the assessment of damages.

(1) <u>Nominal damages for fault</u>

First I note the plaintiff has brought this action for fault in terms of article 1382 of the Civil Code of Seychelles. This article reads:

1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.

2. Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.

3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.

On a careful analysis of this article, it is evident that the cause of action for fault in essence consists of two ingredients:

(i) an act or omission that should have been committed by the alleged tortfeasor; and

(ii) the particular act or omission should have caused damage pecuniary or otherwise, to the claimant.

Obviously, in the present case both ingredients namely: (i) the defendant's unlawful act of detention and (ii) the alleged damage are present and thus constitute the necessary cause of action for "faute" under article 1382. Hence, the defendant is liable in law to compensate the plaintiff for the consequential loss and damages.

Although unlawful detention amounts to a fault in law under the Civil Code, it is indeed, a legal injury to the fundamental right (liberty) guaranteed by the Constitution. It is also

pertinent to note that in the common law system unlawful detention or false imprisonment is a tort actionable per se. What matters most in a false imprisonment is the injury to the right to liberty of a person. Hence, such legal injury *ipso facto* attracts nominal damages, and special damages or loss if any, suffered by the claimant. Hence, I hold that a person who seeks damages for unlawful detention invoking article 1382 of the Civil Code alleging fault against the tort-feasor, is entitled to nominal damages for the legal injury, upon proof of such unlawful detention, irrespective of whether he could prove any special damage or loss suffered as a result thereof. Therefore, the proper approach in ascertaining and assessing the damages in matters of unlawful detention is to regard this "injuria" as actionable per se and award nominal damages to the claimant even without proof of any special damage.

(2) Compensatory damages for infringing the constitutional right

Secondly, I note that 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.

In this matter, undoubtedly the plaintiff's right to liberty, the fundamental right guaranteed by the Constitution of Seychelles, has been curtailed or affected by the unlawful act of the police for about 39 hours. Hence, I find that the plaintiff is entitled to receive compensation from the defendant for the curtailment of his liberty, and the quantum ought to be commensurate with the nature, duration and the degree of

deprivation of his liberty including loss of consortium, amenities of life and the like, if any. In the present case however, there is no evidence that the plaintiff was in any state of fear or emotional stress during his detention. However I would accept that he suffered some loss of rights of personality as envisaged in article 1149 (2) of the Civil Code. Obviously, the plaintiff would have suffered loss of consortium and amenities during the period under detention.

(3) Exemplary damages for unconstitutional action by the servants of the government

Thirdly, the award of exemplary damages is a common law head of damages, the object of which is to punish the defendant for outrageous behaviour or condemnable acts and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or condemnable behaviour - vide the ground relied upon by the Court of Appeal of Bahamas and the Privy Council in *Atain Takitota v Attorney-General* [2009] UKPC 11. It serves, as Lord Devlin rightly stated in *Rookes v Barnard* [1964] AC 1129 at 1223, to retrain such improper use of executive power.

At the same time I warn myself that there is the need for moderation in assessing and awarding exemplary damages in cases of this nature. Indeed, Lord Devlin in *Rookes v Barnard* and Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1081 have emphasised such need for moderation in assessing and awarding exemplary damages.

Precedents for guidance

In the case of *Gerard Canaya v Government of Seychelles* (2000) SLR 143 the Court, inter alia, awarded R 5000 for an unlawful arrest and detention for 18 hours. An award of R 5000 was made by the Constitutional Court in *Noella Lajoie v Government of Seychelles* Const 1/1999 (unreported) in similar circumstances. In the case of *Paul Evenor v Government of Seychelles* (2001) SLR 147 the Court awarded R 20,000 as moral damages for fear and emotional stress while the plaintiff was detained at the Police Army Camp, and for loss of civil rights of personality. At the same time, I note, those awards were made 10 years ago, based inter alia, on the cost of living index which prevailed then in Seychelles.

In the final analysis, on a consideration of all relevant circumstances of this case, I award a global sum of R 25,000 to the plaintiff covering damages under all three heads enumerated hereinbefore.

Judgment is accordingly entered in favour of the plaintiff in the sum of R 25,000 together with interest and costs.

Record: Civil Side No 371 of 2008

Anscombe v Indian Ocean Tuna Limited

Karunakaran J
10 May 2010 Supreme Court 203 of 2005

Contract – promissory estoppel

The plaintiff leased a dwelling-house to the defendant at R 14,000 per month. A term of the lease allowed it to be terminated with one month's notice from either party. A further term of the lease provided that the defendant would be responsible for keeping the premises in good, tenatable repair and condition throughout the tenancy. The defendant terminated the lease. At that time the plaintiff was not in Seychelles and requested that the defendant remain in the property until her return for security reasons. The defendant agreed to do this on the basis of a reduced rent of R 7,000. After an inspection of the premises the plaintiff sought damages from the defendant to replace certain items; the defendant believed this to be an exaggerated amount and offered to pay a lesser sum. The plaintiff applied to the court for an order that the defendant pay her the outstanding damages, including for replacement of materials and moral damages. The plaintiff also claimed rental loss calculated at R 14,000 per month rather than the agreed R 7,000 per month.

HELD

A person is estopped from dishonouring a promise where the promise is intended to create legal relations and, to the knowledge of the person making the promise, the promise is going to be acted on by the person to whom it was made, and the promise is in fact acted on.

Judgment: Plaintiff awarded damages.

Foreign cases noted
Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130
Antony DERJACQUES for the plaintiff
Pesi PARDIWALLA for the defendant

Judgment delivered on 10 May 2010 by

KARUNAKARAN J: The plaintiff in this matter claims the sum of R 92,032.30 from the defendant towards loss and damage which the plaintiff suffered as a result an alleged breach by the defendant of an lease agreement the parties had entered into in respect of a dwelling-house situated at Belonie, Mahe, owned by the plaintiff and leased out to the defendant.

It is not in dispute that the plaintiff, who was at all material times a resident of the United Kingdom, had leased out the said house (hereinafter referred to as the "premises") to the defendant company, for use and occupation of its expatriate workers, under a lease agreement dated 1 December 2003 (in exhibit P1) for a period of two years on a monthly rent of R 14,000. As per the terms and conditions of the agreement, either party could terminate the lease by giving one month's notice to the other. Also it was a term of the agreement that the tenant, namely the defendant, during the tenure should keep all fixtures and fittings on the premises in good, tenantable repair and condition but subject to reasonable wear and tear and damage by fire or force majeure. In this respect, clause 4(a) of the lease agreement, inter alia, reads -

> …for the avoidance of doubt, the expression reasonable wear and tear shall include but not limited to the deterioration and degradation to the premises....

It was also a term of the agreement that upon the expiry of the

lease, the parties shall carry out a joint inspection of the premises, the furniture and the household effects. It is also not in dispute that on 27 November 2004, the defendant terminated the lease by giving one month's notice to the plaintiff, in accordance with the terms of the lease agreement. According to Mr Guy Khan (DW1), the Commercial Manager of the defendant company (IOT), since the plaintiff was living abroad, she requested the defendant company not to leave the premises unattended or unoccupied and keep possession of them for security reasons, until her return to Seychelles in January 2005. The testimony of Mr Khan in this respects runs as follows:

> She (the plaintiff) telephoned me and asked me personally. Since we were moving out and she did not have any representative in the country, we keep a token force, some people there for security purposes. At this point in time, we had already rented a house from Fonseka at St Louis at R 15,000 effective from 15 December 2005 to put our employees there. She asked me because I know her. We being a proper company, agreed to keep a token force of some workers for security purposes in the house. When she did not come back in January we could not move out because she asked me personally and when she came back in February, we agreed to pay her another R 7,000. At this point in time we had already got an agreement and contract to put the workers from her place to Fonseka at St Louis.

According to Mr Khan, following the expiry of the lease and after giving due notice of termination to the plaintiff within the stipulated period, the defendant was ready and willing to return the premises to the plaintiff. However, it was the plaintiff who was not ready to take back possession of the

premises, as she was then overseas. Hence, she requested the defendant to continue in possession of the premises until her return in January 2005 and for the meantime, she agreed or promised to accept a reduced rent of R 7,000 - half the amount of the original rent. But again the plaintiff delayed her return and the defendant had to continue possession and kept some if its workers in the premises for security reasons. Therefore, the defendant had to postpone the cleaning of the premises and minor repair works on the premises until the end of February 2005. After the plaintiff's return, the defendant completed cleaning, replaced some items, restored the premises to good tenantable repair and condition at the cost of R 12,000 and delivered possession to the plaintiff on 25 February 2005. The defendant also agreed in good faith to pay rent even for February 2005 at R 7,000 in addition to R 7, 000 which sum had already been paid to the plaintiff as rent for the month of January 2005. After her inspection of the premises on 22 February 2005, the plaintiff wrote a letter requesting the defendant to replace certain items in the premises, quoting a total of R 14,082. In response, the defendant wrote back to the plaintiff on 11 April 2005 offering in good faith to pay the sum of R 6,885.65 as compensation for certain damaged items that apparently required replacement like door locks, shower curtains etc as the defendant felt that the plaintiff's claim had on the face of it been exaggerated. The plaintiff however, declined to accept the defendant's offer as she was not satisfied with the repair works carried out and the items replaced by the defendant in the premises. Therefore, the plaintiff has come before this Court claiming consequential loss and damages from the defendant as follows:

For materials replaced inclusive of labour charge	R14,032.30
Economic/ rental loss from January to February 23 and for one month's notice at	

R 14,000 monthly	R30,000.00
Economic /rental loss for two months required to repair damages	R28,000.00
Moral damage for distress, depression, humiliation	R28,000.00
Total	R92,032.30

The plaintiff testified in essence, that she had agreed/promised to accept the reduction of rent from R 14, 000 to R 7,000 because she had no other choice. She also testified that when she inspected the premises, she noticed there were broken locks, a broken door, and a missing mirror. She replaced the mirror for the wardrobe at a cost of R 490 and five shower roses each at a cost of R 100. She also had to replace shower curtains at the cost of R 300, ceiling fans at R 1,366, and a hand wash basin at R 200. She paid a carpenter R 2,500 towards labour costs. Although the plaintiff was not able to substantiate in her testimony each and every claim pleaded in the plaint for the materials, she concluded that she had to spend the total sum of R 14,032.30, for which the defendant was liable. Since she had to carry out those repairs, she sustained a loss of rental earning for two months totalling R 28,000. Moreover, she claims that the defendant is liable to pay rent at the rate of R 14,000 for January and February 2005. Besides, she claims moral damages in the sum of R 20,000 alleging that she suffered inconvenience, distress and unhappiness as a result of the breach of the lease agreement by the defendant. Hence, the plaintiff prays this court to enter judgment in her favour and against the defendant in the sum of R 92,032.30 with interest and costs.

I meticulously examined the evidence adduced by the parties in this matter. I diligently considered the submissions made by counsel on both sides for and against the plaintiff's claim.

First of all, on the question of credibility I believe DW1, Mr Guy Khan, the Commercial Manager of IOT, in every aspect of his testimony. I find on evidence that since the plaintiff was admittedly, not in the country to take back possession of the premises immediately upon termination of the lease, she had requested the defendant to continue possession until her return from overseas. The plaintiff also had agreed to reduce the monthly rent to half and accept only R 7,000 for the intervening period. The defendant accordingly relied and acted upon the plaintiff's promise and continued in possession of the premises obviously out of goodwill, and also the defendant generously agreed to pay rent at a reduced rate even for February 2005. It is therefore evident that it was the plaintiff's inability to take possession of the premises on time that has triggered the whole turn of events and procrastination. Hence, I find that the defendant was not at fault nor was it responsible for the delay in handing over possession of the demised premises to the plaintiff. In the circumstances, I hold that the defendant is not liable to pay rent more than what had been verbally agreed upon by the plaintiff, who indeed, promised to accept only half rent for the intervening period. By the same token, the defendant cannot be held responsible for any consequential loss the plaintiff allegedly suffered on account of rental or economic loss for any period subsequent to the termination of lease. Indeed, the plaintiff is now estopped from going back to the original terms of the lease agreement and claim a monthly rent at R 14,000 since she had verbally agreed or promised to accept a reduced rent at the rate of R 7,000 per month for the intervening period. Thus, a promise was made by the lessor (the plaintiff) to accept a reduced rent, which was obviously intended to create legal relations and which, to the knowledge of the person who made the promise, was going to be acted on by the person (the defendant) to whom it was made, and which was in fact so acted on. That is, the defendant acted upon the promise of reduced rent and continued to keep possession until the plaintiff's return to the country. In such

cases, the courts have said that the promise must be honoured... And such a promise gives rise to an estoppel - a "promissory estoppel" - a landmark doctrine formulated by Lord Denning in the *High Trees* case (vide *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130), which reaffirmed the doctrine of promissory estoppel in contract law. The facts of *High Trees* are quite simple. During the Second World War many people left London owing to the bombing. Flats were empty. In one block, where the flats were let on 99 year leases at £2,500 a year, the landlord had agreed to reduce it to half and accept only £1,250 for the intervening period. When the bombings were over and the tenants came back, the landlord went back to the original lease term and sought to recover the full rent of £2,500 a year. Denning J held that promissory estoppel applies in such circumstances and the landlord could not recover full rent for the time when the flats were empty, but only half rent as was promised and agreed upon by the parties. Lord Denning stated:

> If I were to consider this matter without regard to recent developments in law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover full rent at the rate of £2,500 - a year... since the lease under which it was payable... which, according to the old common law, could not be varied by an agreement by parol, but only by a deed. Equity, however, stepped in... there are cases in which, a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on. In such cases, the courts have said that the promise must be honoured…As I have said they are not cases of estoppel in the strict sense. They are really promises- promises intended to be binding,

> intended to be acted on and in fact, acted on....
> And such a promise gives rise to an estoppel.

In the instant case, the plaintiff promised to accept a reduced rent, which was intended to create legal relations and which, to the knowledge of the person who made the promise, was going to be acted on by the defendant to whom it was made and which was in fact so acted on by the defendant. For all legal intents and purposes, the premises remained empty since the termination of the lease by the defendant company. Hence, I find that the plaintiff is estopped from claiming rent at R 14,000 per month for any period subsequent to the termination of the lease. She is legally entitled to claim only the reduced rent at R 7,000 per month. Since, the plaintiff has admittedly received the rent for January 2005 at R 7,000, the balance of rent remains due only for February 2005, which she is entitled to claim at the same rate, that is R 7,000 per month.

As regards the plaintiff's claim for repairs, replacement of materials and labour, I find on a balance of probabilities that although the defendant during the tenure had kept all fixtures and fittings on the premises reasonably in good tenantable repair and condition, some of the items in the premises appear to have been missing or damaged beyond reasonable wear and tear but not by fire or force majeure. Taking all relevant circumstances into account, in this respect, I award the plaintiff a global sum of R 8,000 as compensation for those missing and replaced materials and labour costs. Regarding economic or rental loss claimed by the plaintiff for two months, I find on the evidence that the nature and extent of repair works complained of, at any rate, would not require more than one month for completion. Hence, I hold that the defendant is liable to pay only R 7,000, the reduced rent, to the plaintiff under this particular head since "promissory estoppel" is activated against the plaintiff's claim at the rate of R 14,000 per month. As regards the plaintiff's claim for moral

damages, the amount claimed appears to be exorbitant and unreasonable. Having regard to the entire circumstances of the case, I award the sum of R 5,000 as moral damages.

In summing up, I award the following sums for the plaintiff:

Rent payable by the defendant and due for February 2005	R7,000
For repairs and replacement of materials including labour	R8,000
Rental loss for repair period of one month	R7,000
Moral damages	R5,000
Total	R27,000

In the final analysis and for the reasons stated hereinbefore, I enter judgment for the plaintiff and against the defendant in the total sum of R 27,000 with interest on the said sum at 4% per annum (the legal rate) as from the date of plaint and with costs of this action.

Record: Civil Side No 203 of 2005

In the matter of Ailee Development Corporation and in the matter of the Companies Act 1972

MacGregor P, Hodoul, Domah JJ
7 May 2010 Court of Appeal Civ 13 of 2008

Company law – winding-up – Constitution – fair trial

The respondent appealed the decision of the Supreme Court ordering the winding-up of the company. The decision was based on the ground that the substratum of the company had disappeared and that it would be just and equitable to wind the company up. An audit of the company for the year ending 31 December 2004 showed that the company had assets worth $40 million, with liabilities of over $200 million. The company no longer had a licence to operate. The respondent made four submissions: lack of fair trial; as a shareholder of the company the petitioner had no locus standi to apply for winding-up; the substratum of the company had not disappeared; and there were other remedies available and these should have been explored before ordering a winding-up of the company.

HELD

1. It is just and equitable to wind up a company when the substratum of the company has disappeared.

2. The substratum is held to be gone when the main object for which the company was formed has become impracticable.

3. The substratum is held to be gone where the management or control of the company is characterized by misconduct or

otherwise gives rise to a justifiable lack of confidence.

4. A key test for loss of substratum is whether the objective of the company has become in a practical sense impossible. In determining this question one can consider whether the failure is due to lack of internal strength or external factors. If it is the latter then there may not be a failure of substratum.

5. The public interest (for example, maintenance of the tourist industry) is relevant to a decision on the winding-up of a company.

6. The Constitution guarantees the right of expression and every person has a duty to ensure that effect is given to the existence of these guarantees in everyday life. The Constitution also guarantees the right of trial by an impartial and independent Court established by law.

JUDGMENT: Appeal dismissed.

Legislation
Constitution
Companies Act 1972, ss 201, 208
Court of Appeal Rules, r 18

Foreign cases
Bouhafs v Marillac House Aboriginal Corp (2000) 35 ACSR
Bristol Joint Stock Bank (1980) 44 Ch D 703
Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd (2004) 9 VR 549

Ebrahimi v Westbourne Galleries [1973] AC 360
Gailbraith v Merito Shipping (1947) SC 446
Haven Gold Mining Co (1881) 20 Ch D 151
Loch v Blackwood (1924) AC 783 (PC)
Macquarie University v Macquarie University Union Ltd (No 2) [2007] FCA 844
Re Baku Consolidated Oilfields Ltd [1944] 1 All ER 24
Re Co-op Development Funds of Australia Ltd (No 3) (1978) 3 ACLR 437; (1977-78) CLC 40-306
Re Crown Bank (1890) 44 Ch D 634
Re German Date Coffee Co (1882) 20 Ch D 169
Re Millennium Advanced Technology Ltd [2004] EWHC 711 (Ch)
Re Pacific Fisheries Ltd (1909) 26 WN (NSW) 127
Re Suburban Hotel Company (1867) 2 Chan App 737
Tivoli Freeholds Ltd (1972) VR 445

Bernard GEORGES for the appellant
Ronny Govinden for respondent

Judgement delivered on 7 May 2010

Before MacGregor P, Hodoul, Domah JJ

This is an appeal against a judgment of the Supreme Court dated 28 June 2008 by the then Ag Chief Justice, A Perera, in which he ordered the winding-up of Ailee Development Corporation, hereinafter referred to as the Company or ADC, on the ground as per the Companies Act that in his opinion it was just and equitable to wind up the company, as the substratum of the company had disappeared.

The operative part of the judgment shows that the Judge took a number of considerations into account before he reached that conclusion. His findings by and large were on the evidence that: (a) there was a "pervading insolvency of the company"; (b) "at the time of the presentation of the petition

there was no reasonable hope that the Company could pursue its main object as an hotelier, not merely due to the licence not being renewed by the Seychelles Licensing Authority (hereinafter referred to as the SLA), but mainly due to its inability to find partners or investors who could invest in confidence, knowing the debt situation of the Company; (c) its continued legitimate existence was a practical impossibility; (d) the pursuit of other objects in the memorandum of association was not a viable proposition in the circumstances; (e) its state of insolvency had not changed at the time of presentation of the petition for winding-up and there had been no hope of finding prospective investors or partners to pull the Company out of the quagmire it had been in since its inception; (f) the principal creditors were tied down by a Deferment Agreement and (g) that the interest on those loans, consequently, were mounting with the Company having no hope to settle them even if they sold the assets.

He did not go along with the submission made by the appellant that the plight of the Company was merely a temporary setback.

Initially, the grounds of appeal by the appellant were remarkably lengthy and in our view inappropriately mixing grounds *per se* with arguments, comprising 10 grounds with 28 sub-grounds. The appellant was alerted by the Court to this awkward mode of pleading. They could be said to fall under the following heads:

i. Appointment of provisional liquidator
ii. Lack of fair trial
iii. Public interest in the tourism Industry
iv. Evidence on the state of the hotel
V. That the substratum had gone
vi. Protection of minorities misconceived
vii. Exhausting alternate remedies
viii. Standard of impossibility of activity

ix. Continuation of provisional liquidator
X. Standing over

Those grounds were later narrowed and telescoped to the following three: locus standi, loss of substratum and availability of alternative remedies.

Appellant's counsel, for his argument on locus standi, relied on and referred to grounds 2 and 3(c) of the original grounds listed. For that on substratum, he relied on and referred to grounds 3(a),(b),(d), 4, 5(ii),(iii) and (iv) of the original grounds listed. For that on availability of alternative remedies, he relied on and referred to ground 5(1) of the original grounds listed.

We shall address the above in that order with, however, some preliminary remarks which we consider important, on one particular ground of appeal that was not pursued ie that of lack of a fair trial, and a perception of it.

LACK OF FAIR TRIAL

The argument that there was a lack of fair trial started well before the trial proper in this case. There was a motion for recusal of the trial judge at the very initial stage, with a five page affidavit dated 17 March 2008 (see NI-N7), formally setting out the supposed bias of the trial judge with the rider that that was not the client's view but that of counsel. In fact, a ruling was given on this at page 67-72 of the records dismissing the motion.

The battleground on fair trial then moved to the media, in particular two newspapers. One of them actually used the word not only theft of justice but rape of it.

The attack was pursued even after the trial below was over. The appellant actually pleaded lack of fair trial as a ground of appeal extensively in detail at page A.2 of the records.

Counsel must have advised themselves, and rightly so, that there was no merit in that argument. Consequently, at the hearing on appeal and confirmed in the appellant's head of argument, this particular ground was discontinued and effectively dropped.

We have to say that the Constitution guarantees the right of expression in this country and every person has a duty to ensure that effect is given to the exercise of these guarantees in everyday life. However, the Constitution also guarantees the right of trial by an impartial and independent court established by law. The media's right of expression and the right of the public to know - which is a right of the highest order - does not include the right to pass judgment which may only be passed by a tribunal established by law under our democratic system of government. These comments of ours are kind and should be so taken so that every institution, body and person in the country ensures that we mutually respect, and do not encroach upon, one another's role for the proper functioning and consolidation of our democracy.

The enhanced fairness which the Court gave to this application may be gauged by the following. Normally the practice in a winding-up petition is for the case to be dealt with on affidavit. In this case, appellant's counsel argued for the Court to allow the latitude of calling witnesses. That is not all. Counsel for the appellant made a motion for a visit to the locus in quo. Counsel for the petitioner argued against it. A ruling was given on it. It was in favour of the appellant.

The trial took 15-18 days, the records of which cover seven volumes covering over 1500 pages. The submissions of counsel alone took about 78 pages of the records. The petitioner's witnesses, four in number, were lengthily cross-examined and the Managing Director of the Company’s depositions covered over 370 pages heard over at least three days.

The latitude, the considerations and the opportunities given to the appellant to make its case before the court were generous. We dwelled on this abandoned ground nonetheless because we felt that, considering all these circumstances many of which are unknown or not known in depth, the public has a right to this information in the light of certain adverse comments made to sway public perception of the case one way or the other.

We will now turn to the remaining grounds of appeal.

LOCUS STANDI

On the issue of locus standi, it is contended that the trial Judge erred in treating the respondent, then petitioner, as being entitled because it had an interest in the tourism industry of Seychelles to petition the Court on that basis for an order of winding-up of the appellant company on the ground that it was just and equitable to do so. The Judge ignored the fact that the respondent had stated that its primary reason for filing the petition was to seek to recover its investment amounting to R 5.4 million and did not consider whether the respondent had any hope of realizing that in his determination of whether it was just and equitable to order the winding-up.

We have a procedural impediment in addressing this issue on appeal. We note that it was not raised below at any stage or on the face of the pleadings as per the affidavit of the appellant at Fl. Can it be raised now and would it be fair to do so?

By rule 18(8) of the Court of Appeal Rules the Court cannot entertain such ground without leave of the Court, which has not been sought nor granted.

In fact an issue such as locus standi is such a fundamental precondition to litigation and is normally and properly raised at

the start of pleadings or trial because it goes to the very root and right of cause etc. That also may explain why there is no direct pronouncement on it in the judgment on this issue.

The Court finds this defect substantial and, on that basis alone, this ground of appeal fails. An issue not raised before the trial court cannot be raised for the first time on appeal. The reason is that the opponent has not been given an opportunity to meet the point nor the trial court to pronounce on it.

SUBSTRATUM

As per paragraph 3 of the heads of arguments, appellant's counsel referred us to grounds 3(a), (b) and (d), 4, 5(ii), (iii) and (iv) of the memorandum of appeal and for ease of presentation has chosen to urge them together.

Again we need to go back to the pleadings because although counsel for the appellant has used the words ease of presentation, what is before us is far from a presentation of ease. We have lengthy and disjointed "grounds" of appeal which are more arguments then grounds spread over two pages of paragraphs and sub-paragraphs in the notice of appeal and it is supposed to tally with six pages in the heads of arguments.

From the mass of literature comprising grounds, submissions, argument and references, we have been able to reduce them to two essential matters as set out at paragraph 3.2 of the heads of arguments of counsel for the appellant: the legal test and the evidential considerations. We shall approach it in that manner.

On the first issue, that the trial Court did not apply the proper test as to what constitutes loss of substratum.

WHAT CONSTITUTES LOSS OF SUBSTRATUM?

The substratum is held to be gone when the main object for which the company was formed has become impracticable. Emphasis is on the words 'main objective' and the word 'impracticable', see *Re Suburban Hotel Co* (1867) 2 Ch App 737. Later other authorities use the words where the primary object has failed, see *Tivoli Freeholds Ltd* (1972) VR 445. In the case before us we find the main and primary objective to be that of hoteliers. Other examples of failure of substratum can be seen in the following cases. In *Re German Date Coffee Co* (1882) 20 Ch D 169 a company formed for working a German patent for manufacturing coffee from dates was wound up when it could only obtain a Swedish patent, notwithstanding that the majority of shareholders desired to continue. In *Re Crown Bank* (1890) 44 Ch D 634 a company formed primarily for conducting banking business was wound up when it ceased to carry on banking business but carried on its subsidiary objects. In *Re Bristol Joint Stock Bank* (1890) 44 Ch D 703 a company formed to conduct banking business which, after 6 years, had never made a profit and had virtually exhausted its paid-up capital was wound up. In *Re Pacific Fisheries Ltd* (1909) 26 WN (NSW) 127 a company formed to operate a patent for prevention of decomposition of fish could only obtain an unpatented process and was wound up. In *Re Baku Consolidated OilrIelds Ltd* [1944] 1 All ER 24 a company formed to operate an oil business in Russia was wound up when the business was confiscated. In *Re Co-op Development Funds of Australia Ltd (No* 3) (1978) 3 ACLR 437; (1977-78) CLC 40-306 companies formed to invest subscriptions from the public were wound up in view of unprofitability of investments.

Another factor weighing on a failure of the substratum is what some authorities refer to as where the management or control of the company is characterized by misconduct or otherwise gives rise to a justifiable lack of confidence. Some refer to it

as the lack of confidence resting on a lack of probity in the conduct of the company's affairs: see *Loch v Blackwood* (1924) AC 783 (PC), *Macquarie University v Macquarie University Union Ltd* (No 2) (2007) FCA 844. They inter alia refer to where the history of the conduct of the company indicates a failure to abide by its obligations and by commercial morality in the conduct of the business.

The appellant cited a number of cases to the trial court which the Chief Justice distinguished and found not to be supporting the company. The Court, however, did not refer to the case of *Gailbraith v Merito Shipping* (1947) SC 446 which the appellant's counsel argues is a strong case in its favour in that: (a) the facts resemble the matter on appeal; and (b) the decision reviews all other cases cited and considered by that Court.

We would agree here with counsel for the appellant that that case was relevant to the case before us.

THE MERITO CASE

The basic facts of that case are that the company was formed for the purpose of owning and managing ships in 1906. After 1919 it no longer did so but invested its funds elsewhere in securities for the next 26 years. As at the date of the petition for winding-up, the company had taken the view, which it had taken for many years, that the shipping business was not appropriate for investment. One shareholder petitioned for winding-up on the grounds that the substratum had been gone for 26 years. The company argued that it could still go back to shipping should the situation improve etc. The Court held because of this the substratum had not gone.

We have given serious consideration to the decision. As may be seen, one key test is whether the substratum had become impossible or practically impossible or in the words of one

Lord Justice the objective had become in a practical sense impossible.

The fact of the matter is that in that case, even if the company had abandoned the shipping business which was its main objective and dealt for as long as 28 years in other matters, it had the viable base to come back to shipping business if the situation was to improve. The set-back had to do not with the company's internal strength but with external factors such as the gloomy negative economic environment of periods covering the Great Depression, World War II and its aftermath of loss of lives and devastation of property and the resulting prohibitive prices for ships on account of the number of ships which had sunk. Most of war-torn Europe including Great Britain was inevitably concerned with the reconstruction of infrastructure on land rather than courting projects at sea. As per Lord Keith -

> that at the present and for some considerable time past it has not been prudent to acquire new ships at the ruling prices.

Indeed, reference is made to the difficult shipping position from 1923 to 1935.

The argument "whenever a suitable opportunity occurs the company may return to its main object" was accepted by the Court, for the company had the capacity to bide its time to wait. The *Merito* case can be starkly distinguished from the case before us in that Merito Shipping Company was a very solvent company. That cannot be said of the appellant company here which, on the facts, is not only insolvent but whose practical and probable hope of solvency is next to nil. What is more, apart from that factual basis of its prospect of operation, there is the legal basis in that the present company has no licence to operate. In this regard, the cases of *Re Haven Gold Mining Co* (1881) 20 Ch D 151 and *Re German*

Date Coffee Co (1881) 20 Ch D 169 are pertinent to an extent that the main objective was not attainable, particularly in the latter case where the patent for the objective could not be obtained.

Our conclusion is, therefore, that the *Merito* case does not support the case of the appellant. With this, we come to considerations of fact and evidence.

THE EVIDENCE

On the second issue that the evidence before the trial Court did not support a finding that the substratum of the company had been lost, a crucial part we believe is the state of finance of the company, its continuing inability to service its debt, its failure to produce a master plan, and the cancellation of its licence to operate by the relevant regulatory authorities.

As regards the financial state, evidence has been adduced to the effect that a deceptive veneer of health covers a serious reality of ill-health. The financial state both by the history and the growing amount gives the picture of irretrievability and further sinking and sliding into deeper debts.

The documents we have examined show the following -

i. Encumbrances of mortgages/loan unpaid
ii. Encumbrances of floating charges
iii. Restrictions (following)
iv. Deferment agreement
v. Audited accounts
vi. History of foreclosures, receivership and past winding-up
vii. Leading creditors own admissions

Encumbrances by mortgages for loans

As regards encumbrances by mortgages for loans, we find a total of 29 covering the period from 1980-1987, stretching from about 20-28 years back, most unpaid as at date of winding-up. These facts are certified by an official search at the Land Registry in Ex 1 of the records as follows:

	ENTRIES	DATE		DESCRIPTION
1	(a)	(8/2/80)	Charge	US$2,000,000 Bank of Baroda & Ors
	(b)	(8/2/80)	Charge	US$1,700,000 Central Bank of India
	(c)	(8/2/80)	Charge	US$ 1,500,000 Punjab National Bank
	(d)	8/2/80)	Charge	US$ 1,000,000 Indian Overseas Bank
	(e)	8/2/80	Charge	US$ 1,000,000 Indian Bank
	(f)	(8/2/80)	Charge	Indian Rupees 11,340,000 Grindlays Bank Ltd
	(g)	(8/2/80)	Charge	Belgium Francs 38,950,000 Air et Chaleur MT. S.A
2.	(a)	(16/7/81)	Charge	US$750,000 Bank of Baroda
	(b)	(16/7/81)	Charge	US$ 600,000 - Central Bank of India
	(c)	(16/7/81)	Charge	US$ 550,000 - Punjab National Bank
	(d)	(16/7/81)	Charge	US$ 350,000 - Indian Overseas Bank
	(e)	(16/7/81)	Charge	US$ 350,000 - Indian Bank

	(f)	(16/7/81)	Charge	Indian Rupees 3,060,000 – Grindlays Bank Ltd
	(g)	(16/7/81)	Charge	Austrian Schilings 45,900,000 – International Bank Fur Aussenhandel Aktiengesse Uschaft
3	(a)	(11/2/85)	Charge	US$84,180 – Bank of Baroda
	(b)	(11/2/85)	Charge	US$70,410 – Central of India
	(c)	(11/2/85)	Charge	US$62,790 – Punjab National Bank
	(d)	(11/2/85)	Charge	US$41,310 – Indian Overseas Bank
	(e)	(11/2/85)	Charge	US$41,310 – Indian Bank
4	(a)	(11/2/85)	charge	US$947,000 – Bank of Baroda
	(b)	(11/2/85)	Charge	US$792,000 – Central Bank of India
	(c)	(11/2/85)	Charge	US$706,000 – Punjab National Bank
	(d)	(11/2/85)	Charge	US$465,000 – Indian Overseas Bank
	(e)	(11/2/85)	Charge	US$465,000 – Indian Bank
	(f)	(11/2/85)	Charge	Austrian Schillings 20,000,000 – International Bank Fur Aussenhandel Aktiengesellschaft
	(g)	(11/2/85)	Charge	Belgium Francs 11,838,062 – Air et Chaleur M.T. S.A.

5	(a)	(8/6/87)	Charge	Swiss Francs 15,000,000 – International Finance Corporation
	(b)	(8/6/87)	Charge	US$500,000 – Intercontinental Hotel Corporation
	(c)	(8/6/87)	Charge	US$1,7,000 – Bank of Baroda
6		(11/7/89)	Leased to Ailee Recreations Limited T.147(a)	
7.		(18/11/91)	Restriction Order	
8.		25/6/96)	Restriction Order	
9.		12/2/08 & 20/2/08	Restriction	
10.		25/6/08)	Inhibition Order	

Floating charges on all the assets of the company

As regards floating charges on all the assets of the company, the present and future details featuring in the Registry of Companies covering the period from 1978 to 87, most unpaid as at date of winding-up, total 31 as follows:

ENTRY NO	DATE	DESCRIPTION NO
300	(19/10/78)	(a) Bank of Baroda - US$ 200,000

Restrictions

As regards restrictions in dealings, we find the following impediments registered at the Registry of Companies and the Land Registry, both of which generally restrict any dealing with the property, assets and land of the company without permission of the creditors. What it means is that inevitably this permission would be withheld unless significant payments were made, plus release or waiver on the deferment

agreement, again both options proving hopeless on the records.

Audited accounts per the company

As regards audited accounts per the company, we find the following plight as per the record (Exhibit C33) for the year ending 31 December 2004, but issued in December 2006

(a) Assets worth $40 million
(b) Liabilities over $200 million

The following alarm bells have already been sounded with respect to the above under the caption 'Opinion':

(i) Evidence available to us was limited on a certain R22 million at the Company's recorded turnover comprised "outlet sales" over which there was no system of internal control for the purposes of our audit;

(ii) The Company is insolvent, and its ability to continue is dependent upon -

(a) The continuing support of Associated Companies by their not presenting for payment Demand promissory notes for advances and interest thereon amounting in total to R21,943.234.

(b) EODC Operations Limited not exercising their right to give the company notice that the principal of the new secured loan and interest accrued thereon is

immediately due and repayable. Should EODC Operations Limited give such notice, the principal of the existing secured loans and the unsecured loans together with interest accrued thereon also become immediately due and repayable. At 31st December 2004 the aggregate, including accrued interest of the new secured loan, the existing secured loans and the unsecured loan amounted to R896,305,656.

(c) Because of the materiality of the matters set out in the foregoing paragraphs we are unable to state that the Balance sheet at 31 December 2005 gives a true and fair view of the affairs of the company at that date.
[Underlining ours]

The above shows the work ethics of the company and the state not only of its finances but of its corporate morality. If the audited accounts are unable to give a true and fair view of the affairs of the company, it is in the public interest that the interests of the public be protected so that there may be public confidence and a sound system in our corporate sector so that investors as well as financial partners are resting on firm and solid ground and not on corporate black holes.

Deferment Agreement

The Deferment Agreement was essentially an agreement between all the existing lenders at 1987 whereby a new lender was given priority over all the existing lenders and they

could not be paid until and unless the new lender was paid and that the ratio of current assets to current liabilities in the company is not less than 2 to 1.

Those conditions it appears ruled out the possibility that existing lenders would ever get paid as the facts have shown from the date of that agreement to the winding-up of the company. The existing lenders then were:

I. Bank of Baroda (hereinafter referred to as BOB)
II. Central Bank of India
III. Punjab National Bank
IV. Indian Overseas Bank
V. Indian Bank
VI. Grindlays Bank
VII. Air et chaleur MTSA
VIII. International Bank, FAA
IX. Intercontinental Hotels Coorporation

A new lender entered the scene, the International Finance Hotels Corporation, which later assigned its rights to the Seychelles Government, who in turn later assigned its rights to the EODC, a majority shareholder of the company at one time and later through two other companies, which as it turns out is being wound up.

That last position of the EODC being then in the shoes of the preferential secured lender over all the prior 9 referred - to lenders, combined with the fact that they were never paid since the 1987 date of agreement till the date of the winding-up in 2008 - for over 20 years - clearly smells of suspicion and collusion, particularly that the head of the company being wound up, Mr Marc Davison is also the Managing Director of the preferred lender/creditor of the company, the EODC.

All this gives a strong suspicion of incestuousness amidst a

nettle of conflicts of interest exacerbated by the virtual deadly leverage over the prior and existing lenders who, by the time of winding-up, became the leading creditors to over 2/3 of the liabilities of the company.

The Deferment Agreement is referred to and recognized for its leverage and virtual uncertainty of the major creditors ever getting paid, whilst the loan debt just keeps growing. It is evidence of gradual and inevitable financial irreversible collapse. Such a state of affairs is consistent with a finding that the company must be wound up. Indeed, although not pleaded specifically, another fundamental ground for winding-up is that the company cannot pay its debt, which is certainly the case for the 9 banks consortium led by BOB.

The paralytic effect of the Deferment Agreement is cited incidentally and authoritively in the following:

(a) the audited accounts of the company, referred to earlier;
(b) the foreclosure case of *ADC v Air et Chaleur* (1991) SC 121;
(c) the foreclosure case of *ADC v Bank of Baroda & Ors* SC 129/1996;
(d) the Managing Director of the company himself who in one instance called it the sword of damocles.

History of foreclosure, receivership and winding-up

The manner in which the Deferment Agreement acts as a trap to the unwary lender may be seen by what happened to its Belgian lender, Air et Chaleur MTSA. The latter had lodged a petition against the appellant (*ADC v Air et Chaleur* MTSA 121/91) and served a Commandment Notice on 5 August 1991 for foreclosure for an amount of 59.7 million Belgium francs borrowed. ADC relied on the Deferment Agreement of

2 June 1987, to resist foreclosure and repayment of the loans borrowed. The result was that the borrowers found that by virtue of the Deferment Agreement, the loans were no longer payable on demand. They had to be rescheduled over 10 years commencing 1990. Yet by 2000 the loans still remained outstanding. The Court declared, in the circumstances, that no amount was payable by ADC to the borrower unless all amounts due to the preferred lender have been paid and the ratio of the company would be at least 1:2. As far back as 1992, the audited accounts of the company of 1990 showed that were no available funds to pay that particular lender/creditor, and that the current liabilities exceeded the current assets, and did not meet the required ratio of 1:2.

That judgment shows how repayment of loans has been made illusory by the device of the Deferment Agreement which effectively blocks any chance of that lender and any lender, for that matter, recovering their investments.

That was not the only instance. A few years later in 1996 another attempt was made to foreclose by a group of banks led by the Bank of Baroda, forming the largest creditors. Its fate was no less decided in advance by the now notorious Deferment Agreement. The bank had lent initially about 13.85 million dollars. One of the creditors VJ Construction threatened to wind up the company. By 1996 that lent sum with interest etc ballooned to a total of nearly 100 million dollars. The company was under receivership during the period 1983 -1985. But by virtue of the Deferment Agreement the company would never be able to pay its debts (that was in 1996).

The point was raised that the Deferment Agreement was a sham. The company denied the allegation. But the Court had this to say:

> Although it is reasonable to hold that the respondents/lenders cannot wait indefinitely to have their money paid back, it is, however, my view that there is need for all the parties involved in this matter to see to it that all efforts are made in order to improve the financial position of the petitioner and attain the 1:2 ratio referred to herein so as to enable it meet its obligations.

Since 1996, the Court has urged improvement of the debt servicing situation but in vain. In fact, it has worsened and doubled as borne out by the audited accounts of 2004. The Managing Director's own admission and the Bank of Baroda, Chief Executive Officer on the record bear testimony to that.

In the judgment of that case it was held that the company had no power to influence events; therefore it cannot be said to have the power to influence the fulfilment or prevention of the implementation of the contractual obligation.

The position of repayment capability has worsened since the EODC took over the preferred creditors position. Indeed, EODC through two companies have the major shares in Ailee Development Company and the Managing Director of Ailee Development Company and EODC is the same person. Till the winding-up petition and till today, those lenders/creditors of the above two cases are still unpaid and the indebtedness is still growing. Of those lenders it is more than pertinent to note that, despite the setback in that case, the Bank of Baroda Consortium has supported the present winding-up petition.

Devious motive

With such a history and such a background of facts as set out above, one cannot ignore that aspect of the petition which makes an allegation of devious motive on the part of the petitioner, and the players behind the scene.
This stems mainly from the petitioner, ie the Seychelles Government which has a small percentage holding, which although not paid for in cash, constitutes a valuable goodwill asset as the quid pro quo - the more so when it is State goodwill.

It is pertinent to show that the Seychelles Government is only one of a string of claimants having initiated the proceedings of winding-up and receivership of the appellant company. There is quite a history of it. The Managing Director admitted that there were about 35 lawyers pursuing action against the company at one time.

The Seychelles Government is acting in the public interest to protect the tourism industry, a vital backbone of our economy. It has the right to ensure, on behalf of the people of Seychelles that the image that investors and tourists have of our tourism industry is spotlessly clean, more especially when the economy is fragile and everyone is making an effort to strengthen it. It also has a duty to protect the taxpayer's money which has been invested, the return of which seems illusory in the present circumstances: see *Ebrahimi v Westboume Galleries* [1972] 2 WLR 1289; *Bouhafs v Marillac House Oboriginal Corp* (2000) 35 ACSR; *Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd* (2004) 9 VR 549; *Re Millennium Advanced Technology Ltd* [2004] EWHC 711 (Ch); and *Macquarie University v Macquarie University Union Ltd No 2* (2007) FCA 844.

The players behind the scene and suspicion of a preferred and chosen real intended beneficiary of the winding-up

Things lurk behind the scenes or elsewhere. The picture is one where business wolves or sharks, preferred or not, are wanting the hotel. Also, this cannot detract from the fact that the history and causes of the failure of substratum were there well before the wolves and sharks came in to take advantage of a dying sheep.

Leading creditors position

In the result, it is only logical and pertinent that the Bank of Baroda, and the consortium of banks that it leads making up together about 65% of the debts and liabilities owed and unpaid for, for over 20 years, should require judicial dissolution of the company.

The position is adequately reflected in the undisputed evidence of Dr Phorgat, the Chief Executive of the Bank of Baroda, in his affidavit P1 of the Records in Vol 1, and his testimony from page 915 of the record in Volume V11. The following paragraphs speak volumes:

> The Bank of Baroda acting on behalf of itself and a consortium of banks from India, namely State Bank of India, Indian Overseas Bank, Indian Bank and Bank of India has lent Ailee Development Corporation Ltd a substantial sum of money and as at the 31st January 2008 it owed the said Bank as follows:
>
> SCHEDULE
>
> | Name of Bank | Amount owing in US Dollars As at 31st January 2008 |
> |---|---|

Bank of Baroda	USD – 29,080,988.38
State Bank of India	USD – 28,380,524.95
Indian Overseas Bank	USD – 21,831,525.51
Indian Bank	USD – 18,259,300.65
Bank of India	USD – 32,113,470.76
Total =	USD –129,665,810.76

(errors and omission excepted)

Interest is accruing at the rate of Libor plus 2.5% and penal interest thereon.

From the same document, one may cull the following facts: Ailee Development Corporation Ltd has never paid back a single cent towards the said loan advanced; the company's balance sheet, and the auditor's report filed at the Registry of Companies state that Ailee Development Corporation Ltd is insolvent; it is most unlikely that the Bank of Baroda and the consortium banks would be paid by Ailee Development Corporation Ltd; the Bank of Baroda and the consortium banks therefore support the petition for the winding-up of Ailee Development Ltd; in view of the history of non-payment of the banks' loans, it will be to the manifest advantage of the banks for Ailee Development Corporation Ltd to be wound up and its assets sold. The banks as secured creditor will recover some of the loan at least.

The content of the above affidavit has not been rebutted by the company, not in the least the averment that it is most unlikely that they will be paid.

In testimony, Dr Phorgat had the following to say -

Q. You are supporting the petition for the winding-up of Ailee Development.

A. Yes.

Q. You are also testifying that according to your opinion this company is insolvent and therefore incapable of paying its debt.

A. Yes.

Q. Given the fact that for so long this debt is unpaid you are of the opinion that the company Ailee is not in a position to pay you that debt even in the forthcoming future.

A. Yes.

Q. Besides the foreclosure did your bank attempt to get the loan paid by any other means?

A. I don't remember. We had several discussions with the party for the last few years in order for them to sell their shares but was not successful.

Q. I put it to you that is it has not been fruitful because the company has not presented to you any investor that really was serious in buying shares of the company.

A. That could not materialize.

Q. How many attempts were there?

A. Three, four times.
I don't know. I came in June 2006. I made several contacts with the company asking them to do something for the loan

to be paid. In the later part of the year the deal could not materialize.

Q. In the middle of the year your bank thought they were not serious?

A. Yes.

Q. Why did you not institute a petition in court to be able to get something out of your loan?

A. We perceived that we lost in the Supreme Court and the Court of Appeal there was no need to spend money on court procedures. We lost hope of succeeding.

Q. In these proceedings you are asking the court to order the winding-up of the company so that you can recover part of the loan that have been given to the company.

A. Yes.

Q. And you say that the company never paid a single cent towards the loan.

A. Yes.

One could conclude from the above, on more than a balance of probabilities that the leading creditors would never get their money back in the normal course of events and process.

They tried the foreclosure course but were blocked by the famous Deferment Agreement, which also blocked an earlier large creditor seeking enforcement of payment.

Contractually, unless the preferred creditor EODC was paid and the ratio of the Company was 1:2, or that agreement was legally rescinded or declared frustrated, there was no course of action left for the creditors to get their money. That left only a possibility of gaining something through a winding-up, which is probably why they supported the winding-up.

From the events consequences and implications it is obvious the company could carry on as it is with impunity protected by the notorious Deferment Agreement. Regretfully the answer came through the winding-up, as numerous negotiations and process had failed to solve the killing and growing debt leading to an eventual financial death.

Admissions of Managing Director of the company, Mr Marc Davison

The deposition of the Managing Director of the company, Mr Marc Davison, is not helpful to the case of the appellant either, considering a number of admissions and pertinent remarks. He came as the sole witness in support of the company and against the winding-up. He happens to wear a number of hats which explains the tangled web which blocks the repayments. He is the Managing Director of the company in winding-up and the Managing Director of EODC its major shareholder and "controller" of the Deferment Agreement (both the same person). In his affidavit, at page F2, Volume 1 of records dated 18 February 2008, at paragraph 5, he states:

> I *substantially agree* with the contents of paragraphs 6 to 10 of the Petition insofar as concerns the request of the Seychelles Licensing Authority for repairs and renovations to the resort *and our promises to effect* these.

At paragraph 6-10 of the petition, it states:

> At meetings held in April and October *2005* between the Seychelles Licensing Authority and the company, the company had been informed that the company had to submit a master plan for redevelopment of the hotel in view of the poor state of the physical structures of the accommodation blocks, reception, restaurant, laundry, stores, staff facilities and other buildings.

He concedes, in the same document, that on 17 May 2006 the Company was called upon to appear before the Board of the Seychelles Licensing Authority to show cause why the company should be permitted to continue operation when its licence expires in December 2006 and consequently given an extension of its licence initially to May 2007 and a further and final one to 31 December 2007 with strict conditions that the company submit to the Seychelles Licensing Authority and the Seychelles Tourism Board acceptable plans for the complete renovation within two months and show proof of preparation for the work to start immediately after December 2007. This was because of the poor physical state in which the hotel was being maintained and non-compliance with the standards laid down by the authority responsible for tourist standards and standards of hygiene laid down by the Ministry responsible for health.

In the same document we read as follows. On 12 June 2006, the company wrote to the Seychelles Licensing Authority stating that a master plan for the long-term renovation of the Plantation Resort and Casino was under preparation and would be submitted upon finalisation.

He goes on to state that on 6 December 2006, the company wrote to the Seychelles Licensing Authority informing the

Authority that the resort would be closed with effect from 31 May 2007 towards the facilitation of a major renovation and upgrade of the property.

Finally, he concludes that despite several requests by the Seychelles Licensing Authority and undertakings by the company, the company had failed to submit its master plans for renovation up to 31 December 2007 and was, therefore, informed by letter dated 4 January 2008 that the hotel's licence could not be renewed and was advised to cease operation with effect from 31 January 2008.

Those admissions by the Managing Director indicate the master plan issue was on for quite some years, continually failing to materialize, gradually the company losing credibility until it could no longer be relied on or trusted.

Breach of condition of licence

A closer scrutiny of events leading to the closure of the hotel gives the following picture. There existed strict conditions referred to in paragraph 7 of the petition referred to earlier for compliance which were clearly laid out in the copy of the licence at C7 of the records dated 9 May 2007. Those conditions clearly had the force of law and were legally binding, even the Managing Director intimated to that, and counsel for the appellant admitted that the SLA had followed the rules of natural justice then and had the statutory powers to make that decision. Those conditions also were done by consensus and undertaking by the Managing Director and general management of the company at the crucial meeting of the summons of 17 May 2007. Those conditions, after the deadline of submission of the master plan within two months, were clearly flouted and breached showing a reneging on their commitments at the summons meeting in May and in September 2007, the company changing its position and now contesting these conditions.

Clearly there were good and valid reasons which led to the non-renewal of the licence: breach of trust combined with breach of conditions combined with breach of law.

Other admissions of the Managing Director

If the above is not enough, we may as well refer to the answers given in examination of the Managing Director by his counsel, and cross-examination by the respondent's counsel.

> Q. And to what do you attribute your change of mind, in other words your not meeting these dates that had been agreed?
>
> A I would say that there was only one instance where we had given a firm date which we thought we could hold to which was the 31st of May 2007 when we thought we would have truly been able to resolve, that was the single date when we thought we would be able to and *we failed to be able to meet the deadline.* (page 582 of records)
>
> "The Bank of Baroda debt and interest would stop 150 million USD. The market value of all assets would be about 45 million USD. But no one was interested in buying for that amount. Therefore the Government's hope to get back its share is not possible". (page 577 of records)
>
> Q. You knew that you were breaching a condition of your licence?
>
> A. Which condition my Lord I would like to know?

Q. Which said that you could not take guests over and above past December 2007?

A. Where does it say that in the licence? It is not in the licence.

Q. A specific condition in your licence, the latest licence issued to you.

A. Perhaps you are right it is. (as per 632 of the records)

On the authority of the Seychelles Tourism Board, significance: we may look at the following (page 646 of the records)

Q. You don't know.

A. No, I haven't read the Seychelles Tourism Board Act.

Q. If it was the case that indeed the Seychelles Tourism Board sets the standards and you have to comply and it is not vice versa, what would you say?

A. Set the standard or order this or whatever, if it is a requirement; if it is legally mandated etc then *we are legally at fault..*

On those admissions of breaches of principles of good governance, conditions of licence, legality of continuing operations, the attitude of the appellant not to concede and compromise amount to sheer impunity, unworthy of the work ethics of a business in the hospitality industry of Seychelles. The whole concern of the company seems to have been

litigation at the expense of others, dragging people to court. This paternalistic attitude could be tolerated in a family business but in a business where the country has so many social, cultural, financial and economic stakes, such attitude is tantamount to: "The company decides! Others may go to Coventry but the Company decides!"

On dragging case into Court

The impunity is evident. At 669 of the record where the Managing Director is deposing, we read "I decided I was absolute not going to renovate I was not gonna provide the government, it was my intention to try and drag this into Court".

We further read in the record of proceedings when the Managing Director is giving evidence as follows at pages 666-669:

> Q. Mr Davidson there was no master plan. You were all along misleading the authorities, leading them on and on and on you had no master plan even at the time of you or your General Manager writing this. That is why ultimately you had to write this letter telling the authorities that you are going to go. You have been constantly misleading the SLA and the STB.
>
> Q. You are aware that your licence depended on the provision of this plan.
>
> Q. So your problem was that it was mostly a legal point. They had no right to request the plans from you.

You switched over from not being able to give that plan because of budgetary complaint.

Q. You switched over upon that reason to a legal reason when you felt that the authorities were putting on a little bit more pressure.

I am putting to you Mr Davidson that you had no master plan in fact you find so many reasons for you not to submit that plan; your first justification being you cannot give the plan unless you get the budget and there's a difficulty in securing the finance due to lack of participation. That having failed then come 14th December you change your tactic and you resort to this so called legal justification.

The gravity of this culpable resistance from the part of the company may be seen from the fact that it related to a major renovation through a master plan since at least 2002, which work had been delayed for over 5 years.

Deception, deviousness and lack of good faith

On the company's financial state at page 672 of the records, one may read the following:

Q. And it has always been in that dire financial difficulty from inception.

A. I would say for the majority of the years of its history, yes.

Q. You as the Managing Director of the EODC what were you doing in order to remove this Danamocle's sword as if that was hanging over the top of the head of…

A. That is exactly what we have called it many times.

Q. That reflects yearly in all the annual reports.

A. We as EODC as the controlling shareholders of the company we were in a position to look for a partner, look for new capital to come in. Ailee Development Corporation as a company *could not look for new capital to come in.* In order to bring in new capital you must have security or guarantees, you must have collateral. *With a hotel that has four times as much debt on its books as the actual value the Ailee Development Corporation cannot go to a company or to a bank and say can we have some financing.* It could perhaps go to an eventual capitalist and ask if they would join hands to restructure the debts to renegotiate and find a partner to come in and apply new capital and raise money for renovation but the company is so crippled with debts *it has no financing* options. (page 676 of the records)

The number of cases in which the company was sued numbered approximately 34 or 35: see page 679. When questions were put to the Managing Director, this was his reply (see page 681):

Q. So it was in the best interest to keep the company in dire financial situation it was in order not to meet repayment conditions of the Bank of Baroda consortium.

A. It was in the best interest of the company to survive.

At page 685 of the records –

> I have also explained that to Mr Govinden my lord and that is the company from its inception having opened worth 25 million have cost 42 million. Having open and lost 1.2 million in the first six months. Having had poor trading as Mr Govinden asked me having had poor trading was never in a position and got in the worse, and worse, and worse position to be able to repay these loans as the repayments were made the loan amounts increased and we got to a point where the bank debts is 2 times the value of the company.

At page 687, 694 and 695, the Managing Director accepts the company's debts were unmanageable and that it had entered into a financial vicious circle and impasse:

Q. And at its size and at its design was the hotel going to be a viable business at that inflated project costs?

A. It was bearing so much debt and financing from day 1 from the day that it opened it was never going to be able to meet its financial commitments or make any significant profit. It was over 50% over budget and over the costs that a 200

room hotel should cost to build. (1130)

Q. And the situation today is that EODC is the holder along with Bank of Baroda of the first line charge on the hotel?

A. Yes, all of the company's assets.

Q. And over the years, has the EODC claimed this debt back or has EODC supported the continued operation of the company and the hotel?

A. It is hoped to claim some of it back but the company has never been in a position to be able to repay that loan.

The EODC has never tried to force the issue because otherwise it would have damaged the company; "there is no way for the Company to repay that loan" (1134).

Q. So it wasn't really only a question of the hotel deciding to do it on its own, but there were other important partners that needed to be consulted, that needed to be brought before?

A. Yes, there was also the simple fact that without the permission of the banks, the banks were not fairly happy with us, we couldn't do it but also we simply could not find the partner, get the loan to do it without actually dealing with the BOB matter first.

In answer to a question from counsel for the appellant to the Managing Director, we read as follows:

> Q. And as a consequence of all these hiccups what happened to the initial projecting cost of the resort?
>
> A. By the time the resort opened its doors in 1988 the value of the property which has been created, value of the land and the construction of the buildings which is basically what it should have cost according to budget was about 25 million.
>
> Q. What?
>
> A. USD but it in fact ended up costing with the delays and refinancing, about USD 42 million.
>
> Q. And at its size and at its design was hotel going to be a viable business at that inflated project costs?
>
> A. It was bearing so much debt and financing, from day 1 from the day that it opened it *was never* going to be able to meet its financial commitments or make any significant profit. It was over 50% over budget and over the cost that a 200 room hotel should cost to build.

The evidence reveals that the problem with the hotel started at the very embryonic stage, even and well before it started business. They related to bad workmanship of the construction admitted by the Managing Director himself. That state of affairs led to constant borrowing with the debt burden

growing to over 29 mortgages and floating charges totalling in debt at the time of winding-up of at least $130 million and total liabilities of at least $200 million.

The image of a thriving hotel

The impression that one inevitably obtains from the facts and circumstances of this case is that the appellant was basically an empty shell being used with a cover of special bookings and high profile clientele to give the image of a thriving hotel only to siphon the monies received to proceed elsewhere than the proper books and places. This is reflected in a part of the audited accounts and on the overall facts and circumstances of the case. The contradiction was as sharp as it was stark. The hotel projected the image of a thriving hotel whose special guests included kings, presidents and the Miss World pageant. But behind that image, the books showed that it was pauper paper hotel, whose coffers emptied and dwindled as soon as filled for the money to go to some place unknown.

Authority and status of the Seychelles Tourism Board (hereinafter referred to as "STB") and the Seychelles Licensing Authority (hereinafter referred to as "SLA")

The business has lately been run in breach of law. Both the above, STB and SLA, are regulatory authorities. The appellant's non-compliance or breaches of conditions and fall in standards in its licence cited at page C 7 of the Records, are enough to disqualify a business from operating. It is our view that we cannot ignore and condone the breaches nor overlook their decisions which incidentally was not appealed against by the company.

In fact, there has been a domino effect on the breaches in that one original breach unattended to has led to a series of others and the company has been in a quagmire unable to keep up with the standards required by the STB and SLA. One thing

led to the next until the risk and safety of some of the buildings themselves became too grave for redemption. Finally, the situation culminated in a withdrawal of the licence to operate.

For all the reasons given above, we find that the Judge had more than enough solid material before him to come to the conclusion that the substratum had failed and in all the circumstances of the case, the company should be wound up.

Accordingly this ground fails.

Alternative remedies

The third ground of appeal challenges the misapplication of the law by the Judge. In substance, the argument is that:

> The trial Judge erred in his consideration of the law applicable in this matter in that -
>
> (i) he misread the provisions of section 201 of the Companies Act and in consequence -
>
> (a) made a serious error of law in finding 'as a matter of law' that a petition for protection of minorities had first to be made to the Registrar of Companies rather than to the court, and
>
> (b) as a result did not consider the argument of the appellant that it was incumbent on the respondent to have proved that it could not have obtained sufficient satisfaction by an action

> under that section before requesting and being granted a winding-up order.

The contention of the appellant is: "That the trial court erred in not finding that the Government had other remedies which it should have pursued instead of petitioning for winding up." His reasoning has been that -

> To succeed in a petition for winding-up under section 205 of the Companies Act, the provisions of section 208 (2) become relevant. Under that subsection, a winding-up order shall not be made if there is some other remedy available to the petitioner and the court is of the opinion that he is acting unreasonably in seeking to have the company wound up instead of seeking that other remedy.

On the face it we must note that the appellant pleads s 201 of the Act, but in his heads of arguments, he refers to s 208(2) which states:

> Where the petition is presented by a creditor, shareholder, contributory or debenture holder of the company on the ground that it is just and equitable that the company should be wound up, or by a shareholder of the company on the ground set out in paragraph (e) of section 205, the court, if it is of opinion;
>
> (a) that the petitioner is entitled to relief either by winding-up the company or by some other means; and
>
> (b) That in the absence of any other remedy it would be just and equitable that the company should be wound up; shall

> make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioner , and that he is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

The material part of that section lies in the words "also of the opinion" and "acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy".
We hold that the trial Court did not hold the opinion that the petitioner was acting unreasonably, the more so in the circumstances referred to on the failure of the substratum of the company. That is more than borne out in the evidence.

Accordingly, this ground fails.

As all the grounds having failed, this appeal is dismissed with costs.

Record: Court of Appeal (Civil No 13 of 2008)

Panagary v Republic

Domah, Hodoul, Fernando JJ
7 May 2010 Court of Appeal Civ 9 of 2010

Bail – Constitution – access to justice

The appellants were convicted of possession of explosives. They appealed and applied for bail pending determination of their appeals.

HELD

1. There must be reasons which are exceptional and unusual for bail to be granted pending appeal. The rule is broadly worded in order not to close the categories of cases in a way that would be restrictive on a matter dealing with a constitutional freedom.

2. An application for bail pending appeal is unlikely to be granted unless supported by strong grounds of appeal which are likely to result in the appellant being released from custody.

3. Right of access to the Court of Appeal for the release of a citizen is within the inherent jurisdiction of the courts. The doors of the Court should never be closed where the liberty of the subject is in issue.

JUDGMENT: Application refused.

Legislation cited
Constitution
Explosives Act

Cases referred to
Beeharry v R Civ A 11/2009, LC 326
R v Joubert (1976) SLR 17
Rene v R Civ A 5/1998 (unreported)
Sinon v R Civ A 4/2006, LC 284

Foreign cases noted
R v Walton (1978) 68 Cr App 293

France Bonte for appellant in CRSCA 09
Alexia Amesbury for appellants in CRSA 10
Alexandra Madeline for respondent

Judgment delivered on 7 May 2010

Before Domah, Hodoul, Fernando JJ

The above two appeals have been heard together and we shall deliver one judgment for both. A copy will be filed in both. The appellants were convicted by the Supreme Court for the offence of possession of explosives under the Explosives Act and sentenced to a term of imprisonment of three years on 22 January 2010. They have appealed against that decision. Meanwhile, they applied for bail before the Supreme Court pending the determination of their appeal. The Judge, in a reasoned judgment delivered on 15 February 2010 decided, following the principles laid clown in our case law, that the appellants had not shown any special reason for which bail should be granted to them pending the determination of their appeal.

Aggrieved by that decision, the appellants have appealed against that order. The grounds they have stated are that the Judge failed to consider the clear records and the personal circumstances of the appellants which constitute special reasons for granting bail pending appeal.

Appellant Gemmel's contention, in his affidavit, is in short as follows: that he is one of the two experts for outboard Suzuki engines; that the country needs him for his specialized services in that most of the boat charters involved with tourists in the country depend upon his expertise; that his services include the Seychelles Coast Guard; that his appeal has a strong likelihood of success in that the prosecution had not adduced evidence to prove that he was in joint or exclusive possession of the explosives in question; that he trains young persons in marine engineering, among whom includes the third appellant, then aged 17; that he was on bail and he observed all the conditions for bail; that his incarceration could give rise to a compensation claim against the State on the ground of miscarriage of justice.

In their appeal, the appellants have raised a number of issues of law and procedure against their conviction: namely, that the case of each appellant should have been considered separately; no proof of possession, exclusive, joint or otherwise had been made; no concerted action had been proved against any of them; and no evidence of knowledge had been adduced.

The respondent has objected to this appeal on the ground that they do not satisfy the principles laid down in the decisions of our courts. She referred in particular to the cases of *R v Joubert* (1976) SLR 17 and *Sinon v R* SCA 4 of 2006, LC 284.

In *R v Joubert*, Sauzier J was of the view that:

> The Court would grant bail where the chances of success of the Appeal are so great that the probability that the Appeal will be allowed is overwhelming.

In *Gaetan Rene v R* Civ A no 5 of 1998, the Court of Appeal provided the following guidelines for such applications:

> 1. Chances of success in the appeal should not be considered as a ground for granting bail. If, however, prima facie there exists some obvious error of law, the court should arrange an expedited hearing of the appeal in the Supreme Court, in the case of the Court of Appeal an appeal from the Supreme Court is usually heard within four months, which is a reasonable delay in the case of a convicted person.
>
> 2. Bail will only be granted in exceptional and unusual circumstances that may arise in a particular case or where the appeal is likely to be unduly delayed.
>
> 3. In dealing with the latter class of case, the court will have regard not only to the length of the time which must elapse before the appeal can be heard but also the length of sentence being appealed from, and further these two matters should be considered in relation to one another.

In *Sinon v R* SCA 4 of 2006, LC 284, Hodoul J took the view that for someone to be granted bail pending appeal, there must be special reasons which must be exceptional and unusual. We endorse that view. The ground is widely worded, and rightly so. It is our view that to close the category of cases within restrictive legal terms would be reductive on a question which has to do with the constitutional freedom of the individual.

An application for bail pending appeal is unlikely to succeed unless supported by strong grounds of appeal which are likely

to result in the appellant being released from custody: *R v Walton* (1978) Cr App Rep 293.

On a jurisdictional issue raised on the propriety of this appeal on the decision of the Supreme Court declining bail, Mrs Amesbury referred to the decision of this Court in *Roy Beeharry v Republic* SCA 11 of 2009, LC 326, and Mr Bonte acquiesced. That decision enshrines the principle that, when it concerns the right to release from detention or custody, no citizen in this country should feel that the doors of the courts are at any given time ever closed, or will ever be closed for him or her. We are not unaware of jurisdictions today where any action for habeas corpus has been abrogated. We are not unaware of places where citizens may be picked up from their homes, from their workplace, from the streets or from their hiding places and detained without either their families, their parents or the community having a clue to the whys, the wherefores, the whens and the whats of such “enlevement" by State authority or agents of State authority, and the sheer helplessness of the near and dear in finding them out let alone what has come of them.

God forbid that, by our acts and omissions, such a culture surreptitiously finds its way into our democracy. Our courts are entrusted with that formidable primeval duty under the Constitution as the guardians of the fundamental freedoms and liberties of the citizen that the rights of the individual do not end up as dead letters but are translated as real rights in the everyday life of the people. It is for this reason that we decided in the case of *Roy Beeharry v Republic* that the right of access to the Court of Appeal for the release of any citizen falls within the inherent jurisdiction of the courts, especially the Supreme Court and, by extension, the Court of Appeal. We did point out that if the founding fathers of the Constitution of Seychelles found it fit to include the right to bail in the very Constitution, they must have had a reason for it.

True it is that when the Supreme Court has already determined a question of bail, especially where it has declined it, after a hearing of the parties and has based its conclusions with reasons given, an applicant who has been convicted to serve a sentence would have to come up with exceptional reasons to succeed before this Court. That makes sense and that is what the courts of all evolved democracies decide. But the doors of the courts should never be closed where the liberty of the subject is in issue.

In the present matter, we have taken into account the content of the affidavits and the submissions of all three counsel. Our difficulty is that we are unable to evaluate the merits of the application on the face of the lean documents put in and in the absence of the record of proceedings. We note that the parties are within the first months of a three year sentence following their conviction pronounced on 22 January 2010. In other words, a proper scrutiny of the averments in this appeal would require a proper examination of the complete proceedings of the case.

To obtain the transcript would require time. That would be as good as hearing the case on appeal.

Have the applicants shown that they have special reasons for release? They rely on their clear records and personal circumstances. But we note that the appeal is against conviction only and not against sentence where the clean record and personal circumstances would have been relevant.

We have also given consideration to the final prayer of the appellants. We conclude that it would be in the interests of justice and consonant with the principles of fairness and equity that this is a fitting case for the application of paragraph (f) of the guidelines laid in *Roy Beeharry v Republic*.

Accordingly, in consultation with the President of the Court of Appeal, we have offered to the appellants a fixture in the August 2010 session. With that end in view,

(a) the parties concerned shall make all necessary arrangements for a hearing of the appeal in the forthcoming August session; and

(b) the parties shall ensure timely compliance with all the relevant Rules of the Court of Appeal for the purposes of the prosecution of this appeal.

We direct the Registrar to ensure timely readiness of the transcript for the purposes of giving effect to the above.

We also stated to counsel that should the documents be ready, this Court would be pleased to give a date earlier than August 2010, subject to availability.

The application is otherwise set aside for the reasons stated above.

Record: Court of Appeal (Civil No 9 of 2010)

Raihl v Ministry of National Development

Domah, Hodoul, Fernando JJ
20 May 2010 Court of Appeal Civ 6 of 2009

Judicial review – natural justice – Constitution – executive power

The plaintiff had obtained planning permission, which had been revoked by the defendant. On application for judicial review the decision of the defendant was upheld. The plaintiff appealed.

HELD

1. No executive decision, which adversely affects the citizen's rights, may be taken without giving the citizen an opportunity to be heard.

2. Administrative law is not for the control of executive power. It is for the control of the manner in which the executive exercises the power given by parliament.

3. The exercise of executive power should be judicious, not arbitrary, nor capricious, not in bad faith, abusive or taken by reference to extraneous matters.

JUDGMENT With party agreement, the matter was held over for disposal at the next session.

Legislation cited
Constitution, art 26
Courts Act, s 5
Town and Country Planning Act, ss 4, 9 and 13

Cases referred to
Christodoulis v Minister for Land Use and Habitat Civ 105/1998 (unreported)

Foreign cases noted
Breen v Amalgamated Engineering Union [1971] 2 QB 175
Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141
Cooper v Wandsworth Board of Works (1863) 143 ER 414
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
Dimes v Grand Junction Canal Proprietors (1852) 3 HL Cas 759
Khawaja v Secretary of State for Home Department [1983] 1 All ER 765
Perrine v The Port Authority and Other Workers Union (1971) MR 168
Ridge v Baldwin [1964] AC 40

Frank ALLY for appellant
Samantha AGLAE for respondent

Judgment delivered on 20 May 2010

Before Domah, Hodoul, Fernando JJ

This is an appeal against the judgment of the then Chief Justice who, in an application for judicial review before the Supreme Court, upheld the decision of the respondent which had revoked a planning permission previously granted to the appellant.

The appellant has appealed against that judgment on the following four grounds:

1. The learned Chief Justice failed to take into account the more recent

development in the powers of judicial review of administrative decisions by the High Court in England, which powers may similarly be exercised by the Supreme court by virtue of section 5 of the Courts Act (Cap. 52).

2. The learned Chief Justice failed to take into account the fact that since the enactment of section 13 of the Town and Country Planning Act (Cap 237) the Constitution of the Republic of Seychelles was enacted, under which, by virtue of Article 26(1) every person is given the fundamental right to own and peacefully enjoy property.

3. In this case the granting of planning permission on 7 November 2002 after all the procedures which had been gone through raised a legitimate expectation on the part of the Appellant, owner of the land, of a substantive benefit to her as she could develop her land. To frustrate such expectation for no new reason was so profoundly unfair as to render the decision of the Minister, ex proprio motu, to revoke such planning permission an abuse of power and is, therefore, void.

4. At least, in the circumstances the Minister should before revoking the planning permission, have given the appellant the right to be heard or make representations after giving reasons, if any, for the change of policy.

The appellant in this case owns property at Glacis, Mahe. It is title no 1534. She decided to construct a three bedroom dwelling-house thereon. She made an application, which is dated 1 August 2002, to the Town and Country Planning Authority (the Authority). There followed a number of enquiries, visits, meetings and discussions on the plan so that modifications might be brought to conform to the special requirements of the place and the law. Eventually, on 7 November 2002, the Authority granted the permission, with conditions. One of the conditions was that the development should begin within two years of the date of the permission and be completed in every respect in accordance with the detailed plans and particulars. The others were general, with documents attached: the standard conditions, the environmental authorizations with conditions and the PUC (E) conditions.

However, by notice dated 31 December 2003, the Minister for Land Use and Habitat Authority revoked the permission on the ground that the proposed development would adversely impact on the aesthetics of the area and "in view that the development proposed would adversely impact on the aesthetics of this area and that the land is to remain in its natural state where no development is to take place."

Aggrieved by the revocation, the petitioner applied to the Supreme Court for an order annulling the decision on the ground that her constitutional right to enjoy her property was being infringed and that she was not given an opportunity to be heard before the decision adversely affecting her was taken.

The Supreme Court, after a hearing on the merits, declined the application on the ground that the Court will only interfere in the discretionary powers of the executive where they “have not been exercised in conformity with the rules of natural justice, and other grounds on which they could be challenged

by judicial review."

As may be seen, that was exactly the contention of the appellant namely, that the Authority had exercised its discretionary powers not in conformity with the rules of natural justice in that she had not been afforded a hearing before the revocation had been effected. The Supreme Court took the view that the "petitioner (now appellant), her architect, and agent were given ample opportunities since 1999 to 2002 to conform to planning requirements to preserve the aesthetic value of the area." The appellant could not, therefore, rely on the ground that she was not given a hearing in the particular circumstances of the case.

When we examined the facts of this case, it was pretty clear to us that both the executive and the Supreme Court decisions could not stand. The former could not stand for breach of natural justice and the latter could not stand for incorrectly applying the very proposition of law that the Chief Justice had correctly cited.

With regard to the executive decision, the plea of the respondent was as good as a disguised admission of breach of natural justice. Paragraph 3 of the affidavit reads:

> The Respondent whilst he was appraised of the whole facts: issues and laws arising out of the Petitioner's Planning Application and this Petition and that therefore there was in law no need for the Petitioner to be heard personally or through representatives before the revocation was effected.

The golden rule jealously guarded in administrative law by the courts is that no executive decision adversely affecting the rights of the citizen, more particularly, his property rights, may be taken behind his or her back, without affording him or her

an opportunity to be heard: *Ridge v Balwin* [1964] AC 40; *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759; *Perrine v The Port Authority and Other Workers Union* (1971) MR 168.

No matter how valid and warranted the executive considered the facts and circumstances were, in its eyes, which justified the order of revocation, it could not do so without affording the citizen a right to be heard. In the case of *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, reference is made to the example given in the Bible. Even God did not deem it fit to pronounce sentence upon Adam as well as upon Eve without giving them a hearing as to why they had partaken of the forbidden fruit from the apple tree - As per Bytes J:

> God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam' (says God), "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou should not eat?" And the same question was put to Eve also.

If God, Almighty and All-Powerful, did that, *quaere* puny man. Hence the appellation natural justice.

Now for the judgment of the Supreme Court. If the judgment was maintained, it would be tantamount to saying that if negotiations, visits, discussions and representations take place before any approval is given, all the events and activities which took place before the approval is given are deemed to be a hearing for the purposes of an eventual revocation of the permission given. That would be a dangerous precedent to introduce in our administrative law in Seychelles or anywhere else in a democratic society. Administrative law does not countenance a doctrine of retrospective hearing.

A case on all fours with the present one decided by the Supreme Court about 12 years ago is *Susanne Christodoulis v Minister for Land Use and Habitat*, Civil Side, no 105 of 1998, referred to us by one of us at that time in practice. A property owner was granted a certificate of approval for the construction of a three-unit flat, on 11 July 1997. Soon after, on 6 February 1998, the respondent revoked the permission on the ground that "the plot is unsuitable for development from all environmental coastal zone management point of view" and "therefore, the land should be maintained in its natural state as any development thereon will be environmentally hazardous".

The respondent in that case had also as in this case purported to act by virtue of the powers vested in him under section 13(1) and (2)(a) of the Town and Country Planning Act. Section 13(1) reads as follows:

> Subject to the provisions of this section, if it appears to the Minister that it is expedient, having regard to the development plan and to any other material consideration, that any permission to develop land granted on an application made in that behalf under this part should be revoked, the Minister may, by order, revoke or modify the permission to such an extent as appears to him to be expedient as aforesaid.

The decision to revoke was challenged on the ground, inter alia, of breach of natural justice. The officers from the Ministry of Environment had gone on site and had advised the owner on which trees had to be felled and which ones to be planted. Amerasinghe J was persuaded and decided that the decision of *Cooper v Wandsworth* (1863) 143 ER 414 applied. The executive decision was quashed. The Supreme Court held — and we endorse that decision - that an authority exercising

quasi-judicial powers such as the Minister in the case -

> which is by law invested with power to affect property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that rule is of universal application, and founded on the plainest principles of justice.

Administrative law is not about judicial control of executive power. It is not about government by judges. It is simply about judges controlling the manner in which the executive chooses to exercise the power which Parliament has vested in them. It is about exercise of executive power within the parameters of the law and the Constitution. Such exercise of power should be judicious: it should not be arbitrary, nor capricious, nor in bad faith, nor abusive nor taking into consideration extraneous matters: see *Breen v Amalgamated Engineering Union* [1971] 2 QB 175; *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141. As was stated in *Khawaja v Secretary of State for Home Department* [1983] 1 All ER 765:

> Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Having said this, we may as well recall what has been stated in the case of *Council of Civil Service Unions v Minister of Civil Service* [1985] AC 374 with respect to the modem concept of natural justice. The term now used is "the duty to act fairly" -

> Principles of “natural justice" is a term now hallowed by time, through overuse by judicial and other repetition. It is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find

> a permanent resting-place and be better replaced by another term such as "a duty to act fairly".

We might as well make a couple of comments on other aspects of the case which we think are warranted.

From the point of view of procedure, it is not the Minister who should have sworn the affidavit but an Executive Officer duly authorized by him to do so. The respondent stated in his affidavit that he took into consideration "the whole facts: issues and law which arose out of the Planning Application" to revoke the planning permission granted. But he did not expatiate on what those facts and issues were in any manner whatsoever. The Chief Justice concluded by conjecture what those facts and issues were. The same may be said about the laws. What were those laws that made him take the decision to revoke are neither stated nor apparent.

If it is section 13(1) of the Town and Country Planning Act referred to above, it is easy to see that the section refers to "development plan." The development plan is the one for the whole of Seychelles as prepared under section 4(2) of the Act. One may also refer to section 9(1) of the Act for the purpose. There is nothing to indicate that the revocation related to any development plan as such. The Judge obviously confused the development plan with the planning permission.

If the respondent's argument is that he based himself on "other material considerations" referred to in the relevant sections of the Act, this term connotes matters different from the conditions set out in Document B7 under which the planning approval was granted and the conditions set out in Document B8 under which environmental authorization was granted. The reasons set out in the Revocation Notice namely "development proposed would adversely impact on the aesthetics of this area and to maintain a balanced level of development that promotes the sustained co-existence of built

and natural environment" were addressed under conditions pertaining to landscaping, colour scheme, sand and gravel and as set out in Document B7. Likewise for the conditions that landscaping is to be done with anti-erosion vegetation, embankment is to be trimmed to safe slope angle and planted with anti-erosion vegetation and that felling of trees should be kept to a minimum as set out in Document B8.

We also read in the judgment that the Chief Justice states that "the Minister had expert opinion of the Environment Division" as regards the effect of the aesthetic value of the area. We do not find on record the source of this information. What we have on record, on the contrary, is that the Environment Authority had given its approval.

The Chief Justice also stated in his judgment that "the requirement that the development for which the petitioner was given permission should conform to conditions imposed as regards the preservation of the aesthetic value of the area was not a novel reason imposed by the Minister when revoking the permission". If that be the case, the question which arises is whether the Minister acting by virtue of his powers under section 13(1) could in law revoke a planning permission when the section specifies that such revocation may be exercised "having regard to the development plan and to any other material considerations."

The Judge also went on to say that the revocation could have been averted "had the petitioner complied with the directions." The fact of the matter is that the appellant had not even commenced development to breach the conditions imposed. There could not, accordingly, have been a failure to comply with the directions.

In light of our comments on the law, on the facts and on the flaws in the judgment the decision of both the respondent and the Chief Justice would not stand the test of appellate

scrutiny, both counsel requested some time to consider their respective stands. Later in the day, they apprised us that the respondent had agreed to reconsider the application of the appellant. That is commendable on the part of the respondent.

Subsequently, on 6 May, the motion was for disposal of the matter to the next session. This matter shall, therefore, be called at the next session, in August 2010, for disposal.

Record: Court of Appeal (Civil No 6 of 2009)

Vijay Construction (Pty) Ltd v Ministry of Economic Planning and Employment

Renaud J
28 May 2010 Supreme Court Civ 290 of 2006

Judicial review - employment – personal grievance – limitation - Employment Act 1995

Three employees of the petitioner lodged an employment complaint at the Ministry of Economic Planning and Employment. The complaint related to the petitioner's failure to pay the employees on several occasions. The employees' complaint was a continuing one as they had had issues with payments since their employment began in 1996, 2000 and 2002 respectively. The Competent Officer from the Ministry granted the employees compensation remedying their grievance. The petitioner appealed the Competent Officer's decision to the defendant who, after being advised by the Employment Advisory Board, upheld the decision of the Competent Officer. The petitioner applied to the court to issue a writ of certiorari to quash the decision of the respondent.

HELD

1. A writ of certiorari can be issued whenever a body or person which has legal authority to determine matters which affect citizens has acted with an excess or abuse of power.

2. When making a determination on judicial review, the court exercises supervisory jurisdiction. The jurisdiction supervises the decision-making process of the decision-making body. It does not make a judgment on the merits of the matter.

3. The decision of the decision-making body can be quashed on the grounds of illegality, irrationality or unreasonableness, procedural impropriety, failure to follow the rules of natural justice, or where there is an error of law on the face of the record.

4. While judicial review is not directly concerned with the merits of a decision, when determining the fairness and reasonableness of a decision the court will invariably have to look into the merits of the decision.

5. Only issues that have been considered by the decision-making body can be considered by the court in its supervisory jurisdiction.

6. When adjudicating on a disciplinary matter, the decision-making authority must act judicially and follow the basic principles of natural justice. This includes giving both parties the equal opportunity to be heard.

7. A Competent Officer is not strictly bound by the rules of evidence and normal court procedures. The Competent Officer is required to brief both parties fully on the evidence collected and afford both parties the opportunity to comment on the evidence and to adduce counter evidence.

8. A Competent Officer has authority to allow the filing of a grievance out of time only if the Competent Officer is judiciously

satisfied that it was impracticable for the aggrieved person to file within time.

9. The general law of limitation in respect of a civil claim is 5 years; this term is to be read into the Employment Act.

Judgment: Certiorari issued. Respondent directed to amend its decision.

Legislation cited
Constitution
Employment Act 1995
Employment (Amendment) Act 1999

Foreign cases noted
Associated Provincial Picture Houses v Wednesbury O'Reilly v Mackman [1983] 2 AC 309
Page v Hull University Visitor [1993] 1 All ER 97
[1948] 1 KB 223
R v Electricity Commissioners, ex P London Electricity Joint Committee Co [1924] 1 KB 171
Ridge v Baldwin [1964] AC 40
Seetha Ramanujulu v Sobhanachlam & Co (1958) AIR AP 438

Somasundaram RAJASUNDARAM for the plaintiff
David ESPARON for the defendant

Judgment delivered on 28 May 2010 by

RENAUD J: The petitioner is a civil engineering and building contractor operating in Seychelles who entered this petition on 28 July 2006 praying this Court to:

(1) order that the decision of the Minister dated 30 June 2006 in Griev/09/04 ultra vires the

petitioner's rights,

(2) order the reversal of that decision, and

(3) remit the matter back to the Competent Officer to hear the case afresh so as to invoke the provisions of law in proper manner.

This matter came up for hearing before me on 4 February 2010. It originated with a decision made and an order given by the respondent against the petitioner on 30 June 2006 in the case Griev/09/04 following an appeal against the decision of the Competent Officer made on 9 February 2006.

In his petition the petitioner claimed that the decision and order so made by the respondent is ultra vires because it violated the provisions of law of evidence, the law of prescription and the time limit for award of employment benefits, and the Constitution of Seychelles.

The petitioner also alleged that the respondent overlooked the principles of natural justice and ignored the rights of the petitioner in that the respondent omitted to note that the proceedings of the Competent Officer (CO) were not properly conducted and the resulting order of the CO was erroneously made.

The petitioner further alleged that the respondent failed to appreciate the case of the petitioner as the CO having improperly conducted the case, resulted in the wrong order being made, causing serious hardship to the petitioner.

The petitioner sets out the grounds in support of his petition in an affidavit deponed to by its representative Mr Kaushal Patel.

On 27 September 2006 the Court granted leave for the matter to proceed and for the respondent to transfer all records and

relevant papers to this Court.

On 8 February 2007 the respondent filed his objection to the petition and raised a plea *in limine litis* as well as objection on the merits. This was supported by an affidavit sworn by the respondent Minister Jacquelin Dugasse.

The respondent raised the plea *in limine litis* to the effect that -

> The petition is not made promptly and in any event within 3 months from the date of the order or decision sought to be canvassed in the petition and therefore it ought to be struck off.

I find no merit in this plea as the decision being challenged in this review was made by the Minister on 30 June 2006 and this matter was entered on 28 July 2006 which is within time.

On the merits, the respondent averred that the order of the Minister dated 30 June 2006 is intra vires the law reasonable and proper in all forms and substance, and was made in accordance with the law and the respondent properly appreciated the fact that the proceedings before the CO were done in a procedurally correct manner.

The respondent further denied that the petitioner's affidavit, purporting to show and explain how the decision of the respondent was ultra vires, and averred that as an accompanying affidavit it is a legal requirement in these proceedings.

A writ of certiorari has the effect of quashing a decision which may have been taken by the exercise of an excess or abuse of power. The criteria for deciding which acts or decisions are subject to certiorari was expressed by Lord Atkin in the case of *R v Electricity Commissioners, ex P London Electricity Joint Committee* Co [1924] 1 KB 171, as —

> ... wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division.

Certiorari is also available to quash or nullify actions or decisions that are ultra vires or in breach of natural justice or where traditionally there has been an error of law on the face of the record. As Lord Slynn suggested in the case of *Page v Hull University Visitor* [1993] 1 All ER 97 at 114b, the scope of certiorari may be interpreted widely -

> if it is accepted, as I believe it should be accepted, that certiorari goes not only for such an excess or abuse of power but also for a breach of the rules of natural justice.

The interpretation of the duty to act judicially has been widened considerably since that case was decided. In the case of *Ridge v Baldwin* [1964] AC 40, the courts have interpreted the phrase to include those bodies that have the power to decide and determine matters which affect the citizens. This means that certiorari generally may be available to review all administrative acts.

The formulation of acting judicially commonly used today is that favoured by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 309, that "it is enough to show that the body or person has legal authority to determine questions affecting the common law or statutory rights of other persons".

This Court, when exercising its supervisory jurisdiction does not act as a court of appeal. What is "supervised" is the decision-making process that was involved. The decision of the adjudicating authority could be quashed on the main

grounds of illegality, irrationality or unreasonableness, procedural impropriety, failure to follow the rules of natural justice, or where there is an error of law on the face of the record.

May I also reiterate that judicial review is not concerned with the merits of a decision but with the manner in which the decision was made. Nevertheless, in determining the fairness and reasonableness of a decision one has invariably to look into the merits, as formulated in the case of *Associated Provincial Picture Houses v Wednesbury* [1948] 1 KB 223. Thus where judicial review is sought on the ground of being unjust, unfair and unreasonable, the Court is required to make value judgments about the quality of the decision under review.

At the outset I have to hold that only issues that the petitioner had canvassed either before the Competent Officer or the Employment Advisory Board or the respondent can now be considered by this Court in its supervisory jurisdiction. I cannot reach any decision different from that reached by the Minister unless one or all of the grounds of challenge were present before him then.

The case file reference Griev/09/04 was forwarded to this Court by the then Ministry of Employment and Economic Planning and my judicial review is based on its content. I have accordingly summarised the material facts of the case for ease of reference. These are set out hereunder.

On 16 February 2004 three employees of Messrs Vijay Construction lodged a complaint at the MEPE stating in their grievance form the following claims —

> overtime - work odd hours - don't get paid. Sleep on the islands don't get nothing. No displacement bonus. Sunday – Public Holiday

> same payment. Dredging at La Digue for 9 days no payment. Usually they pay - done it before.

Mr Timothe Confiance alleged that he started working for the said employer on 3 July 2000 at a salary of R 2,800 per month as a deck hand. His normal working hours were from 7 am to 4 pm Mondays to Fridays and 7 am to 12 noon on Saturdays. He also attached a handwritten statement dated 6 February 2009 in which he elaborated on his grievance.

Mr Eugene Morel alleged that he started working for the same employer on 6 May 1996 at a salary of R 4,500 which was then increased to R 5,000 per month as a skipper. His working hours were the same as those of Mr Confiance. He also appended the same handwritten statement to his complaint.

Mr Randy Morel alleged that he started employment with the same employer on 9 October 2002 at a salary of R 2,800 per month as a deck hand for the same working hours as the other two colleagues and he likewise appended the same handwritten statement.

On 9 March 2004 one Ms Eunice Seraphine, an inspector of MEPE, carried out an investigation of the workers' complaints. She interviewed Mr Kaushal K Patel and obtained the employer's version of the facts.

A meeting was then set to take place on 1 June 2004 where all three employees were invited to attend together with the Managing Director of Vijay Construction (Pty) Ltd. The purpose of the meeting was stated as - to bring about settlement by mediation pursuant to section 61(1A) of the Employment (Amendment) Act 1999. That meeting was then re-scheduled for 28 June 2004 at 1.30 pm with due notice to all parties, which notice was dated 8 June 2004.

By letter dated 30 June 2004, pursuant to Schedule 1 Part II of the Employment Act 1995, the Managing Director of Messrs Vijay Construction (Pty) Ltd was invited to appear before the Competent Officer (CO) without fail on Friday 9 July 2004 at 10 am. He was also advised to bring along any relevant documents and witnesses if necessary.

One Mr Roy Bristol being the representative of the workers involved wrote to MEPE on 10 August 2004 indicating that he had met with the Managing Director of Messrs Vijay Construction (Vijay) on 20 July 2004 and had held preliminary discussions and at the request of Vijay he had agreed to submit a formal claim with all financial details to the employer. He also indicated that the matter may be resolved without the need for MEPE to intervene. MEPE by letter dated 19 August 2004 gave the parties up to the end of August 2004 to reach an amicable settlement failing which the case would be heard by the Competent Officer. That period was thereafter extended to the end of October 2004.

The matter was eventually fixed for hearing by the CO on 21 March 2005 at 2 pm presumably because the parties could not reach the settlement as envisaged. All parties were duly informed by letter 4 March 2004 of the hearing. That meeting was adjourned to 14 April 2005 at 1.30 pm with due written notice dated 4 April 2004 to all parties. The meeting was again adjourned to 12 July 2005 with written notice to all parties dated 15 June 2005. By written notice dated 29 July 2005 addressed to all parties, the meeting was fixed for 17 August 2005. The CO who heard the parties was Mr R M Plows.

Following the meeting of 17 August 2005 the CO, Mr Plows wrote to the Managing Director of Messrs Vijay Construction on 5 October 2005 stating that, based on the fact that the applicants' claim was a legitimate one, he had requested the applicants to present a breakdown of their claims. The CO

forwarded copies of the breakdown of the applicants' claims for public holidays, overtime and night allowance, to the Managing Director of Messrs Vijay Construction and the CO requested the latter to comment on those claims in writing within 7 days.

On 12 October 2005 the Managing Director of Messrs Vijay Construction, making reference to the CO's letter of 5 October 2005 wrote to the Principal Secretary of MEPE stating that there was a fundamental flaw in the handling of the case and they set out their reasons for alleging so. They also alleged that the CO was prejudiced and biased, and therefore requested that another CO continue with the matter.

On 27 October 2005, the Principal Secretary of MEPE wrote to the Managing Director of Messrs Vijay Construction inter alia informing him that a new hearing date would be set to bring both parties together to discuss the claims.

On 18 December 2005 the representative for the Managing Director of Messrs Vijay Construction, Mrs Maryse Larue, following a meeting with CO Mr Bennett Alphonse on 6 December 2005, requested an extension of time to 23 December 2005 to meet with the CO in order to submit all documentation to show that there were no outstanding payments due to the three claimants.

The matter was eventually heard before another CO namely Mr B Alphonse. The record of proceedings shows that the three applicants were present and so were two representatives of Messrs Vijay Construction namely Mr Kaushel Patel and Mr Chandran Kannan.

The CO determined that on the basis of the evidence the 3 three applicants were entitled to be paid the underpayments of overtime, public holidays and night allowance. That determination was conveyed to the Managing Director of

Messrs Vijay Construction by letter dated 9 February 2006 stating how much each of the applicants was entitled to, which should be paid by Messrs Vijay Construction. Details of how the claims were calculated were also forwarded. A summary of the final claims was as follows:

Mr Eugene Morel - for period 13 May 1996 to 30 August 2005	-	R140,867.83
Mr Randy Morel - for period 9 October 2002 to 30 August 2005	-	R 32,284.60
Mr Timothee Confiance – for period 31 July 2000 to 30 August 2005	-	R 58,518.67

The Managing Director of Messrs Vijay Construction being aggrieved by the determination of the CO, by letter dated 21 February 2006 lodged an appeal to the Minister, MEPE for re-consideration. The ground upon which the appeal was brought was –

> All documents which have been submitted to the Competent Officer – contract of employment, job card, pay slip, etc clearly show that the workers have been paid all their dues. We therefore disagree with Competent Officer's decision.

The appeal was set for hearing before the Employment Advisory Board (EAB) on 21 April 2006 at 11 am and all parties were duly notified in writing. Messrs Vijay Construction was represented by its representative Mrs Maryse Larue, and the three workers were present and represented by counsel Mr Frank Ally.

Mrs Larue confined her arguments to the following points:

(i) That the grievance procedure initiated by the respondents was out of time and contrary to the provisions of the Employment Act, in that the

subject matter of the grievance arose over ten years back and the respondents never made any claim before 2004 and they have been unable to prove or give genuine reasons as to why they could not do so.

(ii) That the respondents only signed a contract in 2002 and that all previous contracts were verbal.

(iii) That all claims made pertaining to the period before 2002 is erroneous for no claims were made at the time payment of salaries were done. The only claims may be considered are only the ones between the years 2002 and 2004.

(iv) That given the above arguments the decision of the said Competent Officer ought to be reversed accordingly.

Counsel on behalf of the three workers submitted:

(i) That it is incorrect to state that the respondents had lodged their grievances out of time for the grievances were lodged on the 3 February, 2004 when they were still in employment and thus the proper procedures were followed;

(ii) That the argument as to time limit does not apply in this case for the causes of the grievance were "continuous" and the time limit ought to have started upon the knowledge of illegal procedures being known to the respondents;

(iii) That if claims against any employee can be made upon termination of employment there is no reason as to why it cannot be done during a continuous contract of employment;

(iv) That the said Competent Officer was right to rule in the way she did based on the evidence on record.

On 7 June 2006 the Employment Advisory Board gave its considered advice to the respondent, stating as follows:

> Based on the submissions of representatives of the appellant and respondents as well as the evidence on record, the Board has unanimously decided as follows:
>
> (a) That the provisions of paragraph 2(1) of Part II of the Employment Act, 1995, provide that 'whenever an employer or worker is empowered by or under this Act to initiate the grievance procedure, the employer or worker may, within 14 days of becoming aware of the event, act or matter giving rise to the grievance, register a grievance with the Competent Officer furnishing the officer with all information the officer may require'. Sub-section (3) of the same paragraph provides that 'an employer or worker who fails to register a grievance within the time specified under sub-paragraph (1) loses the right to do so, but the Competent Officer, if satisfied that registration within the time was impracticable shall allow registration out of time'.
>
> Taking into consideration the circumstances of this case, there is sufficient evidence on record to prove "genuine cause" as to why the claims of the respondents for the periods before the year 2002 were not done "within the period of 14 days from the time it became known" and

as such these claims were rightly accepted by the said Competent Officer. The argument of the representative of the respondents that "the breach was continuous" is acceptable in view of the highlighted provisions of the Act and the circumstances of this specific case.

(b) The decision of the said Competent Officer is hereby upheld and appeal dismissed.

The respondent by a 'minute' on file dated 27 June 2006 stated – "Having consulted the EAB, I confirm the decisions of the Competent Officer."

Ground 1

When COs hear cases they are not strictly bound by the rules of evidence and normal court procedures. What they are required to do in the process of their enquiry into any grievance is to fully brief the other party of the evidence they have collected and afford the other party the opportunity to comment thereon or adduce counter-evidence. The findings of COs must always be based on facts that have been made by a party with the full knowledge of the adverse party and duly tested as to correctness and veracity. That is the least that is expected of a CO when determining a grievance.

In my review of the proceedings in this matter, and in light of my foregoing observations, I am satisfied that the CO and indeed the respondent has not violated the provisions of law of evidence as claimed by the petitioner. The CO all along kept the petitioner within the process and did not act without its involvement.

The petitioner has also raised the issue of the law of prescription and time limit for award of employment benefits. On that score, I note that the petitioner has awarded the

respondents relief that date back to 6 May 1996 in respect of Mr Eugene Morel, to 9 October 2002 in respect of Mr Randy Morel, and to 3 July 2000 in respect of Mr Timothee Confiance.

Paragraph 2(1) of Part II of the Employment Act 1995, provides that -

> whenever an employer or worker is empowered by or under this Act to initiate the grievance procedure, the employer or worker may, within 14 days of becoming aware of the event, act or matter giving rise to the grievance, register a grievance with the Competent Officer furnishing the officer with all information the officer may require.

This provision is not ambiguous; it is very clear. A person has 14 days from the time that he/she became aware or has knowledge that an event, act or matter had arisen which entitles him/her to lodge a grievance. There may, however, be instances where for good reasons shown it was impracticable for that person to file the grievance within the timeframe. In such circumstances, that person has to show cause why his/her grievance ought to be accepted although it was entered out of time. In such instance it is incumbent on the CO to judiciously consider the matter in the light of subsection (3) of the same paragraph.

Subsection (3) states -

> an employer or worker who fails to register a grievance within the time specified under sub-paragraph (1) loses the right to do so, but the Competent Officer, if satisfied that registration within the time was impracticable shall allow registration out of time.

The CO is therefore invested with the legal authority to allow the filing of a grievance out of time only if the CO having been judiciously satisfied that it was impracticable for the aggrieved to come within the time limit. This is a matter of a finding of fact by the CO into which I will not venture in this judicial review.

In the instant case it is not evident when the three workers came to have knowledge that they were being "shortchanged" in respect of their overtime payments etc. That is a fact that the CO has to establish in the process of the hearing. I do not find this fact on record. For the purpose of this case I take it that the three workers only became aware of their entitlement to such "extras" on or around the date that they filed their grievances.

This brings us to the contentious issue as to within what timeframe the claims should be accepted. There is no provision in the employment law regarding time limits for claims of this nature. As propounded by counsel for the three workers, the claims are of a continuous nature. Because of this lacuna in the employment law, it should not follow that the period is deemed to be unlimited as otherwise a worker may on his retirement claim "extras" from his employer for all the years that he had been so employed, which could possibly be for over 40 years. That is absurd and the law cannot reasonably be expected to allow this. The general law of limitation in respect of civil claims of this nature is 5 years in terms of article 2271 of the Constitution of Seychelles. I believe that that limit should be read into the Employment Act. In the case of *Seetha Ramanujulu v Sobhanachlam & Co* (1958) AIR AP 438 – it was posited that –

> the true test to find out as to when cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result. If there is an infringement of

> a right at a particular time the whole cause of action arises then and there. It is not then open to a party to sit tight and not to bring a suit for declaration of his right which has been already infringed, within the prescribed time. Once that right to sue is extinguished by lapse of time, he cannot thence wait for another cause of action and then institute a suit for establishing a right already extinguished. Such a suit could only mean a suit for revival of a right long ago extinguished by lapse of time. The right is dead for all purposes beyond any such revival.

In that same case it was also held that "if the contract which gives the cause of action to sue is superseded by an agreement, ... the original cause of action ceases to exist".

It is a fundamental principle of limitation that when a right to sue accrues, the cause of action begins there and then.

The clear test to determine when the cause of action accrues is to find out the time when the plaintiff could have first instituted his suit with success.

It appears that the respondent has followed the advice of the EAB which accepted the contention of counsel for the three workers that the claims were of a continuous nature. That may be so, but what needs to be determined is for how long back it is reasonable to allow for such continuity without causing prejudice to the other party. The workers knew of the infringement since they started employment and sat on their right, only to raise it when their employment was being terminated. In such circumstances, it is my considered judgment that their claims cannot in law (article 2271 Civil Code of Seychelles) extend to more than 5 years and so I find.

In conclusion, I find that the decision and order so made by the respondent is ultra vires to the extent that it has violated the law of prescription and the time limit for award of accrued employment benefits.

Ground 2

The three workers formally filed their grievances with the MEPE on 16 February 2004. On 9 March 2004 Ms Eunice Seraphine, an Inspector of MEPE, carried out an investigation of the workers' complaints. She interviewed Mr Kaushal K Patel and obtained the employer's version. The Managing Director of Vijay Construction (Pty) Ltd and all three employees were invited to attend a joint meeting on 1 June 2004. That meeting was then re-scheduled for 28 June 2004 at 1.30 pm with due written notice given equally to all parties.

By letter dated 30 June 2004, pursuant to Schedule 1 Part II of the Employment Act 1995, the Managing Director of Messrs Vijay Construction (Pty) Ltd was invited to appear before the Competent Officer (CO) without fail on Friday 9 July 2004 at 10am. He was also advised to bring along any relevant documents and witnesses if necessary.

One Mr Roy Bristol being the representative of the workers involved wrote to MEPE on 10 August 2004 indicating that he had met with the Managing Director of Messrs Vijay Construction (Vijay) on 20 July 2004 and had held preliminary discussions and at the request of Vijay he had agreed to submit a formal claim with all financial details to the employer. He also indicated that the matter may be resolved without the need for MEPE to intervene. MEPE by letter dated 19 August 2004 gave the parties up to the end of August 2004 to reach an amicable settlement failing which the case would be heard by the Competent Officer. That period was thereafter extended to the end of October 2004.

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Following the meeting of 17 August 2005 the CO, Mr Plows wrote to the Managing Director of Messrs Vijay Construction on 5 October 2005 stating that, based on the fact that the applicants' claim was a legitimate one, he had requested the applicants to present a breakdown of their claims. The CO forwarded copies of the breakdown of the applicants' claims for public holidays, overtime and night allowance, to the Managing Director of Messrs Vijay Construction and the CO requested the latter to comment on those claims in writing within 7 days.

On 12 October 2005 the Managing Director of Messrs Vijay Construction, making reference to the CO's letter of 5 October 2005 wrote to the Principal Secretary of MEPE stating that there was a fundamental flaw in the handling of the case and they set out their reasons for alleging so. They also alleged that the CO was prejudiced and biased, and therefore requested that another CO continue with the matter.

On 27 October 2005, the Principal Secretary of MEPE wrote to the Managing Director of Messrs Vijay Construction inter alia informing him that a new hearing date would be set to bring both parties together to discuss the claims.

On 18 December 2005 the representative for the Managing

Director of Messrs Vijay Construction, Mrs Maryse Larue, following a meeting with CO Mr Bennett Alphonse on 6 December 2005, requested an extension of time to 23 December 2005 to meet with the CO in order to submit all documentation to show that there were no outstanding payments due to the three claimants.

The matter was eventually heard before another CO namely Mr B Alphonse. The record of proceedings shows that the three applicants were present and so were two representatives of Messrs Vijay Construction namely Mr Kaushel Patel and Mr Chandran Kannan.

Supported by the above findings as per the records I find that the petitioner was given all possible opportunity to prove fact of payment of all dues to the three workers. The petitioner also had the opportunity to question the three workers when they met at the joint meeting. The petitioner was afforded all opportunity to present its case before the CO made his considered findings and determination. The findings being findings of fact, this Court when judicially reviewing the case does not go into that.

In light of the foregoing, I therefore cannot hold with the petitioner that the respondent failed to uphold the rule of natural justice or that the latter failed to act fairly towards the petitioner in the handling of the matter from the start up to its ultimate conclusion. This ground of review is accordingly found to be of no merit and is accordingly dismissed.

I also find that the respondent did not in any way overlook the principles of natural justice and that he did not ignore the rights of the petitioner. I further find that the proceedings of the CO were properly conducted.

Having reached my conclusions on the two essential grounds of the judicial review, I believe that the other issues raised by

the petitioner have been sufficiently addressed.

I wish, however, to place on record that I do not find anything in the whole record of proceedings which indicates on what basis the CO decided that it was impracticable for the three workers to file their grievances earlier. It is evident that the three workers registered their grievances on 16 February 2004. No reason was given by the three workers for the inordinate delay to register their grievances albeit their claims were of a continuous nature. My direction to COs is that in future when such a situation arises, a pre-trial enquiry ought to be held to judiciously establish whether there are good reasons shown for allowing grievances for accrued claims to be filed so long after the cause of action arose. Each case, however, should be determined on its own merits with good cause shown.

In view of my findings above, I hereby issue a writ of certiorari quashing the decision and order of the respondent to the extent that the claims of the three workers ought to have been entertained for a period not exceeding 5 years preceding the filing of the grievance. I hereby direct the respondent accordingly to amend its decision and order made on 30 June 2006.

Record: Civil Side No 290 of 2006

Hackl v Financial Intelligence Unit

Egonda-Ntende CJ, Gaswaga, Burhan JJ
1 June 2010 Constitutional Court 1 of 2009

Constitutional right – right to property – right to fair hearing – right to equal protection of law - Proceeds of Crimes (Civil Confiscation) Act 2008 - constitutional principle – separation of powers

The petitioner was a citizen of both Germany and the Seychelles. He had been convicted of criminal conduct in Germany. The proceeds of that criminal conduct had been channelled to Seychelles. The respondent sought orders under the Proceeds of Crime (Civil Confiscation) Act that the petitioner be prohibited from dealing with any property thought to be gained through the proceeds of crime. The Supreme Court granted the orders. The petitioner claims that the orders breached the Constitution, specifically his right to property, right to a fair hearing, and right to equal protection of law.

HELD

1. In a constitutional case there is a duty on the petitioner to establish a prima facie case in respect of the allegations of contravention or risk of contravention of constitutional provisions. That done, the evidential burden will shift to the state to show that there is no contravention or risk of contravention of the impugned constitutional provisions.

2. Where a petitioner has a remedy under any other law which he/she may have pursued

or may still pursue, the Constitutional Court will decline to hear the petition.

3. Proceedings under the Proceeds of Crime (Civil Confiscation) Act are civil in nature.

4. Ex parte applications in civil proceedings are not unconstitutional.

5. The right to property protected under the Constitution extends only to property lawfully acquired.

6. The right to property can be restricted if the restriction is in the public interest, or the property is reasonably suspected of being acquired with the proceeds of crime.

7. Money laundering is a serious crime within the jurisdiction of Seychelles.

8. It is not unconstitutional to deprive people in receipt, ownership, possession and control of property gained through the proceeds of crime.

9. Articles 19 (2)(b), (c), (d), (e), (f) and 19 (4) apply only to criminal proceedings and cannot be relied on in civil proceedings.

10. A right to a fair trial in civil matters has a number of constituent elements including:

    (a) the right for each party to be heard and present its case in an open and public trial before an independent and impartial court established by law;

(b) the provision of adequate time for preparation and presentation of a party's case; and

(c) the discovery and inspection of documents relevant to the case that may be in the hands of the opposite party.

11. The elements of a fair trial are not absolute, they are subject to the discretion of the court and the importance placed on each element will differ depending on the circumstances of the proceedings.

12. In order to claim unequal protection of the law one must show the grounds upon which discrimination has been based and how parties have been treated differently.

13. Section 3(9)(c) of the Anti-Money Laundering Act does not abdicate legislative power to the Attorney-General.

Judgment: Petition dismissed.

Legislation cited
Constitution, arts 19, 26, 27, 46, 85, 89, 130(7)
Anti-Money Laundering Act, s 3
Code of Civil Procedure, s 84
Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules
Land Registration Act
Proceeds of Crime (Civil Confiscation) Act, ss 3, 4, 9, 21

Foreign legislation noted
Constitution of Ireland
European Convention of Human Rights
Proceeds of Crime Act (Ireland), ss 3, 4, 40.3.2
Proceeds of Crime Act (South Africa), chs 5, 6
Prevention of Terrorism Act 2004

Cases referred to
Adeline v Family Tribunal Constitutional Case 3/2000 (unreported)
Amesbury v Chief Justice Constitutional Case 6/2006 (unreported)
Atkinson v Government of Seychelles SCA 1 of 2007, CM3 56
Chow v Gappy SCA 10/2007, LC 294
Elizabeth v Speaker of the National Assembly SCA 2/2009, LC 334
Kim Koon v Republic (1965-1976) SCAR 60

Foreign cases noted
Ali and Rasool v State of Mauritius [1992] 2 All ER 1
Bisher Al Rawi v Security Services [2010] EWCA Civ 482
Brown v Stott [2003] 1 AC 681
Calero-Toledo v Pearson Yacht Leasing Co 416 US 663 (1974)
Clancy v Ireland, Irish High Court, 4 May 1988
Davis v R [2008] UKHL 36
Engel v Netherlands (No1) (1976) 1 EHRR 647 (ECHR)
Gilligan v Criminal Assets Bureau [1997] IEHC 106
Hasia v Mujib (1981) AIR SC 487
Mtikila v Attorney-General (1996) 1 CHRLD 11
Murphy v GM, PB, HC Ireland, 4 June 1999
Murphy v M(G) [2001] IESC 82
Ozturk v Germany (1984) 6 EHRR 409 (ECHR)
Prophet v National Director of Public Prosecutions CCT 56/05
Regina v H [2004] UKHL 3
Secretary of State for the Home Department v MB [2007] UKHL 46

Silver v United Kingdom (1983) 5 EHRR 347 (ECHR)
Sunday Times v United Kingdom (1979-1980) 2 EHRR 245 (ECHR)
Walsh v Director of the Assets Recovery Agency (2005) NICA 6

Basil HOAREAU and Frank ALLY for the petitioner
Ronny GOVINDEN and David ESPARON for the respondents

Judgment delivered on 1 June 2010

Before Egonda-Ntende CJ, Gaswaga, Burhan JJ

Read on behalf of the Chief Justice (who was absent) by the Honourable Mr Justice Duncan Gaswaga on 1 June 2010.

EGONDA-NTENDE CJ: The petitioner is both Seychellois and German. He brings this action against the respondents seeking to challenge the constitutionality of:

(a) orders made against the petitioner and another person by the Supreme Court in Civil Side no 143 of 2009 under the Proceeds of Crime (Civil Confiscation) Act, (Act 19 of 2008) (hereinafter referred to as POCA);

(b) section 3(9)(c) of of the Anti-Money Laundering Act as amended by Act 18 of 2008 (hereinafter referred to as AMLA) and

(c) sections 3(1), 4(1) and 9 of the POCA.

Respondent no 1 is a creature of statute under section 16 of the Anti-Money Laundering Act 2006 as amended by Act 18 of 2008 (AMLA). Respondent no 2 is the Attorney-General and is joined by virtue of rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of

the Constitution) Rules 1994. Both respondents oppose this action.

The facts that give rise to these proceedings are substantially not in dispute. Respondent no 1 started proceedings against the petitioner and another person on 17 June 2009 under Civil Side No 143 of 2009 based on the POCA in the Supreme Court. The Supreme Court made a number of interim orders -

(a) An inhibition was placed pursuant to section 76(1) of the Land Registration Act, prohibiting the disposal of, or other dealing with the whole or any part of the following parcels of land until further orders of the Supreme Court, namely land parcels PR 1478, PR 1479, PR 2380, PR 2378 and PR 1466 at Anse Kerlan, Praslin, and land parcels H 415 and H 876 at Mare Anglaise, Mahe;

(b) An order of prohibition was placed on the sale of or any other dealing with motor vessels catamaran named “Storm”, “Monsun” and motor vehicles bearing no S18826 and S18827 registered in the names of Hans Josef Hackl until further order of the Supreme Court; and

(c) An order prohibiting Barclays Bank and or any other person from disposing or otherwise dealing with the whole or any part of the amounts of US$ 600,956 and US$ 587,279 standing to the credit of Hans Hackl at Barclays Bank.

The said orders were made as a result of ex parte proceedings based on the affidavit of Declan Barber, Director of respondent no 1.

It is contended for the petitioner that the petitioner's right to property as protected under article 26(1) of the Constitution has been contravened by the order of the Supreme Court of 17 June 2009 and the provisions of section 3(1) of the POCA on the following grounds –

(a) the interim order in relation to the land, vehicles and vessels was made despite the absence of any averments and evidence in the affidavit of Mr Barber, upon which the Court could have been satisfied that there were reasonable grounds for the belief and for it to appear to the Court on a balance of probabilities that the said land, vehicles and vessels constitute benefits from criminal conduct or that they were acquired wholly or partly in connection with property that directly or indirectly constitute criminal conduct.

(b) section 3(1) of POCA is contrary to article 26(1) of the Constitution as it is not a provision of law that is necessary in a democratic society on any one of the grounds set out in paragraphs (a) to (i) of article 26(2) of the Constitution.

The petitioner further states that respondent no 1 has commenced proceedings against the petitioner under section 4 of the POCA requesting an interlocutory order. Should that application be allowed it is likely that the respondent will institute proceedings under section 5 of POCA requesting for a disposal order. The application under section 4 of the POCA is supported by an affidavit sworn by Mr Liam Hogan on 9 July 2009 which relies on the affidavit of Mr Barber referred to earlier.

It is contended for the petitioner that these proceedings are

likely to contravene his right to property as protected by article 26(1) of the Constitution in so far as -

a) the two affidavits do not contain any averments and evidence upon which the Court could be satisfied that there were reasonable grounds for the belief and for it to appear to the Court on the balance of probabilities that the said land, vehicles and vessels constitute benefits from criminal conduct or that they were acquired wholly or partly in connection with property that directly or indirectly constitutes criminal conduct.
b) Section 4(1) of the POCA is contrary to article 26(1) of the Constitution as it is not a provision of law that is necessary in a democratic society on any one of the grounds set out in paragraphs (a) to (i) of article 26(2) of the Constitution.

The petitioner contends that the proceedings leading to the interim order and the provisions of the POCA contravened the petitioner's right to a fair hearing under article 19 of the Constitution. The petitioner contends that, given the degree and severity of the interim order that the proceedings against the petitioner are criminal in nature, in spite of the fact that the acts complained of at the time they occurred were not an offence, contrary to article 19(4) of the Constitution. The POCA defines benefit from criminal conduct and criminal conduct to include acts that were committed prior to the coming into force of the POCA thereby contravening the provisions of article 19(4) of the Constitution. The petitioner obtained the property in question, the subject of the interim order before the coming into force of the POCA.

Further under this head it is contended for the petitioner that the proceedings leading to the interim order were ex parte and

the only evidence relied upon was affidavit evidence. The petitioner was thereby denied notification of hearing of the same, the opportunity to be present and put its case including the cross-examination of the maker of the affidavits relied upon. This contravened article 19(2) (b), (c), (d), (e) and (f) of the Constitution.

In the alternative if the proceedings leading to the interim order were civil in nature it is the contention of the petitioner that they contravened article 19(7) of the Constitution, in so far, as the proceedings were ex parte and solely relied on affidavit evidence, following section 9 of POCA.

In the further alternative the petitioner contends that before an order for confiscation of property is made it must be proved on a balance of probabilities that the property is reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime. Therefore there must be both proof of the crime (criminal conduct) and proof that the property was acquired by the proceeds of crime. As the property which is the subject of the interim order was acquired before the enactment of the POCA, the interim order contravenes article 19(4) of the Constitution. Similarly in so far as the provisions of the POCA permit the confiscation of property acquired before the coming into force of the POCA, those provisions contravene the petitioner's right to property under article 19(4) of the Constitution.

With regard to the pending interlocutory application the petitioner avers on the basis of section 9 of the POCA that it will be solely decided on affidavit evidence. In addition under section 21 of the POCA the petitioner is not entitled to further particulars, inspection, disclosure or discovery prior to the filing and delivering of an affidavit setting out the evidence intended to be adduced by him, which affidavit must be filed not later than 21 days from date of service of the application of him.

All the foregoing matters contravene the petitioner's right to a fair trial as the petitioner is not entitled to cross-examine the maker of the affidavits on which the application against him is based. At the same time the petitioner would require further and better particulars of the averments made against him, inspection, disclosure or discovery prior to the filing and delivering his affidavit in reply more so as the proceedings would be determined on affidavit evidence. The time limit for delivering his affidavit is too short.

In the further alternative to the foregoing the petitioner contends that his right to equal protection of the law under article 27 of the Constitution has been contravened by section 3(9)(c) of the AMLA as proceedings under sections 3 and 4 of POCA have been instituted against him. The provisions of section 3(9)(c) of AMLA grant unfettered discretion to the Attorney-General to commence or not to commence proceedings against anyone given the definition of criminal conduct under the AMLA as amended. This provision is inherently discriminatory.

At the same time this provision contravenes the principle of separation of powers enshrined in the Constitution (articles 85 and 89 of the Constitution) in so far as it confers legislative powers on a member of the executive by allowing him to determine whether an act or omission in a foreign country shall or shall not be in a particular case a serious crime in Seychelles.

The petition is supported by an affidavit sworn by Mr Chang-Sam as an attorney in fact and agent of the petitioner. The affidavit basically regurgitates the contents of the petition.

The respondents opposed this action. They filed a reply supported by an affidavit sworn by Liam Hogan of the FIU. The respondents deny that the interim order of 17 June 2009 by the Supreme Court unconstitutionally deprived the

petitioner of the property in question. They contend that on the basis of all evidence submitted to the court by the respondent no 1 there was sufficient evidential basis for the order made by the Supreme Court. If there was an infirmity in the proceedings resulting in the interim order the petitioner had a remedy within the statutory scheme of the POCA and in particular under section 3(3) thereof. The petitioner did not avail himself of this remedy. He is therefore precluded from seeking relief from the Constitutional Court.

With regard to the interlocutory proceedings the respondents contend that no constitutional issues arise and that there is sufficient evidence before the court for it to make the orders sought on the basis of applicable law. The respondents contend that it is an impermissible presumption that the court will act other than reasonably and properly on the evidence before it and in accordance with the law and the Constitution. With regard to section 4(1) of POCA the respondents contend that it is perfectly constitutional, and does not contravene article 26(1) of the Constitution. It is law that is reasonably necessary in a democratic society.

As to the challenge concerning the petitioner's right to a fair hearing under article 19 of the Constitution, the respondents contend that neither the proceedings under sections 3(1) and 4(1) of POCA nor sections 3(1) and 4(1) of the POCA contravened or contravene the petitioner's right as alleged. The proceedings are civil in character against specific property and therefore articles 19(1) to (6) and 19(2) (b) (c) (d) (e) and (f) of the Constitution do not apply to the said proceedings which are not criminal proceedings. Article 19(1) to (6) inclusive apply only to criminal proceedings.

The respondents specifically denied that article 19(4) of the Constitution was breached in relation to the petitioner by reason of the definition of benefit from criminal conduct which includes property acquired before the coming into force of the

POCA. The statutory scheme that allows the freezing, and disposal of assets obtained from criminal conduct irrespective of when that criminal conduct was committed in civil proceedings is constitutionally permissible.

Section 9(1) of the POCA permits calling of oral evidence with the permission of the court. Ex parte applications are, in appropriate circumstances, available and justifiable to ensure that justice is done between the parties. The rules of procedure and evidence applied in respect of the proceedings under the POCA are necessary to achieve the objectives of the POCA.

The petitioner's right to a fair hearing has not been contravened nor will it be contravened in the interlocutory proceedings as it will be up to the judge to determine the matters in issue based on the law and evidence. The person best placed to adduce evidence by affidavit as to whether the property in question is the benefit from criminal conduct is the petitioner (the respondent in proceedings before the Supreme Court).

The respondents further contend that the provisions of section 9 of the POCA allowing the admissibility of statutory belief of the Director and Deputy Director is a proportionate and necessary provision to secure the objectives of the POCA. Section 21 of the POCA is intended to ensure the integrity of the proceedings under the POCA and deny a respondent assistance from the knowledge and material available to the FIU. The necessity for such a law is the experience of other agencies and court practice in other jurisdictions.

The respondents further contend that as the provenance of the property in question is particularly within the knowledge of the respondent 21 days provided for him to file an affidavit is adequate and should he need more time the court may for good cause extend such time. The petitioner in this case has

been afforded more than 21 days and has applied for, and been granted, from time to time, more time.

The respondents contend that the intention of the Legislature was to ensure that the benefit of criminal conduct would not be enjoyed by person in Seychelles nor would Seychelles provide a safe haven for such proceeds. That explains the definition of criminal conduct including the impugned provision of being contrary to the law of another state whether committed in that state or elsewhere unless it would not be in the public interest to take action in Seychelles in relation to such criminal conduct.

The discretion granted to the Attorney-General in this respect does not infringe the concept of separation of powers and the basis upon which it is exercised is clearly set out to be 'public interest'. The Attorney-General is the appropriate officer to be entrusted with such discretion in light of his constitutional authority under article 76(4) of the Constitution. Allegations of discrimination by the Attorney-General are an impermissible presumption. The discretion granted is limited strictly to not intervene in appropriate cases. It is not tenable to suggest that the Attorney-General has wrongly exercised his discretion not to intervene in respect of the property in question.

The respondent contends that articles 85 and 89 of the Constitution have no relevance to proceedings under the POCA. That the petitioner has no locus standi to challenge any provision of the Anti-Money Laundering Act 2006 as amended by Act 18 of 2008.

The respondents answer finally sets out 8 issues that this Court should, in the public interest, consider and determine, which form part of the 18 issues that the petition seeks to have determined.

Submissions of counsel

At the hearing of this petition Mr Basil Hoareau appeared with Mr Frank Ally. They relied on the written submissions filed in court earlier on in accordance with the order of this Court. Mr Basil Hoareau led with oral submissions for petitioner. The Attorney-General, Mr Ronny Govinden assisted by Mr David Esparon, principal State counsel, led the oral arguments for the respondents, in addition to relying on their written submissions filed prior to the hearing of the petition.

In his address to the court, Mr Hoareau was guided, if I may call it that, by the constitutional rights of the petitioner which it is contended have been breached and then brought in the alleged breaches of the same by the respondent. He submitted on the right to property, under article 26(2) of the Constitution; the right to a fair hearing under article 19 of the Constitution; the right of equal protection of law under article 27 of the Constitution; and abdication of legislative authority by the National Assembly in favour of the Attorney-General contrary to articles 85 and 89 of the Constitution. Discussing the case for and against the petitioner under those heads will provide an orderly manner to resolve the matters in issue in these proceedings.

The right to property

Mr Basil Hoareau submitted that the petitioner's right to property protected under article 26(1) of the Constitution had been violated by the interim order issued by the Supreme Court in relation to the properties of the petitioner without the production of sufficient evidence that linked those properties with any criminal conduct save for PR 2378 and PR 1466. He further submitted that section 3(1) of the POCA contravened the petitioner's right to the property under article 26(1) in so far as it exceeded the limitations allowed to the right to the property by article 26(2) of the Constitution.

In particular he contended that though the limitation in this case was provided for by law that law in the form of section 3(9)(c) of the AMLA fails the accepted test which is whether there is 'pressing social need' that is proportionate to the legitimate aim pursued. He contended that to include in the definition of serious crime, an offence which is not an offence in Seychelles that was committed in a foreign country, is not based on any interests that ought to be protected in Seychelles. The criminal conduct relied upon against the petitioner in the case before the Supreme Court was not an offence in Seychelles and was not committed in Seychelles.

These same arguments applied *mutatis mutandis* to the proceedings for an interlocutory order that were commenced in the Supreme Court and to section 4 of the POCA under which they were commenced. It was therefore argued that those proceedings were likely to contravene the petitioner's right to property and section 4 of POCA was in contravention of article 26(1) of the Constitution.

Counsel for the petitioner further contended that in enacting section 3(9)(c) of the AMLA the Legislature abdicated its legislative authority to foreign legislatures to determine what is a serious crime in Seychelles. This cannot be, especially in light of a Court of Appeal decision *Kim Koon v Republic* (1965-1976) SCAR 60. He also referred to *Basu on Administrative Law*, *Silver v United Kingdom* (1983) 5 EHRR 347 (ECHR), and *Sunday Times v United Kingdom* (1979-1980) 2 EHRR 245 (ECHR) to explain what limitations to fundamental rights are permissible.

Mr Hoareau urged this court not to follow the case of *Calero-Toledo v Pearson Yacht Leasing Co* 416 US 663 (1974) from the United States which he argued was merely persuasive. With regard to *Alan Clancy v Ireland* Irish High Court, 4 May 1988, he submitted the Constitution of Ireland was different from our Constitution and therefore that case was not

persuasive at all.

In answer to the foregoing submissions the respondents submitted, in the written submissions and the oral submissions by Mr Govinden, the Attorney-General, and Mr Esparon, principal State counsel, that the petitioners had a remedy before the Supreme Court, in which they could have applied to set aside the interim order within 30 days but which they did not exercise under section 3(3) of the POCA. In the premises, the respondents contend that in accordance with article 46(4) of the Constitution this action against the interim order should not be entertained by the Constitutional Court as other means of redress are available or have been available to the petitioners. Reference was made to *Amesbury v Chief Justice* Constitutional Case No 6 of 2006 in support of this proposition.

Secondly the respondents submitted that there was, in any case, sufficient evidence to support the orders that were made and there would be sufficient evidence for the orders that may be made in the interlocutory proceedings but that would be for the court to decide. They pointed to the full record of the proceedings in the interim application in support of this proposition. The proceedings leading to the interim order or the interlocutory order were civil proceedings that lacked any indicia of criminal proceedings. The respondents cited the cases of *Gilligan v Criminal Assets Bureau* [1997] IEHC 106, *Murphy v GM, PB* (4 June 1999), as heard before the High Court of Ireland and on appeal as a consolidated appeal before the Supreme Court of Ireland [2001] IESC 82 in support of its submission that the impugned proceedings are civil and not criminal in nature.

Thirdly the respondents submitted that sections 3(1) and 4(1) of the POCA were not unconstitutional in so far as there is no constitutional entitlement to property derived from criminal conduct. Secondly those provisions are permitted derogations

under article 26(2) of the Constitution in so far as they amount to law necessary in a democratic society and it is in the public interest under article 26(2)(a) in the case of property reasonably suspected to be the proceeds of drug trafficking or serious crime under article 26(2) (d) of the Constitution.

The Attorney-General submitted that laws similar to the POCA exist in many jurisdictions, including Ireland, United Kingdom, United States of America and the states of Australia. The aim is to restrain not only enjoyment of the benefits of crime but to fight crime as well. Extensive materials including reports on similar laws from other jurisdictions were provided to the court. Such laws are necessary in a democratic society given the ability of those engaged in criminal conduct to avoid prosecution or detection.

It was submitted for the respondents that the petitioner's contentions that the only permissible derogation under article 26(2) in relation to criminal activity must be a matter that is a crime in Seychelles was untenable on two fronts. Firstly, it was orally submitted that in the matters in issue in this particular case, the offence in question is both an offence in Germany and here in Seychelles and that is the offence of money laundering. Secondly that the evil that this legislation is directed to address is the possession and control of the proceeds from criminal activity in Seychelles or by a person amenable to jurisdiction of the Supreme Court of Seychelles. Seychelles shall not be a haven for such proceeds of criminal activity even if the criminal activity was outside of Seychelles and is not a crime in Seychelles.

The right to a fair hearing

According to the written submission for the petitioner the interim order was a penal offence over property that had been acquired well before the ALMA and the POCA came into force. To that extent it infringed the petitioner's right to a fair

hearing contrary to article 19(4) of the Constitution. Article 19(4) of the Constitution bars retrospective legislation creating penal consequences.

Secondly the interim order was made following ex parte proceedings in the absence of the petitioner based only on affidavit evidence. This was contrary to article 19(2) or 19(7) of the Constitution though during oral submissions Mr Hoareau appeared to soften his position and suggested that the attack against the proceedings was not essentially because they were ex parte. The attack was directed to these proceedings as at this stage a judge is able to conclude, without hearing from the other party that the property in question was the benefit of criminal conduct. At that stage what would be acceptable is finding of a prima facie case and the final finding of whether or not the property is the benefit from criminal conduct is made after the inter partes hearing.

Given that the decision was made on affidavit evidence following sections 3 and 9 of the POCA, the petitioner was denied the right of cross-examination of the deponents of affidavit evidence contrary to his right to a fair hearing. He referred to *Davis v R* [2008] UKHL 36, a decision of the House of Lords in support of this point.

The foregoing arguments applied *mutatis mutandis* to the interlocutory proceedings initiated against the petitioner as well as sections 3(1) and 4(1) of POCA, all of which are unconstitutional and in violation of the petitioner's right to a fair trial. Reference was made to article 19(2) of the Constitution and *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 (ECHR) and *Ozturk v Germany* (1984) 6 EHRR 409 (ECHR), decisions of the European Court of Human Rights.

The respondents submit that no right to a fair hearing under article 19 has been infringed by the proceedings for an interim

order or is likely to be infringed by proceedings for an interlocutory order. Neither do sections 3(1) and 4(1) of the POCA contravene article 19 of the Constitution. The respondents submit that article 19(4) of the Constitution only applies to criminal proceedings and proceedings for an interim order or for an interlocutory order are not criminal proceedings. Neither is article 19(2) applicable to the proceedings in question under the POCA as those proceedings are not criminal proceedings.

The fact that AMLA and POCA apply to property that was acquired before the coming into force of the AMLA and the POCA does not render the provisions retrospective. The object relates to possession and control after the coming into force of the POCA and not before but covers property obtained before the coming into force of the POCA or the AMLA if it was obtained as proceeds of crime or the benefit of criminal conduct. Such activity was not legal prior to the enactment of the AMLA and the POCA. Reference was made to *Gilligan v Criminal Assets Bureau* [1997] IEHC 106 for support of this proposition.

The respondents submit that article 19(7) of the Constitution which provides for a fair trial in relation to civil proceedings is not contravened in any way by proceedings under the POCA. The ex parte proceedings for an interim order are necessary by the very nature of the subject matter to ensure that it is preserved at the commencement of the proceedings. This is not uncommon in civil proceedings. The Civil Procedure Code abounds with instances in which ex parte applications can be made and orders made prior to the hearing inter partes.

Under section 3(3) of the POCA it is possible for the petitioner (or respondent in the Supreme Court proceedings) to apply to court to discharge or vary the interim order. The petitioner did not take advantage of this remedy and is thus precluded from

constitutional challenge. With respect to interlocutory proceedings under section 4 of the POCA though the parties submit affidavit evidence, it is possible with the permission of the court to call oral evidence.

The respondents further submitted that the duty placed on the respondent under section 21 of the POCA to disclose in affidavit the evidence he/she intends to adduce if any at the hearing of the application does not breach any constitutional provisions. The respondent would be the best person to know how he/she acquired the property in question and the nature of available evidence to provide proof thereof. At that stage the respondent would be in possession of the evidence against him. The bar against further particulars, inspection, disclosure or discovery prior to the filing of the respondent's affidavit is necessary at this stage but the respondent may after he/she files an affidavit, with the permission of the court ask for further particulars, inspection, disclosure or discovery.

The respondents further submit that the 21 days provided for the respondent to file his affidavit is sufficient and in any case the petitioner has not adduced any evidence or provided any reason why it would not be possible for him to provide that affidavit within 21 days.

The right to equal protection of the law

The third head of attack is that section 3(9)(c) of the AMLA was inherently discriminatory in relation to the petitioner and contravened article 27 of the Constitution in so far as it grants unfettered discretion to the Attorney-General not to take any action against any person in respect of an act that occurred outside of Seychelles. No grounds are provided upon which the Attorney-General may exercise this discretion. He referred to the Indian case of *Ajay Hasia v Khalid Mujib* (1981) AIR SC 487 in support of this ground.

The respondents' counsel submit that no question of discrimination arises with the exercise of the discretion by the Attorney-General as provided under section 3(9)(c) of the POCA. At the same time, as the Attorney-General has not exercised the discretion in relation to the criminal conduct alleged in the proceedings in the Supreme Court, the petitioner has no locus standi to challenge the constitutionality of the definition of proceeds of criminal conduct as it applies to the instant proceedings.

It is further submitted that the Attorney-General is the proper officer to be vested with the discretion under section 3(9)(c) of the POCA given that he is the person vested with the discretion to institute, take over, or discontinue criminal proceedings under article 76(4) of the Constitution.

It is submitted for the respondents that no offence was created by the Legislature punishable in Seychelles but the intention of the Legislature was to ensure that benefits of criminal conduct would not be enjoyed by any person within Seychelles nor would Seychelles be permitted to be a safe haven for such proceeds.

Abdication of legislative power

The petitioner contends that the National Assembly, the body vested with legislative authority, abdicated its legislative responsibility and passed it on to the Attorney-General, contravening articles 85 and 89 of the Constitution, to the detriment of the petitioner. The National Assembly did so by granting the Attorney-General unfettered discretion whether or not to take action against a person in respect of criminal conduct that has occurred outside of Seychelles. Reliance was placed on the case of *Ali and Rasool v State of Mauritius* [1992] 2 All ER 1.

The respondents' counsel submit that there is no

contravention of articles 85 and 89 of the Constitution.

Discussion and decision

Discussion of the matters in issue and my findings and conclusions shall follow the same order as I have done with the submission of counsel. I must start though with the burden of proof, standard of proof and principles of constitutional interpretation that must guide this court.

Ordinarily in civil matters the burden of proof is upon the party wishing to prove a certain fact and the standard of proof is on a balance of probabilities. In constitutional matters this subject is now governed by article 130 (7) which states -

> Where in an application under clause (1) or where the matter is referred to the Constitutional Court under clause (6) the person alleging the contravention or risk of contravention establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the state.

The duty on the petitioner is to establish a prima facie case in respect of the allegations of contravention or risk of contravention of the constitutional provisions, upon which the evidential burden would shift to the State to show that there is no contravention or risk of contravention of the impugned constitutional provisions.

With regards to principles of interpretation we need not go further than the decision of the Court of Appeal on appeal from this court in *Frank Elizabeth v The Speaker of the National Assembly* SCA 2 of 2009, LC 334 in which Domah J stated, with the other members of the panel concurring –

42. We have had a couple of occasions in the recent past to state that the best guide to the interpretation of the Constitution of Seychelles is the Constitution itself: See *John Atkinson v Government of Seychelles and Attorney General* SCA 1 of 2007. The Constitution is not to be treated as legislative text. The Constitution is a living document. It has to be interpreted 'sui generis.' In the case of *Paul Chow v Gappy and Ors* SCA 10 of 2007, we also emphasised on the specific role of the Constitutional Court as well as the principles of interpretation that should obtain when it sits as such. In as much as the Constitution enshrines the freedoms of the people, the constitutional provisions have to be interpreted in a purposive sense. Foreign material on the same matter aid interpretation but it should be from jurisdictions which uphold the bill of rights which our Constitution enshrines.

43. We need, admittedly, to go to foreign source for persuasive authority. At the same time, we need to recall that paragraph 8 of the Schedule 2 of the Constitution makes it so eloquent as to the manner in which we should interpret our constitutional provisions:

"For the purposes of interpretation—

(a) the provisions of this Constitution shall be given their fair and liberal meaning;
(b) this Constitution shall be read as a whole; and
(c) this Constitution shall be treated as speaking from time to time.

44. We need not, likewise, overlook the existence

> of Article 48 which requires that the rights enshrined in Chapter 111 shall be interpreted in such a way as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of the Constitutions of the other democratic states or nations and the decisions of the courts of the States or nations in respect of their Constitutions.

The right to property

The right to property is constitutionally protected under article 26(1) of the Constitution. I shall set out article 26(1) as well as article 26(2) which permits derogations therefrom -

> (1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.
>
> (2) The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by the law and necessary in a democratic society -
>
> (a) in the public interest;
> (b) …
> (c) …
> (d) in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime;…

Similarly I should bring into view at the outset the provisions of

sections 3 and 4 of the POCA which are at the heart of the petitioner's complaints in these proceedings.

….

As noted above in the facts of this case respondent no 1 commenced proceedings against the petitioner and another person for which an interim order was granted in respect of certain properties. This order is impugned for contravening article 26(1) of the Constitution. The answer of the respondents is that the petitioner had a remedy under section 3(3) of the POCA which he did not pursue and is therefore not entitled to pursue this constitutional litigation. Reference is made to article 46(4) of the Constitution and *Germaine Amesbury v Chief Justice* Constitutional Case No 6 of 2006 for authority for that proposition.

I shall bring in view article 46(4) of the Constitution at this stage -

> Where the Constitutional Court on an application under clause (1) is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned in any other court under any other law, the Court may hear the application or transfer the application to the appropriate court for grant of redress in accordance with the law.

In the *Germaine Amesbury v Chief Justice* (supra) the Constitutional Court considered a petition in which the petitioner had brought an action against a judge and others seeking to declare unconstitutional an ex parte order made by that judge. The Constitutional Court held that the petitioner had a remedy of applying for that order to be set aside before the Supreme Court or appealing to the Court of Appeal. Perera CJ, stated for the court -

> As the means of redress for the alleged contravention have been available to the petitioner under other law, this court cannot permit a collateral petition for redress under the Constitution to a court of co-ordinate jurisdiction. Accordingly, subject to the objections that may be raised by the 2nd respondent, the petitioner may, if so advised, seek to set aside the ex parte order of 30th June 2006 in case no. CS185 of 2006, either before the Supreme Court, or before the Court of Appeal, so that her executorship is restored, and consequently to proceed with the prosecution of case no CS 262 of 2001.

Case law of this court has interpreted article 46(4) of the Constitution to mean that where a petitioner has a remedy under any other law which he/she may have pursued or may still pursue the Constitutional Court will decline to hear the petition. I am in agreement with that position. Applying that position to this case it is obvious that the petitioner when served with an interim order had an opportunity to apply to set it aside which he did not use. The proceedings are currently at the level of proceedings for an interlocutory order and he is free to pursue the remedy provided therein. If the challenge rested only on the interim order having breached his constitutional rights or that an interlocutory order is likely to breach his constitutional rights it would have been possible for this court to decline to hear the petition under article 46(4) of the Constitution as the petitioner clearly has remedies under the POCA.

However, there is at the same time a challenge to the constitutionality of sections 3(1), 4(1) and 9 of the POCA and section 3(9)(c) of the AMLA, which only this Court can determine. In the result I would hold that we must proceed to

determine the constitutionality of those provisions of the law.

The interim order made under section 3(1) of the POCA is to prohibit -

> the person in the order or any person having notice of the making of the order from disposing of, or otherwise dealing with the whole or any part of the property or diminishing its value during the period of 30 days from the date of the making of the order.

The order is intended to last 30 days only and it prohibits disposing of or otherwise dealing with the property for the duration of the order. At this stage the ownership, occupation, use and enjoyment of the property stays the same, save for the fact that it cannot be disposed of.

The right to property protected under article 26(1) of the Constitution extends only to property lawfully acquired. It does not protect property unlawfully acquired. The restriction against disposal of specified property, at the commencement of proceedings that will determine, whether such property is the benefit from criminal conduct, is necessary in order not to render those proceedings nugatory. If no restraint was imposed on the current holder of such property, it could be possible to dispose of the property, as soon as one got wind of the commencement of such proceedings. Restraint is imposed for only 30 days and the affected person has a right to apply to court to discharge or vary such order.

Restriction of disposal is without doubt an interference with the right of ownership of property under article 26(1) of the Constitution. The question is whether it is permitted derogation under article 26(2) of the Constitution. It is contended for the petitioner that section 3(1) of the POCA fails the test as it permits the encroachment on the right to property

in respect of proceeds of crime or benefit of criminal conduct arising from a crime committed outside of Seychelles and which is not a crime in Seychelles. The respondents do not show that there is a pressing social need for such restriction.

Article 26(2) of the Constitution is clear. The right to property can be restricted in a limited number of situations. The respondents rely on article 26(2) (a) and (d). That is whether it is in the 'public interest' and or the property is 'reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime'. Under article 26(2)(d) of the Constitution it is permissible to restrict the right to property in cases where that property 'is reasonably suspected' of being acquired by the proceeds of serious crime.

Section 2 of the POCA provides in the definition of criminal conduct that it shall have the meaning set out in the AMLA. Section 3(9)(c) of the AMLA defines criminal conduct as -

> shall also include any act or omission against any law of another country or territory punishable by imprisonment for life or for a term of imprisonment exceeding 3 years, or by a fine exceeding the monetary equivalent of R50,000 whether committed in that other country or territory or elsewhere and whether before or after the commencement of the relevant provisions of this Act, unless the Attorney General shall certify in writing that it would not be in the public interest to take action in the Republic in relation to an act or omission as defined in this subsection.

Section 2 of the POCA defines 'benefit from criminal conduct' in the following words -

> means any property obtained or received at any

> time (whether before or after the passing of this Act) by, or as a result of, or in connection with the commission of criminal conduct.

It is this definition of property that forms benefit from criminal conduct and definition of criminal conduct that is the subject of constitutional attack by Mr Hoareau. He contends that in so far as it includes criminal conduct which is not a crime within Seychelles committed outside Seychelles, including criminal conduct before the passing of the Act, it does not pass constitutional muster. Similarly he attacks the fact that the benefit of crime includes property obtained before the passing of the POCA or the AMLA specifically as a penal statute that is retrospective contrary to article 19(4) of the Constitution. He asserts that these provisions cannot be in the public interest under articles 26(2)(a) or 26(2)(d) of the Constitution.

As noted above, the POCA is not a penal statute. It does not possess the commonly known aspects of criminal legislation. No offence is created. No one is charged with an offence. No one is tried for any offence. Its thrust is to deprive ownership, possession, and control of property derived from criminal conduct from those that hold that property in the manner described at the time of initiating proceedings under the POCA. To that extent it is not retrospective at all. It speaks to the present not to the past. Property acquired from criminal conduct is not constitutionally protected. Article 19(4) of the Constitution is not contravened in any way by the provisions impugned.

Orders under section 3 of the POCA are of temporary and limited duration, intended only to preserve the property in question pending further proceedings between the parties when all the parties to the proceedings will be given an opportunity to press their cases before the court before a final decision is made. As noted above, proceedings of such a nature are not alien to the civil procedure in Seychelles and

are employed often to preserve either the subject matter in dispute or assure a party of an ability to satisfy its anticipated judgment (see sections 280 and 281of the Seychelles Code of Civil Procedure).

A somewhat similar challenge, as in the case before us, was mounted in *Gilligan v Criminal Assets Bureau* [1997] IEHC 106, a decision of the High Court of Ireland in which provisions, in *pari materia,* as those under attack in the instant case. The court observed, inter alia -

> 134. It appears to me that the State has a legitimate interest in the forfeiture of the proceeds of crime. The structure of the Act, in a similar way to ordinary civil injunction proceedings, allows for the temporary freezing of assets and for various actions to be taken on an interlocutory basis. The Respondent at any time may intervene to show good title to the assets. If he does so not only must they be returned, but the Court may order the State to pay compensation to him. It is also provided at Section 3 that the Court shall not make an Interlocutory Order "if it is satisfied that there would be a serious risk of injustice". The same provision applies to the making of a disposal order under Section 4.
>
> 135. While the provisions of the Act may, indeed, affect the property rights of a Respondent it does not appear to this Court that they constitute an "unjust attack" under Section 40.3.2, given the fact that the State must in the first place show to the satisfaction of the Court that the property in question is the proceeds of crime and that thus, prima facie, the Respondent has no good title to it, and also given the balancing provisions built

> into Sections 3 and 4 as set out above.
>
> 136. This Court would also accept that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.

This decision was appealed to the Supreme Court of Ireland (that country's court of last resort), and it was affirmed in a combined appeal of *Murphy v GM and Gilligan v Criminal Assets Bureau* [2001] IESC 82.

South Africa has its own version of the Proceeds of Crime Act. Its specific structure and thrust is different from the Seychelles POCA. However, the purpose is somewhat similar to the Seychelles POCA. The constitutionality of that Act was discussed in the case of *Prophet v National Director of Public Prosecutions* Case CCT 56/05 and the comments of the Constitutional Court below are, in my view, apposite -

> 58.Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive. The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to

which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence.

59.The POCA is an important tool to achieve the goal of reducing organised crime. Its legislative objectives are set out in its Preamble which observes that: (a) criminal activities present a danger to public order and safety and economic stability and have the potential to inflict social damage; and (b) South African common law and statutory law fail to deal adequately with criminal activities and also fail to keep pace with international measures aimed at dealing effectively with such activities. Its scheme seeks to ensure that no person convicted of an offence benefits from the fruits of that or any related offence, and to ensure that property that is used as an instrumentality of an offence is forfeited.

60.The POCA uses two mechanisms to ensure that property derived from an offence or used in the commission of an offence is forfeited to the State. The mechanisms are set out in Chapters 5 and 6. Chapter 5, in sections 12 to 36, provides for the forfeiture of the benefits derived from the commission of an offence but its confiscation machinery may only be invoked once a defendant has been convicted, while Chapter 6, in sections 37 to 62, provides for forfeiture of the proceeds of and properties used in the commission of crime. This case involves the mechanism set out in Chapter 6.

The United Kingdom and several jurisdictions in Australia have enacted civil forfeiture statutes with the objective of fighting organised crime. Seychelles is not alone in this

approach.

The legislature in Seychelles has decided in the POCA that Seychelles should not become a haven for property that is acquired from the proceeds of criminal conduct, whether committed in Seychelles or outside of Seychelles. This is permissible under article 26(2)(a) of the Constitution, that is in the public interest. It is equally permissible under article 26(2)(d) of the Constitution. Depriving people in receipt, ownership, possession and control of such property is not unconstitutional in my view. It is a legitimate restriction to the right to the property. Civil forfeiture of illicitly gained property is one of the latest ways in which governments are fighting crime. I have no hesitation to find that fighting crime is a pressing social need. It is ultimately about the safety of the population. I would therefore hold that sections 3(1) and 4(1) of the POCA pass constitutional muster and do not contravene article 26(1) of the Constitution.

The right to a fair hearing

I shall start by setting out the provisions of the Constitution that are contended by the petitioner to have been violated under this head of claim. These are articles 19(2) (b), (c), (d), (e) and (f); 19(4); and 19(7). Article 19 states in part -

> (1) Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with an offence –
>
> > (a) is innocent until the person is proved or has pleaded guilty;

(b)shall be informed at the time the person is charged or as soon as is reasonably practicable, in, as far as is practicable, a language that the person understands and in detail, of the nature of the offence;

(c) shall be given adequate time and facilities to prepare a defence to the charge;

(d) has a right to be defended before the court in person, or, at the person's own expense by a legal practitioner of the person's own choice, or, where a law so provides, by a legal practitioner provided at public expense;

(e) has a right to examine, in person or by a legal practitioner, the witnesses called by the prosecution before any court, and to obtain the attendance and carry out the examination of witnesses to testify on the person's behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

(f) shall, as far as is practicable, have without payment the assistance of an interpreter if the person cannot understand the language used at the trial of the charge;

(g) …
(h) …
(i) …

> (3) …
>
> (4) Except for the offence of genocide or an offence against humanity, a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence, and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed.
>
> (5) …
>
> (6) A person shall not be tried for an offence if the person shows that the person has been pardoned for that offence in accordance with an Act made pursuant to article 60 (2).
>
> (7) Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time.

I have already noted above that the interim proceedings leading to the interim order were not penal proceedings. The respondent was not charged with any offence. Those proceedings were civil proceedings related to certain

properties. Articles 19 (2) (b), (c), (d), (e) and (f) as well as 19(4) of the Constitution clearly apply only to criminal proceedings and are therefore not applicable to the interim proceedings, to the interlocutory proceedings and to the provisions under sections 3(1) and 4(1) of the POCA. Consequently *Davis v R* [2008] UKHL 36, cited by the petitioner's counsel is unhelpful in this particular case as it deals with criminal proceedings.

It is the contention of the petitioner that even if the proceedings under sections 3(1) and 4(1) of the POCA are held to be civil proceedings the petitioner's constitutional rights under article 19(7) were contravened in so far as the proceedings for an interim order were ex parte and based on affidavit evidence. The proceedings under section 4(1) of the POCA are attacked on the basis that they are based on affidavit evidence and the petitioner will be denied the right of cross-examination. Secondly the right to a fair trial is further infringed by the provisions of section 21 of the POCA which bars the respondent in proceedings under section 4(1) from further particulars, inspection, disclosure or discovery from the applicants.

Section 21 of the POCA states -

> A respondent who is served with an application for an interlocutory order or a disposal order shall not be entitled to further particulars, inspection, disclosure or discovery prior to the filing and delivering an affidavit stetting out the evidence intended to be adduced by him as contemplated in section 4(1) (b), which affidavit shall be filed within 21 days of the service of the application on him unless the Court shall have for good cause otherwise determined.

The petitioners further contend that the 21 days within which

they are to file an affidavit is too short a time for the respondents to be able to do so and as a result their right to a fair trial is contravened.

The right to a fair trial in civil matters is fundamental. It has several constituent elements including the right for each party to be heard and present its case in an open and public trial before an independent and impartial court established by law. There must be adequate time for preparation and presentation of one's case. Discovery and inspection of documents relevant to one's case that may be in the hands of the opposite party is another element of the right to fair trial. This is provided for in section 84 of the Seychelles Code of Civil Procedure with a proviso that -

> Provided that the order shall not be made when and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

It is clear that this right [to discovery or inspection of documents] by a party to a civil proceeding is not absolute. It is in the discretion of the court. It is available with in-built restrictions.

As was noted by Lord Bingham in *Brown v Stott* [2003] 1 AC 681, at page 693E -

> What a fair trial requires cannot, however, be the subject of a single varying rule or collection of rules. It is proper to take account of the facts and circumstances of particular cases, as the European court has consistently done.

This view was repeated by Baroness Hale in *Secretary of State for the Home Department v MB* [2007] UKHL 46, at paragraph 57-

> Of the fundamental importance of the right to a fair trial there can be no doubt. But there is equally no doubt that the essential ingredients of a fair trial can vary according to the subject matter and nature of the proceedings.

Disclosure of documents as an ingredient of the right to a fair trial was considered in the case *Bisher Al Rawi v Security Services* [2010] EWCA Civ 482 by the Court of Appeal for England and Wales. The English courts have to apply the European Convention of Human Rights. The Court was, inter alia, considering the application of article 6 (1) of the European Convention of Human Rights in relation to UK domestic legislation. Lord Neuberger MR stated [paragraph 32] in part -

> A litigant's right to disclosure of documents is not a fundamental right in the same way as the right to know the evidence and argument presented to the judge and the reasons for the judge's decision. Quite apart from this, if PII, [public interest immunity], legal professional privilege or "without prejudice" privilege is claimed in respect of a relevant document, the trial process itself is not impugned, as it is still fair: all the parties are in the same position in that none of them can rely on the document.

The restriction placed on possible requests for further and better particulars, inspection, disclosure or discovery prior to the filing of the affidavit required under section 21 of the POCA is intended, according to the respondents herein, to avoid a situation for a respondent to be mendacious. It would be permissible after the filing of the affidavit in question.

As noted above the right to a fair trial has several elements and not all of them bear the same weight. In the

circumstances of proceedings under the POCA, in order to ensure a truthful and timely answer by a respondent, the respondent's ability to delay or drag out the proceedings is curtailed with postponement of requests for further particulars, inspection, disclosure or discovery, until the respondent has disclosed the evidence he or she intends to rely on to show how it acquired a particular property. In my view this restriction is only for a specific period of time but the right is otherwise available to the respondent once the respondent has complied with certain conditions. The restriction is not so fundamental as to be taken to have impaired the respondent's right to a fair trial.

The restriction is provided for in law to achieve a legitimate objective. It has not impaired the right to a fair trial in the circumstances of proceedings of this nature. It has simply reordered the procedure that may be followed prior to commencement of requests for further and better particulars, inspection, disclosure or discovery.

Turning to the issue of adequate time I note that the Supreme Court has the jurisdiction to enlarge time if it is not sufficient. Given the fact that the matters upon which the respondent would be required to depone are matters that peculiarly would ordinarily lie within his knowledge I do not think 21 days is too short. In any case the petitioners have not, apart from asserting that it is not enough time, provided any evidence in support of the claim that 21 days is intrinsically inadequate or was inadequate in the particular circumstances of this case.

Though evidence may be adduced by affidavit in the proceedings under sections 3(1) and 4(1) of POCA, oral evidence may adduced with the permission of the court. I am unable to see any restrictions in the provisions complained of about the right to cross-examine a maker of an affidavit, should the adverse party require to do so.

The petitioner, other than asserting a general contravention of the right to fair trial, has not established, prima facie, on evidence, in which specific manner that he has suffered in his enjoyment of the right to a fair trial.

The right to equal protection of the law

The petitioner has contended that section 3(9)(c) of the AMLA is discriminatory in so far as it grants unfettered discretion to the Attorney-General not to take any action against any person in respect of an act that occurred outside of Seychelles contrary to article 27 of the Constitution. The petitioner impugns the provisions aforesaid on the basis that no grounds are provided upon which the Attorney-General can exercise the discretion so granted.

Article 27 reads -

> (1) Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination *on any ground* except as is necessary in a democratic society.
>
> (2) Clause (1) shall not preclude any law, programme, or activity which has as its object the amelioration of the conditions of disadvantaged persons or groups.
> [Emphasis is mine.]

Mr Hoareau asserts that no grounds are provided upon which the Attorney-General can exercise the discretion when in fact, as the Attorney-General pointed out, 'public interest' was provided as the ground upon which the Attorney-General would exercise that discretion. It is disingenuous for Mr Hoareau to claim that no grounds were provided in the law when in fact a ground has been provided.

In order to claim to be the victim of discrimination under article 27 it is imperative that you provide a ground, or 'any ground' upon which you have suffered discrimination and therefore not offered equal protection of the law as available to other people. Discrimination denotes being treated differently, and often to one's detriment, from others on the basis of a certain ground.

The provisions set out above do not define or set out the grounds upon which discrimination is not permitted. It bars discrimination on any ground whatsoever without cataloguing a list of such grounds. If one alleges infringement of that provision it is necessary to assert, at the same time, the ground upon which one has suffered discrimination. Is it sex, sexual orientation, gender, race, colour, religion, age, height, or some other ground? It appears to me that the ground upon which someone has suffered discrimination must be articulated.

The petitioner has not shown on its petition and supporting affidavit how he has been treated differently and to his detriment, by the-Attorney General from persons who are in his situation or other citizens of Seychelles or those with dual nationality and thus denied equal protection of the law. Neither has he alleged a ground upon which he has been treated differently. Was it based on sex, colour, religion, nationality, or age? There must be a ground upon which the discrimination is alleged to have been based. The petitioner's claim under this head is entirely without merit.

Abdication of legislative power

It is the contention of the petitioner that articles 85 and 89 of the Constitution have been contravened by section 3(9)(c) of the Act. I shall therefore begin by setting out those provisions of the Constitution.

Article 85 states -

> The Legislative power of Seychelles is vested in the National Assembly and shall be exercised subject to and in accordance with this Constitution.

Article 89 states -

> Articles 85 and 86 shall not operate to prevent an Act from conferring on a person or authority power to make subsidiary legislation.

As we have seen above and in fact set out the provisions of section 3(9)(c) of the AMLA it confers on the Attorney-General, in 'the public interest', discretion to take or not take any action in respect of benefits of crime or criminal conduct arising out of an act which is not an offence in Seychelles and was committed outside of Seychelles. Those provisions do not confer on the Attorney-General any legislative role.

I conceive the role of the Attorney-General under the impugned provisions to be akin to that described by Lord Bingham in *Regina v H* [2004] UKHL 3 when speaking for the House of Lords on the role of the Attorney-General in appointing Special Advocates. He stated (at paragraph 49) -

> It is very well-established that when exercising a range of functions the Attorney General acts not as a minister of the crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, *but as an independent, unpartisan guardian of the public interest in the administration of justice.*

I see no abdication of legislative power at all by the National Assembly in providing that the Attorney-General shall be the

guardian of the public interest in relation to the matters in question, that is whether or not to take any action against property that finds its way into Seychelles which is the benefit from criminal conduct committed outside of Seychelles while at the same time the acts in question did not amount to an offence in Seychelles but were an offence in a jurisdiction outside of Seychelles.

No legislative power is abdicated by the National Assembly to the Attorney-General by section 3(9)(c) of the AMLA. The claim is without basis.

Disposition

For the reasons set out above I find that this petition has no merit. As both Gaswaga and Burhan JJ agree, this petition is dismissed accordingly. Each party shall bear its own costs in order not to discourage constitutional litigation.

BURHAN J: The petitioner in this case has invoked the jurisdiction of this court under article 46(1) of the Constitution seeking relief that his constitutional rights under articles 19, 26 and 27 of the Constitution have been contravened by the respondents. He has further sought relief under article 130 (1) of the Constitution alleging that articles 85 and 89 of the Constitution too have been contravened by the respondents in this case.

The salient facts of this case are that the first respondent, the Financial Intelligence Unit (FIU) filed proceedings against Hans Josef Hackl (the petitioner in this case) and one Dominic Dugasse in the Supreme Court under the Proceeds of Crime (Civil Confiscation) Act (Act No 19 of 2008, hereinafter referred to as the POCA) seeking inter-alia:

a) An order pursuant to section 3 of the POCA prohibiting the respondents or such persons

as may be specified in the order or any other person having notice of the making of the order from disposing of or otherwise dealing with the whole or any part of the property described therein or diminishing its value, and

b) An order providing for notice of any such order to be given to the respondents and any other person as directed by court.

The said application before the Supreme Court was supported by an affidavit (annexed to this petition marked as document HH2) sworn by Declan Barber the director of the FIU. The affidavit set out in great detail the investigations carried out by the said unit in respect of the respondents Hans Josef Hakl (hereinafter referred to as the petitioner) and Dominic Dugasse. It stated that the petitioner was of dual nationality and held two passports one German and the other a Seychelles passport.

It further stated that the petitioner in this case had pleaded guilty and been convicted in Germany and sentenced to a term of six years imprisonment and had been ordered to pay a sum of €705,00. The criminal conduct for which he was convicted included the illegal trading into Iran of prohibited material namely high quality graphite, which due to its quality was suitable to be used in the production of medium and long range ballistic missiles, and also could be used within the scope of a nuclear weapons program.

In paragraph 7 of the said affidavit Mr Declan Barber stated inter alia, that this unlawful activity by the petitioner amounted to criminal conduct on the part of the petitioner for the purpose of these proceedings as in terms of section 34 of the German Foreign Trade Act, the said criminal conduct was punishable by a prison sentence of up to 5 years and a fine. The affidavit

further stated that the petitioner had confessed to the court that the proceeds of the said criminal conduct had been channelled into Seychelles.

Ag Chief Justice Bernadin Renaud made his order dated 17 June 2009 (annexed to the petition as document HHI) in favour of the applicant granting -

a) An inhibition order pursuant to section 76(1) of the Land Registration Act, prohibiting the disposal or otherwise dealing with the whole or any part of the parcels of land mentioned in the application until a further order was made by court,

b) An order of prohibition on the sale of or any other dealings with motor vessels catamaran named “”Storm” and “ Monsun” and motor vehicles bearing no S18826 and S18827 presently registered in the name of Hans Josef Hackl, with the Seychelles Licensing Authority until further order was made by court,

c) An order prohibiting Barclays Bank and or any other person from disposing or otherwise dealing with the whole or any part of money set out in the table of the application.

It is from these orders and the related provisions of the law on which the said orders were based, that the petitioner as stated in the prayer of his petition, seeks the following declarations, that the petitioner’s constitutional rights namely -

a) The right to property as set out in article 26(1) of the Constitution has been contravened by the said orders of court and

that sections 3(1) and 4(1) of the POCA contravene article 26(1) of the Constitution, as the said provisions are not provisions which are necessary in a democratic society on any grounds set out in paragraphs (a) to (i) of article 26(2) of the Constitution and should thus be declared void;

b) The right to a fair hearing as set out in articles 19(2) (b), (c,) (e), 19(4) and 19(7) of the Constitution have been contravened by sections 3, 4 and 9 of the POCA;

c) The right to equal protection in law as set out in article 27 of the Constitution had been contravened by section 3(9)(c) of the Anti-Money Laundering (Amendment) Act, Act No 18 of 2008 (hereinafter referred to as the AMLA); and further that

d) Articles 85 and 89 of the Constitution and the principle of separation of powers have been contravened, as the legislative power of Seychelles which is vested in the National Assembly had been abdicated in favour of the Attorney-General by section 3(9)(c) of the AMLA.

Having thus outlined the background facts of this case at the very outset it would be pertinent and necessary for this court, prior to deciding the issues raised by counsel, to first determine the nature of the proceedings in the aforementioned case, instituted before the Supreme Court under the POCA. In doing so it would be relevant to consider the approach of other jurisdictions to this issue as provided for in article 48(d) of the Constitution.

In the case of *Murphy v M (G)* [2001] IESC 82 at para 125 Keane CJ of the Supreme of Ireland held -

> The court is satisfied that the United States authorities lend considerable weight to the view that *in rem* proceedings for the forfeiture of property, even where accompanied by parallel procedures for the prosecution of criminal offences arising out of the same events, *are civil in character and that this principle is deeply rooted in the Anglo-American legal system* [emphasis added].

In *Walsh v The Director of the Assets Recovery Agency* (2005) NICA 6, the Court of Appeal concluded that the effect of the application of the tests in *Engel v Netherlands* (No 1) (1976) 1 EHRR 647 at 678-679 was to identify the proceedings as civil proceedings.

In the Republic of Seychelles the legislative objectives of the POCA were set out in the Bill which reads as follows -

> This Bill seeks to put in place a regime of civil confiscation which will provide a statutory process whereby the benefits from criminal conduct will be identified in a court process and then ultimately transferred to the Republic of Seychelles on the civil standard of proof as set out in the Bill.

Referring further to the objectives of the Bill it is to be noted that -

> The Bill envisages a civil process in the Supreme Court whereby the FIU. ……. will be responsible for the of civil confiscation cases and will be the applicant in court.

Further section 9(3) of the POCA reads as follows -

> The standard of proof required to determine any question arising under this Act, other than proceedings for an offence contrary to section 23 shall be that applicable to civil proceedings.

Therefore in all inter partes applications under this Act, the required standard of proof would be on a balance of probabilities, which further supports the fact that the proceedings under this Act are essentially intended to be civil in nature and character.

Considering the aforementioned factors, it is clear that the proceedings under the POCA are civil in nature and the proceedings are governed by the civil law in respect of procedure and determination.

The Seychelles Code of Civil Procedure Cap 213 recognises and provides for ex parte procedure and further ex parte applications may be made in civil litigation in instances of provisional attachment and in cases of urgency, to preserve the status quo and to ensure that a litigant would not be deprived of the fruits of his litigation. Ex parte applications are an established and recognised procedure in civil litigation not only in the Seychelles but in other jurisdictions as well. Having concluded the proceedings under the POCA are essentially civil in nature it cannot therefore be contended, that ex parte procedure under the said Act is unlawful or unconstitutional.

On the basis of the aforementioned finding that the POCA is essentially civil in nature, this court will now proceed to consider the contraventions complained of by the petitioner.

Contravention of the right to property of the petitioner

Counsel for the petitioner submitted that in this instant case there was "no link or connectivity between the property and the alleged criminal conduct" and despite there being no link or connectivity, the said order was issued which was a clear breach of the petitioner's right to property. Counsel for the petitioner further submitted that the affidavits filed by the respondent did not contain sufficient evidence to satisfy court on a "balance of probabilities" that there were reasonable grounds to believe that the specified properties were acquired from criminal conduct.

Firstly, the said application being an ex parte application, counsel's contention that in an ex parte application the standard of proof required by an applicant seeking an interim order is on a "balance of probabilities", cannot be accepted as the question of a "balance of probabilities" does not arise at this stage, as only one party is present and heard in an ex parte application and such orders are always made on a prima facie basis. Furthermore it is relevant to mention at this stage that a judicial order made erroneously cannot be said to breach a constitutional right of a person. It is settled law that the remedy would lie in an appeal or by way of judicial revision.

In *Edmond Adeline v The Family Tribunal* Const Case No 3 of 2000, the court held that the character of judicial process and judicial decisions, does not permit challenge of any error or omission in a judgment of a court as violations of fundamental rights and that the remedy remains in a right of appeal.

In *Germaine Amesbury v The Chief Justice and ors* Const Case No 6 of 2006, a case referred to by counsel for the respondents, Perera CJ held -

> As means of redress for the alleged contravention had been available to the petitioner under other law, this court cannot permit a collateral petition for redress under the Constitution to a court of co–ordinate jurisdiction.

Article 46(4) of the Constitution reads -

> Where the Constitutional Court on an application under Clause (1) is satisfied that adequate means of redress for the contravention alleged are or have been available, the court may hear the application or transfer the application to the appropriate Court for grant of redress in accordance with law.

Furthermore as submitted by the Attorney-General section 3(3) of the POCA itself, provides an opportunity for the respondent or any other person claiming to have an interest in any of the property concerned of having the said interim order issued ex parte discharged or varied. It is apparent that the petitioner has not availed himself of this opportunity but instead has sought to petition this court.

For the aforementioned reasons, as collateral remedies exist and are available to the petitioner for the alleged contravention this court will not permit a petition for redress under the Constitution in respect of any alleged erroneous findings made by a trial judge. It is the duty of the petitioner to avail himself of the opportunities provided by law for redress, without circumventing those opportunities and seeking redress under the Constitution.

Counsel for the petitioner further contended that the law contained in sections 3 and 4 of the POCA, in permitting the Court to prohibit the person specified in the order from disposing of or otherwise dealing with in whole or any part of

the property, is unconstitutional as it cannot be justified under any of the limitations contained in article 26 (2) and therefore it infringes the constitutional right to property under article 26(1) which guarantees the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

Counsel however admits, that the right is subject to the limitations as may be prescribed by law and is necessary in a democratic society in the instances provided for in article 26(2) (a) to (i) but submits, that this law does not fall within any of the necessities provided for in article 26(2). More specifically counsel submitted, that the prescribed law namely the POCA limiting the right of an individual to property is not based on the prevailing necessities contained in article 26(2)(a) namely public interest nor article 26(2)(d) in respect of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime which (serious crime) counsel contended should be committed *in the Seychelles*.

He further contended that the crime committed in the instant case namely selling an embargo of heavy duty graphite to Iran was a crime which occurred in another jurisdiction and was not a serious crime within this jurisdiction and thus article 26 (2)(d) could not be considered as a limitation necessary in a democratic society to cover the forfeiture of proceeds of serious crimes committed out of this jurisdiction and thus the grounds of criminal conduct as relied on by the respondents, in terms of section 3(9)(c) of the AMLA was void.

Once again referring to the legislative objectives of the POCA as set out in the Bill, it is obvious that it was *necessary* to enact the POCA to put in place a regime of civil confiscation which would provide a statutory process whereby the *benefits from criminal conduct* would be identified in a court process and then ultimately transferred to the Republic of Seychelles.

It cannot be contended that the Constitution seeks to protect the rights of parties in regard to properties which are the benefits from criminal conduct. Thus it is in the public interest that the necessary laws should be enacted in order that such proceeds or property which is the benefit from criminal conduct should be identified and forfeited or transferred to the State.

The term "benefit from criminal conduct" referred to above has the same meaning as defined in section 2 of the Anti-Money Laundering (Amendment) Act and means any money or property that is derived, obtained or realised, directly or indirectly, by any person, while the term "criminal conduct" contains the same meaning as that set out in section 3(9) of the AMLA and reads as follows -

> In this Act criminal conduct means conduct which-
>
> (a) contitutes any act or omission against any law of the Republic punishable by imprisonment for life or for a term of imprisonment exceeding 3 years, and/or by a fine exceeding R 50,000 and, without prejudice to the generality of the above, including the financing of terrorism as referred to in the Prevention of Terrorism Act 2004, and for the avoidance of doubt includes the offence of money laundering established by sections 3(1) and 3(1) of this Act and whether committed in the Republic or elsewhere and whether before or after the commencement of the relevant provisions of this Act;
>
> (b) where the conduct occurs outside the Republic, would constitute such an offence

if it occurred within the Republic and also constitutes an offence under the law of the country or territorial unit in which it occurs;

(c) shall also include any act or omission against any law of another country or territory punishable by imprisonment for life or for a term of imprisonment exceeding 3 years, or by a fine exceeding the monetary equivalent of Rs 50,000 whether committed in that other country or territory or elsewhere and whether before or after the commencement of the relevant provisions of this Act, unless the Attorney General shall certify in writing that it should not be in the public interest to take action in the Republic in relation to an act or omission as defined in this sub-section; and

(d) includes participation in such conduct, including but not limited to, aiding, abetting, assisting, attempting, counselling, conspiring, concealing or procuring the commission of such conduct.

It is apparent from the said definition of criminal conduct itself that while sections 3(9)(a) and 3(9)(b) of the AMLA state the criminal conduct must be common to Seychelles, section 3(9)(c) refers to criminal conduct in any country only. Therefore in terms of section 3(9)(c) of the AMLA it is not necessary that the criminal conduct in any country should be common to Seychelles as well.

The Attorney-General contended that the said serious crime that fell within the scope of article 26(2) was the serious crime of money laundering and the limitations prescribed by law in section 3 of the POCA arose as a necessity in regard to the

confiscation of proceeds from the serious crime of money laundering which was an offence within this jurisdiction in terms of section 3(4) of the AMLA.

A serious crime is in itself defined in section 2 of the AMLA and reads as follows -

> Serious Crime means any act or omission against any law of the Republic punishable by a term of imprisonment exceeding 3 years and/ or fine exceeding 50,000 whether committed in the Republic or elsewhere, and where the conduct occur outside the Republic, would constitute such an offence if it occurred within the Republic and also constitutes an offence under the law of the country or territorial unit in which it occurs.

Section 3(4) of the AMLA sets out that a person found guilty of money laundering is liable on conviction to a fine not exceeding R 5,000,000 or to imprisonment for a term of not exceeding 15 years or to both.

This clearly indicates the offence of money laundering falls within the definition of a serious crime within the jurisdiction of Seychelles.

Further section 3 of the AMLA defines money laundering as -

> A person is guilty of money laundering if, knowing or believing that property is or represents the benefit from criminal conduct or being reckless as to whether the property is or represents such benefit, the person without lawful authority or excuse (the proof of which shall lie on him)

a) converts, transfers or handles the property or *removes it from the Republic* [emphasis added]

b) conceals or disguises the true nature, source, location, disposition, movement or ownership of the property or any rights with respect to it or

c) acquires, possesses or uses the property.

It is to be noted that section 3(2) of the AMLA reads -

> Removing it from the Republic shall *include* references to *removing it from another country or territory as referred to in subsection (9) (c)* and moving property within the Republic or a country or territory in preparation for or for the purpose of removing it from the Republic or the country or territory in question. [emphasis added]

Thus the very definition of money laundering includes removing it from another country or territory as envisaged in section 3(9)(c) which clearly demonstrates the extra-territorial application of the AMLA.

In *Murphy v M (G)* (supra) at para 124 the Supreme Court of Ireland held -

> The issue in the present case (forfeiture under the PCA) does not raise a challenge to a valid constitutional right of property. It concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general

> such forfeiture is not punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, *a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use*. [emphasis added]

Therefore it is clear that sections 3 and 4 of the POCA is a prescribed law necessary in a democratic society as envisaged and permitted under the limitations contained in article 26(2) of the Constitution to limit the right to property which is derived from the benefit from criminal conduct.

For the aforementioned reasons the petitioner's contention that sections 3 and 4 of the POCA are in contravention of article 26 (1) bears no merit.

Contravention of the right to fair hearing of the petitioner

It is the petitioner's contention that sections 3, 4 and 9 of the POCA contravene articles 19(2) (b), (c), (e) and 19(7) of the Constitution.

Firstly as it has already been decided that the proceedings under the POCA are civil in nature, thus as correctly submitted by the Attorney-General, articles 19(2) (b), (c), (e) are not applicable as article 19(1) and 19(2) specifically refer to a person charged with an offence which entitles such person to the right to a fair and public hearing and articles 19 (2) (a) to (i) refer to such persons charged of an offence and are not applicable to proceedings which are essentially civil in nature. Therefore counsel for the petitioner's contention that sections 3, 4 and 9 of the POCA contravene articles 19(2) (b), (c), (e) of the Constitution bears no merit.

With regard to counsel's submission that sections 3 and 4 contravene article 19(7) of the Constitution it is to be noted that section 3(1) of the POCA reads -

> When on an ex-parte application to court in that behalf by the applicant, *it appears to court* [emphasis added], on evidence, including evidence admissible by virtue of section 9 tendered by the applicant, that ….

The term "it appears to court" on a reading with clause 2 of the aforementioned Bill, shows the said term should be read in the context of "reasonable grounds" which appears to be, according to the objects of the Bill, the underlying principle governing orders being made under this Act. Therefore it follows that in an ex parte application, if it appears to court on reasonable grounds the person is in possession or control of specified property as mentioned in section 3(1) (a) and (b) of the POCA and the value of the property is in accordance with section 3(1)(b) of the Act, then the court could make an interim order as specified in the said section.

Further a reading of section 3(2)(a) of the POCA provides that the Court may impose such conditions and restrictions necessary or expedient in respect of the interim order issued, and section 3(2)(b) of the POCA makes it a mandatory requirement, that notice of such an ex parte order be given to the respondent in the application or any party affected by such order who may come to Court and have the said order discharged or varied. Section 3(3) of the POCA provides ample opportunity for a party aggrieved by the said order to come to Court and have the said interim order set aside.

Further the law as a control measure specifically provides that the interim order shall automatically lapse after a period of 30 days in the event of an application for an inter partes interlocutory order under section 4 of the Act not being made

by the applicant.

The ex parte order made under section 3(1) of the POCA is only to be issued by Court on being satisfied that reasonable grounds exist. Further the said order is subject to such conditions and restrictions necessary as decided by the Court. It is a mandatory requirement that the said order be served on the aggrieved party unless not reasonably possible and would lapse automatically if no further steps are initiated by the applicant. Finally the law most importantly provides ample opportunity for the aggrieved party to come to Court and be heard and have the ex parte interim order discharged or varied. Thus an analysis of section 3 reveals that even though the application is an ex parte application, the law itself provides many measures to ensure that the petitioner's right to a fair hearing is safeguarded.

Counsel for the petitioner further submitted that section 9 of the POCA limited the evidence to evidence by affidavit which he contended contravened the petitioner's right to a fair hearing. However a closer reading of both sections 3(1) and 4(1) of the POCA shows that both sections contain the phrase -

> …. it appears to the court, on evidence, *including* evidence admissible by virtue of section 9 tendered by the applicant…. [emphasis added]

It is clear that neither section 3(1) nor 4(1) seeks to limit the evidence to affidavit evidence but seeks to include it together with the other evidence.

Further section 3(8) provides that oral evidence may be adduced during an application made under section 3. Thus it cannot be contended that the law limits the evidence to affidavit evidence thus contravening the right of the petitioner to a fair hearing as the law specifically provides that oral

evidence may be be adduced. The discretion is vested with the courts and if aggrieved by the decision of the court the remedy does not lie before the Constitutional Court.

Similarly section 4 of the POCA deals with the application for an interlocutory order made inter partes. It provides for evidence to be led by parties which includes evidence by affidavit. This section too does not seek to shut out any oral evidence being led by any party and like section 3 contains a specific provision section 4(8) which provides for oral evidence to be adduced in an application under section 4 at the discretion of court. Once again the discretion is vested with courts and if aggrieved by the decision of court, the remedy does not lie before the Constitutional Court.

Therefore the petitioner cannot seek to complain that his constitutional rights under 19(2) (b), (c), and (e) and 19(2)(7) of the Constitution have been contravened by the provisions of sections 3 and 4 of the POCA.

Contravention of article 19(4) of the Constitution

Counsel in his further material skeleton heads of argument has raised the issue that the criminal conduct which forms the basis of this case was committed prior to the coming into force of the POCA. He further states “the creation of this new offence could not be given retrospective effect by virtue of article 19(4) of the Constitution”. Further on page 3 of his skeletal heads of argument, he states “the serious crime must exist first before you have proceeds from it. Proceeds received before 25 August 2008 cannot be proceeds of serious crime.”

Article 19(4) of the Constitution is applicable to criminal and not to civil proceedings. Thus it is not applicable to the POCA. The property or proceeds derived from criminal conduct remain continuously “soiled” even though attempts

may be made at laundering same. The Act seeks not to punish the offender of the criminal conduct but to ensure that such soiled or tainted benefits derived from such criminal conduct are subject to scrutiny and forfeiture if necessary. Therefore although the criminal conduct may have been committed prior to the coming into effect of this piece of legislation, the proceeds and property namely the benefits derived from such criminal conduct, continue to remain soiled or tainted as it will always remain benefits from criminal conduct and thereby be subject to forfeiture, even if the legislation regarding forfeiture of such property has been enacted subsequent to the criminal conduct being committed. The emphasis should be not on the "criminal conduct" but the "benefits" derived from such criminal conduct which would always remain soiled or tainted and would be subject to forfeiture.

In *Simon Prophet v National Director of Public Prosecutions* CCT 56/05 the South African Constitutional Court held -

> Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law [emphasis added]. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive.

In the case of *Walsh v Director of the Assets Recovery Agency* (supra) the Court of Appeal stated -

> We do not accept that it is in any way inevitable that the recovery proceedings will be confined to an examination of specific events as committed by the appellant. We consider that it would be open to the Agency to adduce evidence that the

> Appellant had no legal means of obtaining the assets without necessarily linking the claim to the particular crime.

Therefore counsel's contention that proceeds of serious crime received before 25 August 2008 (the date the AMLA came into effect) cannot be proceeds of a serious crime as envisaged by the Act as it would be conflicting with article 19(4) of the Constitution bears no merit.

Contravention to right to equal protection before the law

Counsel for the petitioner while admitting that in certain cases in order to maintain the status quo ex parte proceedings are necessary, states that having brought such ex parte proceedings court decides "behind the back" of the party that the said property is a benefit from criminal conduct and then places a burden on the respondent to the application to rebut it. He argues that such an order should be made after inter partes proceeding and after oral evidence has been led and the right to cross-examine being given, otherwise the petitioners right to equal protection as contained in article 27 would be contravened.

It would not be necessary to once again analyse the procedure set out in section 3 of the POCA but one must keep in mind the main objective in obtaining an ex parte order under section 3(1) of the POCA would be to maintain the status quo. In order to do so the law provides that on an ex parte application an interim order be issued by court in terms of section 3(1) of the POCA which is of a temporary nature and for the limited purpose of maintaining the status quo. As referred to earlier the law lays out many safeguards to ensure that justice prevails for both parties even though one may not be present at the time of making of the order. Therefore it cannot be said that this procedure is unconstitutional, as what is issued on an ex parte application is an interim order which

is of a temporary nature as its term denotes and for limited purposes and is only issued once the applicant in the absence of the respondent, has established that reasonable grounds exist for the issue of such interim order. The law then provides that the burden shifts on the aggrieved party to satisfy the court that the said interim order should be vacated, as the reasonable grounds on which the interim order was issued are non-existent.

The next step which is for all purposes a fresh application, is for the applicant to make an inter partes application to court in terms of section 4(1) of the POCA. The court in this instance issues an interlocutory order after evidence either by way of affidavit or oral evidence in terms of subsection (8) is led in the presence of both parties as this is an inter partes application. Therefore a party cannot seek to complain that his or her rights are being infringed as he or she has been given the opportunity of being heard prior to the interlocutory order being made. At this stage a court is free to use its discretionary powers to decide on whether or not to call for oral evidence, documentary evidence, in the interest of justice and could even permit cross-examination if the necessity demands as this is an inter partes application. However such discretionary powers are vested strictly with the trial court. Once again in an inter partes application the burden is first placed on the applicant to first satisfy court in the presence of the respondent, the requisites contained in section 4(1) (a) (i) (ii) and (b) and the respondent to the application or aggrieved party is next given an opportunity to satisfy court that such an order should not be made in terms of section 4(1)(b) (i) and (ii) of the POCA. Thereafter the court if satisfied on a balance of probabilities may issue an interlocutory order in terms of 4(1)(b). Analysing the procedure it is obvious that the applicant must first establish that reasonable grounds exist for such an interlocutory order to issue before the burden shifts to the respondent to the application. The final decision of court would be based on the

civil standard of proof namely balance of probabilities, this standard of proof and recognised procedure being in no way unfair or unconstitutional.

Contravention of articles 85 and 89 of the Constitution

Counsel next contended that the wording of section 3(9)(c) of the AMLA is inherently discriminatory because it leaves too much discretion in the hands of the Attorney-General and therefore leaves it to the whims and fancy of the Attorney-General, to decide without stating any controls or policies or mentioning as to when the Attorney-General will exercise such power. He states that this is a breach of articles 85 and 89 of the Constitution affecting the interest of the petitioner, as the legislature has abdicated its powers to the Attorney-General and the legislature has granted the Attorney-General a member of the executive to decide whether proceedings will be taken in respect of an act or omission.

It is pertinent at this stage to draw attention to article 76(4)(a) and (c) of the Constitution which gives the power to the Attorney-General to institute and undertake criminal proceedings and to discontinue same.

The Attorney-General therefore has the complete discretion and power according to article 76(4) if he "considers it desirable so to do" to institute, undertake and discontinue criminal proceedings against any person in respect of any offence alleged to have been committed by that person. The discretion is not fettered in any way and therefore counsel's contention that controls and policies are necessary when the Attorney-General is exercising such discretionary powers is not acceptable, as the Constitution does not seek to control the powers in relation to the institution of actions by the Attorney-General in any way.

This is further supported by a reading of article 76(10) of the

Constitution, which states that in the exercise of the powers vested in the Attorney-General by clause (4), the Attorney-General shall not be subject to the direction or control of any person or authority. It is to be observed that the Attorney-General derives such powers from the Constitution itself and therefore the discretion vested with the Attorney-General in terms of section 3(9)(c) which is not to prosecute on the grounds of public interest is consistent with article 76(4) of the Constitution.

If counsel for the petitioner contends that the said article conflicts with articles 85 and 89 of the Constitution it is a recognised principle of constitutional interpretation that if such a conflict arises the "principle of harmonisation" must be applied and the entire constitution read as an intergrated whole with no one provision destroying another as held in the case of *Mtikila v Attorney-General* (1996) 1 CHRLD 11.

Therefore the power given to the Attorney-General by section 3(9)(c) cannot be said to be an abdication of the legislative functions of the National Assembly as the Attorney-General's power to discontinue proceedings is consistent with article 76(4) and therefore the said provision cannot be said to be conflicting with any other provision of the Constitution.

On a reading of section 3(9)(c) of the AMLA it is apparent that the legal sanction to prosecute emanates from the section itself and is based on public interest and the discretion vested with the Attorney-General is only not to prosecute if it would not be in the public interest to do so. It is to be noted that the section in fact limits the discretion of the Attorney-General not to prosecute to the grounds of public interest only. Therefore it cannot be considered as a situation where wide discretion has been given to the Attorney-General to act on his whims and fancies as claimed by counsel.

When the Attorney-General in his official capacity, acts on the

laws passed by the legislature, within the powers provided to him by the Constitution, it cannot be said that he is usurping the powers of the legislature nor could it be said that the legislature has abdicated its powers to the Attorney-General in any way.

Therefore counsel's contention that section 3(9)(c) of the AMLA is inherently discriminatory because it leaves too much discretion in the hands of the Attorney-General or that the legislature has abdicated its powers to the Attorney-General and therefore violates articles 85 and 89 of the Constitution bears no merit.

For the aforementioned reasons this court holds that the claim of the petitioner that his constitutional rights have been contravened by the respondents bears no merit. The petition is accordingly dismissed. No order is made in respect of costs.

GASWAGA J: I have read in draft the judgments of my Lords FMS Egonda-Ntende CJ, and M Burhan J.

I entirely agree. I have nothing useful to add.

Record: Constitutional Case No 1 of 2009

Pragassen v Vidot

Renaud J
2 July 2010 Supreme Court Civ 360 of 2005

Plea in limine litis - res judicata - inter vivos gift – disguised donation

The defendant was one of 9 heirs of the deceased. The deceased, during her lifetime, leased to the defendant for a period of 99 years a shop standing on the deceased's land. The plaintiff claimed that this was an inter vivos gift which was contrary to article 913 of the Civil Code. The plaintiff also claimed that the gift was a disguised donation. The defendant raised a plea of res judicata.

HELD

1. For a plea of res judicata to be upheld there must be an identical subject-matter, cause of action, and identical parties in the first and second case.

2. Generally, an inter vivos gift made during the lifetime of the deceased is legal.

3. An inter vivos gift which is in excess of one fourth of the value of the estate, is contrary to article 913 of the Civil Code. The party who is relying on article 913 of the Civil Code must prove the value of the gift and the estate in order to successfully rely on the article.

4. To invoke disguised donation, bad faith and fraudulent preference of the deceased must be proved.

5. To prove a disguised donation, the plaintiffs must prove that the gift infringed the basic principles of ordre public and was executed fraudulently to deprive the plaintiffs of their inheritance.

Judgment: Plaint dismissed.

Legislation cited
Civil Code, arts 389(4), 450, 913 - 918, 920, 1048, 1351(1)

Bernard GEORGES for the plaintiff
France BONTE for the defendant

Ruling delivered on 2 July 2010 by

RENAUD J: On 10 October 2007, I gave my considered ruling in this matter and declared that a lease agreement (the lease) dated 7 June 1996 signed by the late Dorenville Vidot (the deceased), leasing to the defendant for a period of 99 years, renewable, for a monthly rent of R1, a shop standing on the deceased's land, was valid in law.

Plea in limine litis

The defendant raised a plea *in limine litis* worded as follows:

> The matter before the Court is res judicata or has "autorite de la chose jugee" by virtue of the Supreme Court's Ruling dated the 10th day of October 2007 delivered by his Lordship Judge B. Renaud, in that the purported cause of action of disguised donation as averred by the Plaintiff in its amended plaint at paragraph 5 was an integral part of the Plaint that was dismissed by the Court in the aforementioned ruling. The

> Plaintiff's reliance on this cause of action is fully demonstrated by its written submission dated the 28th day of March 2007 wherein at paragraph 2 of the said submission he took up as argument entitled "Disguised donation" and "the authority of Articles 918 and 920 of the Civil Code"

Is the matter before the Court res judicata?

This Court delivered its considered ruling in this same suit between the same parties and the issue on which this Court gave that ruling was to the effect that "the lease agreement dated 7 June 1996 between the deceased Dorenville Vidot and the defendant Margaret Vidot is legally valid." The plaintiff raised the issue in terms of articles 389(4) and 450 of the Civil Code of Seychelles. The cause of action was therefore whether a lease agreement, between the parties before Court dated 7 June 1996, was null, void and of no effect. That issue was one of four prayers of the plaintiff in his original suit. The three other prayers were to be continued with after the Court ruling on the first prayer was delivered.

After the delivery of that ruling the plaintiff, with leave of this Court, amended his pleading in his original plaint, to the effect that the lease agreement entered into by the deceased with the defendant on 7 June 1996 was invalid and added a new phrase -"for being a disguised donation". The first prayer was accordingly amended by the addition of the phrase – "and reducing the gift of lease to the disposable portion".

Article 1351-1 of the Civil Code of Seychelles provides that:

> 1. The authority of a final judgment shall only be binding in respect of the subject-matter of the judgment. It is necessary that the demand relate to the same

> subject-matter; that it relate to the same class, that it be between the same parties and that it be brought by the or against them in the same capacities

The defendant contended that by virtue of the ruling of this Court dated 10 October 2007, the lease agreement dated 7 June 1996 between the deceased and the defendant was legally valid and that the Court had ruled out all possibilities of illegality and irregularity as argued then by the plaintiff. That contention is indeed not disputed by the plaintiff, but what the plaintiff is now saying is that the said valid lease was a gift made ultra the provision of articles 913 - 918 of the Civil Code.

For the plea of res judicata to be upheld there must be the threefold identity of subject-matter, cause and parties between the first and second case. On the facts I find, firstly, that there are not two cases before the Court but only one ie CS 360/05 entered on 27 September 2005.

For this reason alone, it is sufficient for this Court to find that the plea of the defendant that this matter is res judicata raised *in limine litis* by the defendant cannot be upheld and it is accordingly dismissed.

On the merits

By his pleadings, the plaintiff is now contending that the same lease agreement be declared invalid for being a disguised donation. The plaintiff further prays that in the circumstances of the said declaration by this Court, the same lease must be reduced to the disposable portion and the remainder returned to the estate for distribution.

The plaintiff is also calling upon the defendant to account and pay for the proceeds of rents or income that she obtained

from the renting of the shop to the plaintiff.

It is the case for the plaintiff that a 99 year lease would amount to a gift inter vivos from the deceased to the defendant, in view of the term of years given to the benefit of defendant. According to the plaintiff the lease would amount to a disposition by the deceased to the defendant. The same disposition would be a disguised donation made for the purpose of depriving the other heirs of the deceased of their rights in the succession of their father.

The plaintiff submitted that the deceased's act towards the defendant would fall foul of article 913-918 of the Civil Code of Seychelles. Hence, in view of the fact that the deceased had more than three children, the gift of the leased shop to the defendant must be regarded as a gift inter vivos which exceeds the capacity of the donor to make. The plaintiff argued that defendant cannot be expected to gain more than one quarter of the deceased's estate. In view of the fact that the shop burdens the succession, the same gift would be contrary to article 913.

It is also the argument of the plaintiff that in accordance with article 918, the value of full ownership of the property alienated shall be set against the disposable portion. Any excess shall be returned to the estate. Article 920 further states that a disposition by way of a gift inter vivos which exceeds the disposable portion shall be liable to be reduced to the size of that portion at the opening of the succession. In the case of the defendant, that portion cannot be more than the one quarter to which she would be entitled under article 913 of the Code. The remainder of the gift must therefore be returned to the succession for distribution. Hence, the plaintiff prays for an order to account for the rents received as prayed in prayer (b) and (c) of the plaint.

For ease of reference I will hereunder cite the relevant articles

of the Civil Code of Seychelles referred to in the submissions of the parties.

Articles 913 of the Civil Code reads:

> Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by article 915-1.
>
> Nothing in this article shall be construed as preventing a person from making a gift inter vivos or by will in the terms of article 1048 of this Code.

Article 918 of the Civil Code reads:

> The value of full ownership of the property alienated, whether subject to a life annuity or absolutely or subject to a usufruct in favour of one of the persons entitled to take under the succession in the direct line, shall be set against the disposable portion; the excess, if any, shall be returned to the estate. This calculation and return shall not be demanded by other persons entitled to take under the succession in the direct line who have agreed to the alienation, and in no circumstances by those entitled in the collateral line.

Article 920 of the Civil Code reads:

> Dispositions either inter vivos or by will which exceed the disposable portion shall be liable to

be reduced to the size of that portion at the opening of the succession.

Article 1048 of the Civil Code reads:

1. The property of which fathers and mothers *are at liberty to dispose* may be given by them, as a whole or in part, to one or more of their children, whether by an act inter vivos or by will, subject to their obligation to pass that property on to the children born or to be born of the said donees in the first degree only.

2. It shall also be lawful for any person by deed inter vivos ....

It is not in dispute that the deceased is survived by nine heirs, in addition to the defendant who is the youngest of them all. It is also not in dispute that the deceased passed away on 9 June 1999. It is also agreed that the lease was signed by the deceased on 7 June 1996, three years prior to his death.

The parties in their respective submissions agreed that the lease of the shop by the deceased to the defendant was a gift inter vivos. The shop given obviously burdens the succession of the deceased as it is situated on the property of the deceased.

It is contrary to the provisions of article 913 of the Civil Code of Seychelles if the deceased as donor made a gift inter vivos, the value of which is in excess of one fourth of the value of his property when he had nine other children. It is not the extent of immovable property given which forms the basis in determining the *"quotite disponible"* but rather, it is the value of the property in issue, in relation to the value of the whole property that must be considered. That also applies to the gift

finer vivos made in the present context as well as in a case of *"donation deguisee".*

Does the value of that gift inter vivos exceed the capacity of the donor to make in terms of article 918 Constitution of Seychelles?

There is neither any pleading nor any evidence before this Court adduced during the hearing of this suit as to the value of the whole property of the deceased. Neither do we have the value of the gifted property. Hence this Court cannot determine the value of the gifted property in relation to the value of the whole property of the deceased in order to ascertain whether this falls foul of article 918 of the Civil Code of Seychelles. As it is the plaintiff who asserts, the onus is on him to prove that element. I find that the plaintiff has failed to do so.

If the plaintiff is now raising an objection to the lease agreement on the ground of "disguised donation", the plaintiff has to prove that the contract in this case, the lease agreement, infringed basic public order principles and was fraudulently executed to deprive him of his inheritance. The "disguise" has likewise to be proved by evidence. The lease agreement in dispute was legally executed by the deceased on her behalf and it was a gift inter vivos made during the lifetime of the *de cujus* and this, in my judgment, is perfectly legal.

The plaintiff has also to prove that the value of his disposable portion has been encroached upon and evidence to this effect has not been forthcoming from the plaintiff.

To invoke *"donation deguisee",* bad faith on the part of the *de cujus* and for that matter fraudulent pretence should not only be averred but must be proved against the defendant. In this case, none of the elements which constitute *"donation*

deguisee" has been proved nor is apparent in the pleadings. It is clear that the lease agreement was a legally executed legal document as far as competence of the parties to it and its form is concerned, hence the issue of disguised donation does not arise at all unless proved otherwise.

It is my judgment that it is indeed perfectly legal during the lifetime of the *de cujus* for him to make a gift inter vivos and by having done this he did not infringe the basic public order principles. If the plaintiff is alleging that the defendant acted in bad faith and/or under fraudulent pretence, the onus is on him to prove that element; I find that he had not done so to the satisfaction of this Court. This Court is unable to determine, on the basis of evidence or pleading laid before it, the value of the gift inter vivos in relation to the whole succession of the deceased. In the circumstances, I find and conclude that it is not possible for this Court to adjudicate whether the value of the disposition by way of that gift inter vivos exceeds the value of the disposable portion in terms of article 920 of the Civil Code of Seychelles for such to be reduced to the size of the appropriate portion at the opening of the succession.

In the light of my finding and for reasons enunciated above, the plaint is accordingly dismissed with costs.

Record: Civil Side No 360 of 2005

Labiche v Ah-Kong

MacGregor, Hodoul, Domah JJ
13 August 2010 Court of Appeal Civ 3 of 2009

Concubinage – société de fait – unjust enrichment – actio de in rem verso

The parties had lived in concubinage for 19 years. Their relationship broke down and the plaintiff claimed in quasi-contract a share in the property on the basis that the parties had "orally agreed that they would engage in life and operate their expenses as one unit for their joint benefit". At first instance judgment was given for the plaintiff. The defendant appealed.

HELD

1. On the breakdown of a de facto partnership (concubinage notoire) (société de fait), the action available to a party is based on quasi-contract.

2. A société de fait can be established orally even if immovables are part of the property.

3. If a de facto partnership is established, on dissolution of the relationship, the Court will share the partnership assets. In the absence of agreement as to distribution, the property will be distributed in proportion to the partners' contributions.

4. The fact that the parties lived together does not establish a partnership. It must be proven that the parties intended to share losses and benefits.

5. Where a concubine cannot establish that a de facto partnership existed, the claim must be by way of action *de in rem verso*.

6. An action cannot be based on both a société de fait and unjust enrichment.

JUDGMENT: Appeal allowed.

Legislation cited
Civil Code, art 1381

Cases referred to
Charlie v Francoise SCA 12/1994, LC 72
Fostel v Ah-Tave (1985) SLR 113

Francis Chang-Sam for the appellant
Frank Elizabeth for the respondent

Judgment delivered on 13 August 2010

Before MacGregor, Hodoul, Domah JJ

Desita Ah-Kong, a 40 year old chambermaid, initiated legal proceedings (CS No 201/2003) against Robert Labiche, above-named, a cook by profession. The couple had lived in concubinage notoire, for 19 years.

During those 19 years they lived and worked in various islands, namely, La Digue, Felicite, D'Aros, depending on the availability of employment in tourism establishments.

In her plaint before the Supreme Court, the respondent (then plaintiff), inter alia, averred as follows:

Para 3. The parties orally agreed that they

> would engage in life and operate their expenses as one unit for their joint benefit. Inter alia the parties intended to buy land in Mahe to build a house for themselves and to establish a small guest house business in La Digue when they would stop employment.
>
> Para. 4. As a result of the aforesaid on the 6th February 1998, the parties purchased title H5274 situate at Majoie, Mahe for the consideration of R20,000 and the exchange of title B883 which they had previously purchased at R40,000. The parties to this suit also purchased LD959 situate at La Passe, La Digue for the consideration of R30,000 on the 27th October 1998.
>
> Para. 5. Both H5274 and LD959 were transferred and registered onto your (sic) sole name as the plaintiff trusted defendant who at that time took all official steps to realize both transactions for their joint convenience.

The words in para [3]: "The parties orally agreed that they would engage in life....” have a solemnity reminiscent of an exchange of marriage vows. The respondent (then plaintiff) thereby intended to and did root her action in quasi-contract. We do find accordingly.

When, after a period of 19 years, the relationship broke down amidst much acrimony and bitterness, the parties failed to reach a settlement *a l’amiable* and the respondent (then plaintiff), resorted to legal action, CS No 201/2003.

What cause of action was available to the plaintiff (now respondent)? We have found that she rooted her action in quasi-contract and her claim is formulated in para 9 of her

plaint, as follows:

> By reasons of the aforesaid, the plaintiff has been unjustly impoverished and the defendant has been unjustly enriched by the sum of R. 450, 000 which the plaintiff estimates to be her half share of the properties and furniture. The plaintiff claims R25,000 moral damages.

The case was heard by Karunakaran J, who gave judgment dated 3 September 2009, in favour of the plaintiff, as follows:

> For these reasons, I enter judgment for the plaintiff and against the defendant in the sum of R 475,000 with costs. I make no order as to interest.

The appellant was aggrieved and submitted his appeal, raising six grounds:

(1) The learned trial Judge erred in law in his application of the principles of law to the fact of the case.

(2) The learned trial Judge erred in law in not properly considering and weighing the whole evidence put before the court at the hearing of the case, in particular the evidence adduced by the appellant (then defendant).

(3) The learned trial Judge erred in his finding that the respondent (then plaintiff) had suffered an impoverishment as there was no evidence to support such finding.

(4) The learned trial Judge erred in finding

that the appellant (then defendant) enriched himself on the fruit of the respondent's (then plaintiff's) labour.

(5) The learned trial Judge erred in law in his finding that the Defendant suffered a detriment in amount of R450,000 and the appellant was corresponding enriched in the same sum on the basis of the evidence before the court.

(6) The learned trial Judge erred in law in finding that the respondent (then plaintiff) has suffered moral damage in an amount of R25,000.

The Law: We shall endeavour first to state the law pertaining to concubinage upon the breakdown of the relationship. The claim is intended to redress the situation resulting from the alleged unjust enrichment of one party at the expense of the other. The existence of a de facto partnership must be proved and pronounced accordingly by the trial Judge. We thank the two advocates for the parties for their written submissions supported *viva voce* in open court. We particularly wish to commend F Chang-Sam, Esq, for stating the law with clarity. He relied mostly on *Dalloz*. We shall do likewise and also refer to our own case law and jurisprudence.

De facto partnership *(société de fait)*: Upon the breaking down of the relationship (conbinage notoire), in most cases, one of the former concubines wishes to claim some payment in compensation before the courts. The action available to the claimant is one based on quasi-contract, on condition that the existence thereof, is the subject of a finding by the Judge of first instance. Further, the finding must be based on evidence adduced by the claimant.

Dalloz, *Encyclopédie Juridique*, Verbo, "Concubinage" at page 3, para 27 explains: "S'agissant d'une société de fait, il n'est pas nécessaire qu'elle soit constatée par écrit, même si elle comprend un immeuble dans son actif". If the existence of the de facto partnership is established, it is necessary that it should be dissolved by the Judge who should then proceed to share out the assets of the partnership.

The sharing is done by the judge in accordance with the wishes of the parties, as expressed by themselves when the partnership was established. In the absence of such expressed wishes, "elle doit l'être en proportion des apports de chacun, compris des apports en travail" (*Dalloz*, ibid, para 28).

Proof of partnership: It cannot be assumed by the mere fact that the parties were living together that a partnership did exist. Dalloz at para 26 states -

> ... une telle société n'existe pas par le seul fait que les concubins ont usé en commun des biens qu'ils possèdent et participé aux dépenses sur leur ménage, ni même par le seul fait qu'ils ont mis en commun leurs resources et travaille ensemble. Le juge de fond, dans notre droit actuel, doit, pour affirmer l'existence d'une société relever les circonstances de fait d'où résultent l'intention des intéressés de participer aux bénéfices et au pertes du fonds social constaté par les apports, et la volonté de s'associer.

Evidence: Further, the law requires that the said finding must be supported by evidence adduced by the claimant. Although some documents might be available, by reason of the special relationship between the parties, it is well established in law

that, as regards concubines, there is an impossibility of proof by documents. This constitutes an exception to the rule of evidence in article 1341, Civil Code of Seychelles, namely, that testimonial evidence is normally not admissible.

Action *de in rem verso:* In cases where the concubine claiming redress knows or is advised that he/she has no or not sufficient evidence to establish the existence of a de facto partnership, the claimant must institute his/her claim in an action *de in rem verso* (unjust enrichment), pursuant to article 1381(1), Civil Code of Seychelles.

Where a concubine knows or is advised that, on the facts, he/she is unable to establish a *société de fait,* as the ultimate resort an action *de in rem verso* (unjust enrichment), grounded on article 1381(1) of the Civil Code of Seychelles is available. It is abundantly clear from article 1381(1) that such action *de in rem verso* is only available where a concubine cannot bring an action in contract or quasi-contract. "... if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; ..."

In the present case, it is our finding that the claimant is combining a claim based on *société de fait* with one based on "unjust enrichment" or *de in rem verso,* which article 1381(1), Civil Code of Seychelles, clearly prohibits. This constitutes a fundamental error which, on its own, is fatal to the action. We are mindful that the advocate for the defendant raised a pertinent objection in his submission at p 148 of the record.

The cumulation of both types of claims in the plaint was raised and objected to by counsel for the defendant in his submission at page 148, last paragraph. The trial Judge ignored the objection and dealt with the case as if it were based completely on “unjust enrichment” (see the opening of his judgment at page 178). He further ignored or failed to properly address the point of the alternative remedy when

analyzing the requirements of the law with regard to a case based on article 1381(1) (see 195 at lines 22 downwards).

Our contention is that the plaintiff (now respondent) in using the words "orally agreed" expressed her intention to ground her claim in contract or quasi-contract. Any insistence that these words manifest an intention to ground her claim in "unjust enrichment", can only proceed from bad faith.

In his judgment, the trial Judge states –

> the defendant in his statement of defence has not only denied the plaintiff's claim for restitution but also has averred that the plaintiff never contributed anything either to the properties or to the business ...

Further, the Judge states: "The parties orally agreed that they would engage in life ..." (7th line, p 179, record). This statement is overridden by another pronouncement of the Judge, namely, "It is not in dispute that the plaintiff and the defendant ..." (1st line, page 179, record), followed by an enumeration of various matters, including the oral agreement. Be that as it may, good drafting practice may require that a party denies, in the statement of defence, any plea or averment in the plaint, which is favourable to his/her case. Legal practitioners know that, in pleadings, any averment of facts is taken to be proved, unless denied by the other party. At the hearing, the parties adduce evidence in support of their averments. In the end, it is the trial Judge who decides whether the issue or the plea has been proved or not. As judges of appeal, we have found no evidence, on a balance of probabilities, that the oral agreement has been disproved. We find that the parties had indeed orally agreed.

According to the trial Judge "the plaintiff's action in this matter is based on unjust enrichment". It is humbly submitted that

the trial Judge was error in respect of matters pertaining to the following:

1. He overlooked the issue of the cumulative claim, despite the objection from the advocate for the appellant;

2. he failed to consider adequately or at all, the question of an alternative claim;

3. he proceeded as though the claim was entirely grounded in unjust enrichment and failed to give any or sufficient consideration to the alternative claim.

Where a concubine is unable to establish *a société de fait,* he/she can, as a last resort, bring an alternative action, in *de in rem verso,* grounded on article 1381(1), Civil Code of Seychelles. It is trite law that a party cannot bring an action based both on "unjust enrichment" and on quasi-contract *(Antoine Fostel v M Ah-Tave* (1985) SLR 113).

In the present case the plaintiff starts her claim in para 3 as follows: "The parties orally agreed that they would engaged in life and operate their expenses as one unit for their joint benefit." However in para 9, the plaintiff seems to shift her claim to one in *de in rem verso* when she refers to "unjustly impoverished" and "unjustly enriched". But this is clearly prohibited by article 1381, Civil Code of Seychelles as stated by the advocate for the appellant (then defendant) at page 148 of the record. His objection was overruled by the trial Judge. This constitutes a grave error.

Finally, on the authority of the judgment of this Court in *Tex Charlie v Marguerite Francoise* (SCA 12/1994, LC 72), it was not open to the trial Judge to find a case for the plaintiff based on "unjust enrichment" when the plaintiff had chosen to bring

an action arising from *société de fait* (quasi-contract). However, in the interest of justice, this should not be the end of the matter.

By reason of the matters aforesaid, the appeal is allowed with costs. We therefore remit the case to the Supreme Court for rehearing before another judge.

Record: Court of Appeal (Civil No 3 of 2009)

Anscombe v Indian Ocean Tuna Ltd

MacGregor P, Hodoul, Domah JJ
13 August 2010 Court of Appeal Civ 40 of 2009

Evidence – personal answers procedure

The plaintiff, a businesswoman, rented a house to the defendant. She alleged that renovations were made to the premises at the request of the defendant with the view to a new lease agreement. The defendant terminated the lease and the plaintiff claimed damages in respect of the renovations. The defendant succeeded at first instance on a motion of no case to answer. The plaintiff appealed.

HELD

1. A party who seeks to admit oral evidence to prove a contract above R 5000 should first apply to the Court to do so under the Personal Answers procedure.

2. An application for Personal Answers should be made before the date of hearing but may in some cases be made by motion on the day of hearing.

3. Special provisions relate to the process when it involves the Republic, a public body or other body corporate.

4. The purpose of cross-examination at the hearing would be to secure admissions, which would establish either a commercial transaction or that the existence of a contract was likely. The

defendant is able to re-examine on the answers given.

5. Where the Court allows the evidence of the transaction, the case proceeds as any other civil case on the basis of the evidence provided at the trial.

6. The rule against oral evidence is not applicable where the issue is the intention of the parties to a contract.

7. Article 109 of the Commercial Code is not a derogation from article 1341 of the Civil Code.

JUDGMENT: Appeal dismissed.

Legislation cited
Civil Code, arts 1341, 1347, 1771
Code of Civil Procedure, arts 161, 162, 163, 164
Commercial Code, art 109

Foreign legislation cited
French Code of Civil Procedure, art 324

Cases referred to
Bossy v Redaelli (1982) SLR 438
Cook v Lefevre (1982) SLR 416
Estralle v Michaud (1962) SLR 316
Ladouceur v Bibi (1975) SLR 279
Leong Kee v Chinchen (1978) SLR 55
Savy v Rassool (1981) SLR 201
Wilmot v W & C French (Sey) Ltd (1972) SLR 144

Foreign cases noted
Bouvet v Mauritius Turf Club (1962) MR 213
Chatharoo v Bappoo (1968) MR 74
Dubarry Babbea (1983) MR 52
Ex parte Esmael (1941) MR 17
New Goodwill v Tuyau (1977) MR 329
Soormally v Soormally (1971) MR 115

Antony DERJAQUES for appellant
Pesi PADIWALLA for respondent

Judgment delivered on 13 August 2010

Before MacGregor P, Hodoul, Domah JJ

This is an appeal against the decision of the then Ag Chief Justice who dismissed an action which the appellant had brought against the respondent company for breach of contract.

The appellant, a landlady and a business woman who owned a house at Belonie, had rented it to the respondent company on a written contract at a monthly rent of R 14,000 stated to start on 1 December 2003. It was her case that while the lease was subsisting a "preposé" of the respondent, Mr Joe Madnack, the Operational and/or Financial Manager represented to her that should extensions and renovations be carried out in the said premises, the respondent company would enter into a new lease agreement with the appellant for a substantial monthly rental. She further averred that she relied on his word and carried out the extensions and renovations and that she even altered the character of the accommodation to suit 50 employees but that, by letter dated 22 February 2005, the respondent terminated the agreement. She claimed the sum of R 209,770 as damages which included R 40,000 as moral damages.

The respondent, in its plea, admitted that there was a lease agreement between them for R 14,000 starting from 1 December 2003 but denied any representation that it had made to the appellant to bring about changes to the accommodation for an enhanced return to the landlord for her investment.

The record of proceedings in the Court below shows that the case was a non-starter. The situation of the appellant was one of oral contract going *"outre et contre"* the written word in the lease agreement. When counsel attempted to adduce evidence to prove an oral contract which exceeded the prescribed amount of R 5,000, counsel objected under article 1341 of the Civil Code, and rightly so.

However, the record also shows that counsel for the respondent did hint that there was a special procedure that was required for the same to be done. But, the proceedings show a blissful oblivion of it. Neither counsel for the appellant nor the Court applied its mind to that special procedure.

Be that as it may, the matter proceeded with that procedural impediment, the appellant deposed to what she did, to what she spent, to the hassles she underwent to effect alterations to the property - construction of extra and additional toilets, showers, soak pits, septic tanks; partitioning of the lounge area to create more rooms; painting of the property and landscaping of the yard etc. The reason was that they needed the place for 50 employees. Her prejudice amounted to R 209,770 as damages which included R 40,000 as moral damages. However, when it came to the question of proving the contract between the appellant and the respondent, there was an objection by counsel for the defence on the basis of article 1341 of the Civil Code, which was sustained by the learned Ag Chief Justice. Counsel decided to appeal against that ruling but since it was still an interlocutory matter, no appeal was possible except by closing the case.

As it happened, at the close of the case for the plaintiff, counsel for the respondent moved that the company had no case to answer. The Judge ruled that this was so and gave judgment with costs in favour of the respondent company.

It is against that judgment that the appellant is appealing on the following five grounds:

1. The Honourable Judge erred in law and principle in holding that the plaintiff's oral testimony was inadmissible in law;

2. The Honourable Judge erred in law in failing to determine that the appellant and the respondent were both merchants and the transaction was a commercial transaction and the commercial code applied;

3. The Honourable Judge erred in law in failing to determine that plaintiff's evidence was an exception to article 1341 of the Civil Code of Seychelles-,

4. The Honourable Judge erred in law in failing to find that there was sufficient evidence in writing providing initial proof in writing and thereby admitting into evidence appellants and testimony;

5. The Honourable Judge erred in law in failing to determine that either plaintiff or defendant was a merchant thereby the transaction was a commercial transaction rendering the oral testimony of the plaintiff admissible in law.

All the above matters raised in appeal relate to the same question of law and procedure which counsel for the respondent had hinted to counsel and the court: How does one go to prove oral evidence in a contract above the prescribed amount of R 5,000 where it concerns traders or where there is a beginning of proof in writing? The rule is that provided in article 1341 of the Civil Code which requires that all contracts above R 5,000 be in writing and that no oral evidence may be adduced *"outre et contre"* the written word in a contract.

The rule is stated in article 1341 of the Civil Code which provides:

> Any matter the value of which exceeds 5000 rupees shall require a document drawn up by a notary or under the private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 rupees.

Article 1341, however, must be read with, inter alia, article 1347 of the Civil Code which provides for the exception in that that rule will not apply where there is a beginning of proof in writing or as the original or source French text puts it *"a commencement de preuve par écrit."*

Article 1347 of the Civil Code thus provides:

> The above-mentioned rules shall not apply if there is writing providing initial proof.
>
> This term describes every writing which emanates from a person against whom the claim

> is made, or from a person whom he represents, and which renders the facts alleged likely.

Admittedly, professionals exposed to the procedure applicable in the common law system and unexposed to the civil system would be excused for little suspecting the existence of this special procedure. That is why *we* thought of dwelling for a moment on the important matter of the procedure.

Where a party seeks to admit oral evidence for the purposes of proving a contract above the prescribed amount which in this case is R 5,000, he or she should first make an application to the judge to do so under the procedure known as Personal Answers or *Examen sur Faits et Articles.* On this matter, the paragraphs on *Encyclopédie Dalloz, Répertoire de Procédure Civile, V° "Comparution Personnelle et Interrogatoire ",* nos 12, 32 would be of immense value to those who want to know more.

On Personal Answers, article 162(1) of the Code of Civil Procedure provides:

> 162. (1) Any party to a cause or matter may examine the adverse party on his personal answers as to anything relevant to the matter at issue between the parties.

Now there are preliminaries for triggering this procedure. There should be, as a rule, an advance application which should indicate that the purpose is for examination under Personal Answers. This is akin in purpose to interrogatories in the common law jurisdictions but quite different. Even if it is more safely made prior to the date of hearing, it may even be made by way of motion in certain circumstances on the very day of the hearing:

> 163. Whenever a party is desirous of obtaining

> the personal answers not upon oath of the adverse party, he may apply to the Judge in court on the day fixed for the defendant to file his statement of defence or prior thereto, or he may petition the court ex parte at any time prior to the day fixed for the hearing of the cause or matter to obtain the attendance of such adverse party and the court on sufficient ground being shown shall make an order granting the application or petition. And the party having obtained such order shall serve a summons, together with a copy of the order, on the adverse party to appear in court on the day stated therein.

The above article speaks of application by petition but it may also be made by motion on the day of trial in certain cases such as when the adverse party is in attendance:

> 164. If a party to the cause or matter is present in court at the hearing of the case, he may be examined on his personal answers with the permission of the Judge, without any previous application.

It needs to be stated that where the adverse party is a corporate body, it would not be in order to await the day of trial to make the motion. The reason lies in the fact that the person representing the corporate body may simply come into the witness box and answer in the negative to every question asked and defeat the purpose of the *examen.* Article 162(2) takes care of this when it requires the corporate body to mandate someone to *give* the answers, whence the necessity of advance application.

The advance application and the measures to be taken by the corporate body applies also to the Republic, a public body or any corporate body:

> (2) If a party to a cause or matter be the Republic, a public establishment (établissement public), a corporation or body having a legal entity, such party shall be bound to appoint a special attorney to give his personal answers in such cause or matter If, on the day fixed for the appearance of any such party to give personal answers, no such attorney appears on behalf of such party, and no satisfactory reason for such attorney's non-appearance is give, the facts, matters and things alleged by the adverse party may be held to have been admitted.

That does not prevent a party from calling a representative of a corporate body, be it public or private, where the person required to depose in court is the person who has personal knowledge of the facts necessary for this case. The proviso to article 162(2) addresses this issue:

> Provided however that administrators, managers or agents of such party may also be called upon to give their personal answers on matters which are within their personal knowledge, and the court may in its discretion attach whatever weight it thinks fit to such answers.

For the sake of completeness, one may take note of the rest of the article which has to do with parties who lack legal capacity:

> (3) If a party to a cause or matter be incapable in law of contracting (incapable), he shall give his personal; answers through his guardian, curator or other legal representative.

The source of the procedure obtaining under article 161 of the

Seychelles Code of Civil Procedure which is akin to the procedure of interrogatories in common law jurisdictions but hardly comparable to it resides in article 324 of the French Code de Procédure Civile on *Examen sur Faits et Articles.* Further guidance may be sought on how that article is interpreted and applied in practice, more particularly on how the courts assess the answers given to decide whether oral evidence may be admitted or not in the circumstances: see *Ex parte Esmael* (1941) MR 17; *Bouvet v Mauritius Turf Club* (1962) MR 213; *Dubarry Babbea* (1983) MR 52; *Chatharoo v Bappoo* (1968) MR 74; *Soormally v Soormally* (1971) MR 115; *New Goodwill v Tuyau* (1977) MR 329.

In accordance with the special procedure, it was open to Mr Derjacques to make timely application for the procedure on *Faits et Articles* inasmuch as the defendant was a corporate body which needed advance notice to supply the answers in court, which answers would have been received, not under oath and by cross-examination of the company representative. It was also open to Mr Derjacques, on the day of hearing to call Mr Joe Madnack on account of his personal knowledge of the impugned transaction. But he did neither.

The purpose of his cross-examination should have been to secure a certain number of admissions following which he would have tried to show that the matter they were dealing with was either of a commercial transaction or rendered the existence of a contract likely or *"vraisemblable".* After this session of answers received in open court as part of the case, counsel for the respondent would have been able to re-examine the defendant on the answers he gave, if he felt any need for same.

After the re-examination, counsel for the plaintiff would have moved for a ruling so that he is allowed to adduce oral evidence on the basis that the answers showed that the transaction was of a commercial nature or that they rendered

vraisemblable the existence of a contract. The Court would then have given a ruling one way or the other. If he were allowed, the case would have proceeded as any other civil case on the appreciation of evidence and witness depositions are received on oath or solemn affirmation. If he were not allowed, that would have been the end of the claim.

What we find, however, is that counsel for the appellant sought to adduce evidence by the normal procedure applicable to a civil case rather than the special procedure, even if he had been given the hint of its existence.

Without intending to be exhaustive, the profession may stand guided by the following decisions on the issues raised. In *Daniel Savy v Bella Rassool* (1981) SLR 201, the plaintiff transferred his right in a succession to the defendant reserving for himself usufruct of the property. The deed was set aside in appeal to the Court of Appeal. The plaintiff claimed that he had not received the purchase price. Objection was taken to any oral evidence being adduced. Thereafter, the defendant was called on his personal answers in terms of 161(1) and 163 of the Code of Civil Procedure (Cap 50) in which she referred to a document signed by her father relating to the receipt of the purchase price. In the light of this the plaintiff renewed his motion to adduce oral evidence *"outre et contre"* or contrary to what was stated in the document to the effect that no money has changed hands, the notary stating that he had only presumed that no money had been given.

The Court held that:

1. Oral evidence to prove receipt of purchase price was in the circumstances admissible.

2. Hearing to proceed to hear plaintiff on oral

evidence and determine whether the plaintiff had proved the case against the defendant on the evidence adduced.

Oral evidence to prove non-receipt of the purchase price was, in the circumstances, admissible under article 1347 of the Civil Code.

In the case of *Barry Lee Cook and Anor v Philip Lefevre* (1982) SLR 416, the Court held that the procedure for the admissibility of oral evidence is not applicable in the case of a contract where the issue is the determination of the intention of the parties in a contract.

In *Wilmot v WC French (Seychelles) Ltd* (1972) SLR 144, Sauzier J held, inter alia, that the deed of sale in the case was ambiguous and oral and extrinsic evidence was admissible because of such ambiguity, and also because no formal objection had been raised on behalf of the plaintiffs who had thus tacitly waived their right to object to the hearing of such evidence.

Ladouceur v Bibi (1975) SLR 279 involved a case of interpretation of the true intention of the parties. Sir Georges Souyave CJ held that oral evidence was not admissible to decide the matter as there was an agreement on the correctness of the statement recorded and attested by the notary. The only question was the construction of the expressions used.

In the case of *Leong Kee v Chinchen* (1978) SLR 55, Sauzier J held that albeit that a land surveyor cannot be said to be practicing a trade under the law so as to bring the case under commercial law, oral evidence was admissible so as to interpret the obscure and ambiguous clauses included in the agreement or to make certain the terms thereof which have been expressed in imprecise language.

In *Eric Bossy v Rodolfo Redaelli* (1982) SLR 438, the Court held that article 1341 would not apply in cases of commercial transactions. However, in this case the lease was for a civil transaction and had nothing to do with commercial matters either in terms of parties or the property involved. Hence it was held that article 109 of the Commercial Code did not apply as a derogation from article 1341 of the Civil Code.

Counsel for the respondent also referred to article 1771 of the Civil Code of Seychelles to argue that such a lease may only be proved by oral evidence provided that there is a "*commencement de preuve par écrit"*- that the party against whom proof of such an oral lease is alleged may be examined on his personal answers with a view to obtaining an *aveu* or admission of the existence of the lease or the commencement of the execution of a lease: see *Estralle v Michaud* (1962) SLR 316. Counsel, however, conceded that his reason for citing this article was not for its applicability to the present case but for the analogy with the procedure applicable.

So much for the law. As we remarked at the hearing, we were unable to reconcile a few material facts in the case. The plaint speaks of a contract period starting on 1 December 2003 at a monthly rent of R 14,000 and its termination after two years by letter dated 22 February 2005. But the evidence shows that major part of the works had been carried out in the year 2002. When and what was the actual representation allegedly made by the defendant's representative to the appellant is very much unclear.

The flaw, in our view, with respect to the case of the appellant, lies not in the judgment but in the procedure adopted and in the very evidence of the appellant. All the grounds raised above fail. The appeal is dismissed with costs.

Record: Court of Appeal (Civil No 40 of 2009)

Simeon v Republic

Hodoul, Domah, Fernando JJ
13 August 2010 Court of Appeal Civ 23 of 2009

Drug trafficking – controlled drug – quantity in mixture – legislative interpretation

The defendant was convicted inter alia of drug trafficking for having 2.44 grammes of a mixture, which contained 4% heroin (0.0976 diamorphine). The defendant appealed on the grounds that the law required possession of more than 2 grammes of pure heroin and not of a mixture in excess of 2 grammes which contained some heroin.

HELD

The statutory requirement for a presumption of trafficking requires more than 2 grammes of heroin in its pure form.

JUDGMENT: Appeal allowed.

Legislation cited
Constitution, arts 19, 47
Misuse of Drugs Act ss 6, 14, 26
Prisons Act, s 30

Foreign legislation cited
Dangerous Drugs Act 1986 (Mauritius), s 28

Cases referred to
Alphonse v R (unreported) Cr A 6/2008

Foreign cases referred to
Ali v R (1988) MR 17
Asbe v State of Maharashtra (2001) AIHC 1271

Boui v Columbia 12 L Ed 2d 894
Das v State of Punjab (1972) SCD 262
Emperor v Mohammad (1913) 14 Cr LJ 204
Everard v Poppleton (1843) 5 QB 181
Francis v R (Privy Council Appeal 35/1990)
Hamza v State of Kerala (1999) 3 KLT 879
King v Republic of India (1952) AIR SC 156
Macleod v Attorney-General for NSW [1891] AC 455
Molvan v Attorney-General (1948) AIR PC 186
Re Wainwright (1843) 12 LJ Ch 426
Singh v Crown (1925) 1 LR Nag 358
Venkatanarayana v Rao (1967) AIR AP 111
Yates v US 1 L Ed 2d 1356

Elvis CHETTY for the appellant
Ronny GOVINDEN, Attorney-General with Beryl CONFAIT, Asst State Counsel for the respondent

Judgment delivered on 13 August 2010

Before Hodoul, Domah, Fernando JJ

This is an appeal against a conviction for trafficking in 2.44 grams of diamorphine (heroin) on the basis of the section 14(c) presumption and the minimum mandatory sentence of 10 years imposed by the trial Court.

According to the evidence of PW 1 Freddy Issac on 10 October 2008 at about 7 to 8 pm in the company of Sergent Souffe, Constable Labiche and S Jupiter, they raided a place called the ‘Toll’ at Plaisance. On seeing the police party, the people who were there ran and they found the appellant lying on the ground in the tall 'fatak' grass. He had a backpack marked 'Adidas' on his back. The appellant was arrested and brought to the Mont Fleuri police station as it was not possible to carry out a proper search of all the contents of the appellant's bag at the place of his arrest due to lighting

conditions. On searching the bag at the Mont Fleuri police station amongst a mobile charger, a roll of bandage and a few other items, they had found a small red plastic bag. On opening the plastic bag they had found a brownish powder wrapped in cling film and some herbal material inside another small red plastic bag, which the police suspected to be controlled drugs. The controlled drugs were kept safely in the custody of PW 1 and taken to the Government Analyst two days later as the arrest and seizure took place during the weekend. A day after the drugs were taken to the analyst they were returned by the analyst and kept in the custody of PW 1 until their production in court.

PW 3 Sergent Maryse Souffe had corroborated PW 1 on all material particulars as regards the custody of the bag after its seizure from the appellant and its examination at the police station. The contradiction between PW 1 and PW 4 Serge Labiche as to the manner the appellant was hiding in the tall grass has been dealt with by the trial Judge at page 8 of the judgment and we have no reason to disturb that finding. The appellant does not deny that he was at the place where he was arrested or that the backpack was on his back.

The defence of the appellant, a former police officer, through the dock statement he made is to the effect that the drugs were planted on him. According to the appellant, he had been arrested at the place as narrated by the prosecution witnesses and PW 1 and PW 4 had told him that they had been looking for him for a long time and his name was on their list. The search of his bag at the scene of his arrest had not revealed anything. He was then taken to the Mont Fleuri police station where a further search of his bag was carried out. In the course of this search PW 1 had said "Here I have removed this from your bag". He had also told the appellant that when the appellant was in the police force he had given them a hard time. The trial Judge came to the conclusion that the defence of the appellant that the drugs were "planted" on him was

unacceptable. We have no reason to disturb this finding of fact of the trial Judge.

There was no challenge to the analysis of the drugs by PW 2 Dr Jakariya. This of course is in line with the defence of the drugs being planted on the appellant.

Section 14(c) of the Misuse of Drugs Act states –

> A person who is proved or presumed to have had in his possession more than 2 grammes of diamorphine (heroin) contained in a controlled drug, 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.

According to the interpretation section, "controlled drug" means a substance, preparation or product specified in the First Schedule. 'Diamorphine' is a controlled drug specified amongst Class A Drugs of Part 1 of the First Schedule to the Misuse of Drugs Act. 'Preparation' according to Part IV of the First Schedule means a mixture, solid or liquid, containing a controlled drug. It is clear from this definition that before a person can be convicted for trafficking on the basis of the section 14(c) presumption it must be proved that he had in his possession more than 2 grammes of diamorphine (heroin) in whatever preparation or mixture he was in possession of. This is what is meant by the words 'contained in a controlled drug'. In simple words there should be 2 grammes of heroin in the mixture and in this case in the 2.44 grammes of powder that the appellant was found in possession of.

The evidence of PW 2 Dr Jakariya, who examined the powder seized from the appellant is to the effect that he was given a sample of very light brown powder weighing 2.44 grammes for purposes of analysis. The quantitative analysis revealed that

the light brown powder had a percentage of 4% heroin in it. I have set down below the entirety of the cross-examination of PW 2 because of its importance:

> Q: Only 4% of the 2.44 grams was actually pure heroin?
> A: Yes
> Q. Basically this was only heroin the 4% of that powder?
> A: That is correct.
> Q: Other 96% was not heroin?
> A: Definitely.
> Q: That 4% is one of the lowest I ever come across in case before the court?
> A: That will be true my Lord.
> Q: Generally it would be at least over 10%?
> A: Much over 10%."
> (Underlining is by us)

Thus in this case the entire mixture weighed only 2.44 grammes and in that mixture there was only 4% of heroin. When one converts the 4% into grammes it amounts to only 0.0976 grammes of heroin. Thus on the basis of the prosecution evidence the appellant had in his possession 0.0976 grammes of diamorphine (heroin), which is less than even 0.1 grammes of diamorphine (heroin). This is 1.9024 grammes less than what is referred to in section 14 (c) of the Misuse of Drugs Act. According to PW 2 "the herbal material did not contain cannabis it was cheaply tobacco" (verbatim).

There is no evidence in this case as to the components of the other 1.9024 grammes of the powder. In the case of *Terrence Alphonse v Republic* SCA 6 of 2008 referred to later in this judgment the total weight of the powder found with the accused was 4.9 grammes, of which 25% was heroin. The "other components of the powder were mono acid morphin and acid codeine" which the Court of Appeal stated "both of

which are controlled drugs and which are usually present in illicit heroin".

The trial Judge in rejecting the submission of defence counsel that only 4% of the 2.44 grammes was heroin and therefore section 14(c) did not apply has relied entirely on the decision and cited the case of *Terrence Alphonse v Republic* SCA Cr 6 of 2008, where Bwana J with the other two Justices of Appeal concurring held that in the case of heroin "The entire powder is taken and weighed together. It cannot be separated by weighing the different chemical components". This is particularly so in this case where, according to PW 1, other components of the powder in the plastic bag were monoacid morphin and acid codeine both of which are controlled drugs and which are usually present in illicit heroin. The law and the courts should not be moved to assume or adopt some arithmetical cum-scholastic exercise divorced from the realities of the underworld drug business. Morphine is classified as a class "A" drug and codeine a class "B" drug. Therefore even as to the composition of the powder there is a distinction between this case and that of *Terrence Alphonse v Republic*, for in this case before us there is no evidence as to what the balance 96% of the powder consisted of.

The trial Judge went on to state:

> However the evidence of Dr Jakariya does not show that in the instant case the product taken into custody was a preparation of *another product* containing Diamorphine. For all purposes the product was Heroin of 4% purity. [emphasis added]

We find it difficult to understand the words 'another product', namely as what was recovered from the appellant and analysed by Dr Jakariya was in his own words "a light brown powder" which certainly was a solid mixture, a preparation.

Further this in no way has a bearing on the interpretation to be given to section 14(c).

ln the case of *Terrence Alphonse v Republic* referred to earlier, the evidence indicated that only 25% of the 4.9 grams of the powder found in the possession of the appellant was heroin. The trial Judge in *Terrence Alphonse v Republic* did address the crucial issue as to whether the appellant ought to have been charged with 25% of the total weight of the heroin or the 100% total weight of the substance that is, with possession of 4.9 grams and concluded –

> A person when trafficking in illegal drug such as heroin does not differentiate whether the substance is 100% pure or it contains "cutting agents". When he dispenses one gram of the powder, he collects his money for that 1 gram. He does not collect a percentage of the money relative to the percentage of purity of the powder. He trafficked in the whole content. In my view, when the law refers to heroin, it should be interpreted in the context of that illegal trade...

The Court of Appeal in that case citing this part of the trial Court judgment states "We are of the settled opinion that the learned trial Judge was perfectly right." With all due respect to the trial Judge and the judges who heard that appeal the view expressed by the trial Judge has not considered the clear and unambiguous provisions of section 14(c), but rather sought to give an interpretation as stated by the trial Judge "in the context of that illegal trade". This is against all known rules of interpretation of statutes.

There is no doubt that one cannot find 100% heroin or morphine as they are always found in a stereoisomeric form of a substance, preparation (mixture, solid or liquid) or product.

It is common knowledge that heroin is an opiate drug that is produced from morphine, a naturally occurring substance extracted from the seed pod of the Asian opium poppy plant. But the wording in section 14(c) is very clear for if a person is to be convicted of trafficking on the basis of the presumption in section 14(c) it must be proved that there was more than 2 grammes of diamorphine (heroin) contained in the mixture the person was in possession of. It is for this reason that the Legislature when referring to heroin or morphine in section 14 of the Misuse of Drugs Act has sought to use the words; "contained in a controlled drug" unlike when referring to opium, cannabis or cannabis resin [underlining is by us]. The two cases cited and relied on by the Republic, namely *Stephen Francis v The Queen* (Privy Council Appeal No 35 of 1990) and the case of *Muktar Ali v R* (1988) MR 117 have no relevance to the issue raised before us in this case.

In the Privy Council case of *Stephen Francis v The Queen* the Privy Council had said "Heroin remains heroin notwithstanding that it is mixed with other substances..." There is no dispute in the case before us that the 4% substance found with the appellant is heroin. The dispute is as to its weight and whether it comes within the definition of section 14(c) to attract the presumption of trafficking.

In the case of *Muktar Ali v R* the Supreme Court of Mauritius had to interpret section 28(2) of the 1986 Dangerous Drugs Act of Mauritius which was to the effect that every person who unlawfully imports any heroin or any preparation of which heroin forms the base or esters, ethers isomers, salts or salts of esters, ethers, isomers of heroin commits an offence. The appellant's argument in *Muktar Ali* was to the effect that if an accused were to be convicted under section 28(2)(b) the Crown had to necessarily prove that the article found on him is 'pure heroin'. It was in answer to this submission that the Mauritius Supreme Court held as quoted in the judgment of *Terrence Alphonse*:

> Where someone is accuses under section 28 (2) (b) [of the Dangerous Drugs Act 1986]
>
> … the Crown can only succeed if it proves that the article found on the person is pure heroin. If that submission is correct, it would follow that a person found in possession of preparation containing heroin could not be prosecuted at all unless heroin formed the base thereof. This would have startling consequences. Firstly because everyone knows that,..., pure heroin is practically non-existent in the drug trade. And secondly because, as the word 'base' in this context cannot but have its chemical meaning, that is a substance which combines with an acid to form a salt, the result would be that a person could freely import any preparation containing heroin provided the heroin had not combined with an acid to produce a salt... [emphasis provided].

Section 14(c) of our Misuse of Drugs Act is completely different to section 28(2)(b) of the Mauritius Dangerous Drugs Act and the issue in *Muktar Ali* is different from the issue before us in this case. In *Muktar Ali* the issue before the court was what constitutes pure heroin whereas in the case before us the issue is, is it possible to say that there are two grammes of heroin in a mixture, where the total weight of the mixture is only 2.44 grammes and out of that, the actual heroin content of such mixture is only 0.0976 grammes. Therefore section 28(2)(b) of the Mauritius legislation has no relevance to our section 14(c) and cannot be considered as an aid to the interpretation of our section 14(c).

'Heroin' can be interpreted "in the context of the illegal trade" as a substance, mixture or product. This has already been done by the Misuse of Drugs Act. But one cannot interpret the words "2 grammes of diamporphine(heroin)" in section 14(c),

without an "arithmetical calculation" and doing so is not a "scholastic exercise". The confusion that has crept into this case and that of *Terrence Alphonse* was mixing up the issues as to what constitutes 'heroin' with that of its weight.

N S Bindra in his book on *Interpretation of Statutes* (10th edition, LexisNexis, 2007), making references to several English, Australian, Indian and American cases has this to say:

> When it is said that all penal statutes are to be construed strictly, it only means that an offence falls within the plain meaning of the words used and must not strain the words. The rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It has been held that in construing a penal statute, it is a cardinal principle that in case of doubt the construction favourable to the subject should be preferred (*Ishar Das v State of Punjab* 1972 SCD 262; *WH King v Republic of India* AIR 1952 SC 156). To determine that a case is within the intention of a statute, its language must authorize the court to say so. It would be dangerous indeed, to carry the principle, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerate (*Boni v Columbia* 12 L Ed 2d, 894, *Yates v United States* 1 L Ed 2d 1356). Where an enactment entails penal consequences, no violence should be done to its language to bring people within it but rather care must be taken to

> see that noone is brought within it, who is not within the express language. In criminal cases which entail conviction and sentence, liberal construction of the law with the aid of assumption, presumption and implications cannot be resorted to for the purpose of roping in the criminal prosecution, such persons who are otherwise not intended to be prosecuted or dealt with by the criminal court. Clear words of an Act of legislature, conveying a definite meaning in the ordinary sense of the words used, cannot be cut down or added to as to alter that meaning (*Hari Singh v Crown* 1925 1 LR Nag 358). Words and phrases in a penal statute cannot be strained beyond their ordinary meaning in order to confer penal jurisdiction (*Nairn Molvan v Att-Gen* AIR 1948 PC 186; *Macleod v Att-Gen for New South Wales* 1891 AC 455). Nor can the judges add sections of their own to penal statutes with a view to improve them by some fancied completeness or consistency (*Emperor v Jaffur Mahommad*, (1913) 14 Cr U 204). It is not merely unsound but unjust to read words and infer meanings that are not found in the text (*P Venkatanarayana v Sudhakar Rao* AIR 1967 AP 111). In *Re Wainwright* (1843) 12 LJ Ch 426) Lord Lyndhurst LC, observed: "It is not the court's province to supply an omission in an Act, and if any such correction would extend the penal scope of an Act, still less will the court be inclined to correct".

Another well recognized cannon of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision, the court should adopt the literal construction if it does not

lead to an absurdity. We must not lose track of the maxim *'absoluta sententia expositore non indiget'*, which means that language that is unequivocal and unambiguous does not require an interpreter, in other words, plain words need no explanation. "Nothing" said Lord Denman, in *Everard v Poppleton* (1843) 5 QB 181, "is more unfortunate than a disturbance of the plain language of the legislature, by the attempt to use equivalent terms". *Maxwell on Interpretation of Statutes* (9th ed, London, 1946) says:

> When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation.

The Court cannot, while applying a particular statutory provision, stretch it to embrace cases, which it was never intended to govern. In interpreting a statute, the Court cannot fill gaps or rectify defects. Undoubtedly, if there is a defect or an omission in the words used by the legislature, the Court would not go to its aid to correct or make up the deficiency. The Court would not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court cannot aid the legislature's defective phrasing of an Act, or add or mend, and by construction, make up deficiencies which are there (*K B Asbe v State of Maharashtra* (2001) AIHC 1271).

A further factor that needs emphasis is that section 14(c) of the Misuse of Drugs Act is a derogation from article 19(10)(b) of the Constitution of the fundamental right of being treated as innocent until the person is proved or has pleaded guilty. Any interpretation of section 14(c) should therefore be in accordance with articles 19(10) and 47 of the Constitution. Article 19(10) reads:

> 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 –
>
> …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 declares that the proof of certain facts shall be prima facie proof of the offence or of any element thereof;

This construction of the right to be treated as innocent should also be read in consonance with article 47 which states:

> Where a right or freedom contained in this Charter is subject to any limitation, restriction or qualification, that limitation, restriction or qualification-
>
> (a) shall have no wider effect than is strictly necessary in the circumstances; and
> (b) shall not be applied for any purpose other than that for which it has been prescribed.
> [emphasis is by us].

In the Indian case of *Hamza v State of Kerala* (1999) 3 KLT 879 it was held that the percentage of morphine in the contraband is the important factor which makes the possession of the contraband culpable under the Act. It is incumbent on the prosecution to establish that the contraband had morphine contents above the percentage as mentioned in the definition and the possession of such opium alone could be culpable under the Act. Where the prosecution has failed to establish that the seized contraband article was opium with morphine contents more than 2% as defined in the Act, the

prosecution must fail and the conviction cannot be sustained.

Similarly we are of the view where the prosecution fails to establish that there was more than 2 grammes of diamorphine (heroin) contained in a controlled drug the presumption under section 14(c) cannot be made use of to convict an accused of trafficking by adding on to its meaning or straining beyond its ordinary meaning in order to confer penal jurisdiction. If the Legislature had intended to give the meaning attributed to section 14(c) by the Court of Appeal in the case of *Terrence Alphonse v Republic*, they would have worded section 14(c) in the following way:

> A person who is proved or presumed to have had in his possession diamorphine (heroin) contained in a controlled drug which is more than 2 grammes 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.

The Legislature would have taken into consideration "the realities of the underworld drug business" when it fixed the weight of the dangerous drugs enumerated in sections 14 (a), (b), (c), and (d). Even the subsequent amendment to section 14(d) from 15 grammes to 25 grammes would have been "in the context of that illegal trade". It is the actual weight of the specified drugs referred to in section 14 (a), (b), (c), and (d) that brings the possession of them under the presumption of trafficking and not the total weight of the mixture in which the controlled drug is found.

If we are to go along with the reasoning of the trial Judge in this case we would have to convict a person of trafficking if he were to be found with a container of one kilogram of flour mixed with 0.0001% heroin. The Court posed this question to the Attorney-General and he was of the view that this is how it

should be. He however stated that he may not consider indictment where the quantity is minimal. But this would then be purely at the discretion of the Attorney-General as there is no criteria laid down in the Act to decide as to what quantity may be treated as minimal. We find it difficult to agree with the submission of the Attorney-General. Further such an extended interpretation will fall foul of article 19(10) of the Constitution, for it will be difficult to visualize that such a law can be deemed "necessary in a democratic society". We have no hesitation in concluding that the appellant was in possession of heroin but to state that by being in possession of 0.0976 grammes of diamorphine (heroin) he is guilty of trafficking under the section 14(c) presumption leads to an absurdity and an injustice.

The Attorney-General argued in view of the provisions of paragraph 5 of Part 1 of the First Schedule to the Misuse of Drugs Act, the actual heroin content in the 'preparation' is irrelevant and what matters is the total weight of the 'preparation'. This argument loses its weight on an examination of the meaning attributed to the expression 'preparation' in Part 1V of the First Schedule. According to Part 1V 'preparation' means a mixture, solid or liquid, containing a controlled drug. Therefore when one examines section 14(c) along with the definition of "controlled drug" in section 2 of the said Act it is clear that there has to be 2 grammes of heroin in the mixture containing the substance, preparation or product. One can make use of the provisions of paragraph 5 of Part 1 of the First Schedule only to establish that what the appellant was found in possession of was 'diamorphine' heroin, of which this Court has no doubt. But the Attorney-General's argument that in view of the provisions of paragraph 5 of Part 1 of the First Schedule to the Misuse of Drugs Act the actual heroin content in the preparation is irrelevant and what matter is the ‘preparation’ is irrelevant and what matters is the total weight of the ‘preparation’ is too far-fetched.

We therefore acquit the appellant of his conviction of trafficking and convict him of possession of heroin contrary to section 6(a) of the Misuse of Drugs Act relying on section 26(2) of the said Act. We quash the sentence of 10 years imposed by the trial Court and substitute a sentence of 7 years. The period which the person has spent in custody before and after conviction shall be taken into account in assessing the length of the sentence to be served bearing in mind the amendment to section 30 of the Prisons Act by the Prisons (Amendment) Act 2008.

Record: Court of Appeal (Civil No 23 of 2009)

Vital v Republic

MacGregor P, Hodoul, Fernando JJ
13 August 2010 Court of Appeal Civ 2 of 2010

Evidence – closed circuit cameras

The defendant was convicted of trafficking in controlled drugs on the evidence of two police officers. A camera in the area, which had not been focused and did not capture critical pictures, had been auto-erased a week after the incident. The defendant appealed on the ground that sufficient weight had not been attached to the video evidence.

HELD

1. The onus to prove a case beyond reasonable doubt does not oblige the prosecution to lead evidence of the recordings of a police camera.

2. The defence has a right to request recordings of police cameras. A refusal to comply with such a request may be a ground for complaint.

JUDGMENT: Appeal dismissed.

Legislation Cited
Misuse of Drugs Act, s 14

Elvis CHETTY for the appellant
C JAYARAJ, Principal State Counsel for the respondent

Judgment delivered on 13 August 2010

Before MacGregor P, Hodoul, Fernando JJ

This is an appeal against a conviction for the offence of trafficking in controlled drugs, contrary to section 5 of the Misuse of Drugs Act in accordance with the section 14(d) presumption in the said Act. As per the particulars of the charge laid before the Supreme Court the appellant was on 24 July 2008 found in possession of 46.3 grams of cannabis (herbal material).

There are 2 grounds of appeal, namely:

(i) The trial judge erred on the evidence in not attaching sufficient weight to the fact that the police camera in the vicinity had not recorded any incident of the appellant throwing away any object, especially bearing in mind that the onus was on the prosecution to prove the case beyond a reasonable doubt.

(ii) The trial judge erred on the evidence in attaching great weight to certain inconsistencies in the evidence of the defence witnesses, and yet the trial judge did not treat the inconsistencies in the prosecution case in similar manner.

According to PW *2,* Cpl Steve Jupiter, on 24 July between 3.30 to 3.45, along with Inspector Marie, PW 3 Cpl J Samson and another WPC were patrolling at Castor Road in vehicle number S 1773 when they saw the appellant, a one-legged man by the side of the road about 8 feet from them, standing with the aid of one of his crutches. The other crutch was on the ground. Seeing the police approach him he had dropped a

red plastic bag that was in his right hand to the ground. The bag had fallen near him and the ground there, was clear. PW 2 had picked up the plastic bag, opened it in front of the appellant and showed him the herbal material contained therein. The appellant was arrested and taken to the Central Police Station with the herbal material and the money that was seized from him. The herbal material was placed in a locker and on the following day taken to Dr Jakariya who confirmed it to be cannabis. There is no challenge to the chain of evidence or the analysis of the herbal material. There had been R 1175 consisting of notes and coins in denominations ranging from R 100 to R 1. Under cross-examination the witness had denied that DW Rosemonde was with the appellant at the time of his arrest. According to PW 2 the appellant was arrested on the left side of the road leading from English River towards the church, opposite a shop. He had admitted that there was a police security camera installed in that area of the road, but not at the place where the appellant was standing.

PW 3, LCPL Samson, has corroborated the version of PW 2 on all material particulars. PW 3 at first was confused as to the side of the road the appellant was standing when they arrested him but later corrected himself to fall in line with the evidence of PW 2. Again there is a slight contradiction between the testimonies of PW 2 and PW 3 as to where PW 3 was seated in the vehicle when they saw the appellant. We see no inconsistencies in the testimonies of PW 2 and 3 for a court to doubt the veracity of their evidence. The trial court has decided to accept the prosecution evidence and we see no reason to disturb that finding of fact by the trial Judge who had the advantage of seeing the witnesses testify.

The appellant testifying before the Court has not challenged the evidence of the prosecution witnesses as regards his arrest at the time and place as testified by them, but denies that he was in possession of drugs as narrated by the

prosecution witnesses. According to him this case was fabricated against him as he had filed a case against the police claiming damages for unlawful assault on him. He had said that the money seized from him was from the sale of fish. He had said that at the time of his arrest he was seated on an old pickup truck speaking to DW Rosemonde. He was drinking a Seybrew while Rosemonde was having a Guinness. DW Rosemonde had contradicted the appellant on both these matters by saying that the appellant was standing on the road at the time of his arrest and did not have a Seybrew in his hand. The trial Judge had rejected the defence evidence in view of its contradictory nature. Here again this is a finding of fact by the trial Judge, which we see no reason to disturb.

The appellant in his second ground of appeal is not denying the inconsistencies in the defence evidence nor is he complaining that the inconsistencies in the prosecution evidence are so material that a reasonable court could not have come to a finding of guilt against the appellant in view of those inconsistencies. His complaint is as regards the manner the trial Judge decided to treat the inconsistencies in the two versions. In our view the trial Judge's treatment of the two versions is not faulty as to warrant interference by this Court with his findings on facts.

We see no merit in ground 1 of the appeal as the trial Judge has dealt with the issue raised in ground 1 at length at pages 4 and 5 of his judgment. DW Mr E Quatre, the Commissioner of Police, had stated that security cameras can record events within a radius of 90 degrees but recordings would depend on the specific area being recorded, whether view is obstructed by buildings, trees and sometimes light. They have to be operated by hand and the operator has to rotate it. If there is anything of evidential value it would be retained, if not it gets automatically erased after one month. It must also be said that a recording would depend on which direction a camera is

focused at a given moment especially because it rotates. We are in agreement with the trial Judge when he states:

> It is clear that as the camera had not been focused and therefore had admittedly not captured the act of dropping the bag, it had been auto-erased after a week and it is for this reason that the prosecution seeks to rely on the evidence of these two witnesses in respect of the detection and subsequent arrest.

The onus on the prosecution to prove a case beyond a reasonable doubt does not oblige them to lead evidence of the recordings of a police camera. They had every right to lead the evidence of PW 2 and 3 without recourse to the recordings of a police camera, even if the incident had been recorded and the trial Court was perfectly entitled to rely on the testimony of PW 2 and PW 3 to convict the appellant on the testimony of PW 2 and 3 alone. The defence had every right to request for the recordings of the police camera, within one month of the arrest of the appellant if the recordings would prove the testimony of PW 2 and 3 false. The record does not disclose that such a request was made. A refusal to comply with such a request without valid reason may have been a ground of complaint.

We therefore dismiss the appeal.

Record: Court of Appeal (Civil No 2 of 2010)

Seychelles National Party v Michel

MacGregor P, Hodoul, Domah JJ
14 August 2010 Court of Appeal Civ 4 of 2009

Constitution – freedom of expression – broadcasting – public interest - interpretation

The plaintiff was a political body, which sought a declaration from the Constitutional Court that the Broadcasting and Telecommunication (Amendment) Act 2006 which amended the Broadcasting and Telecommunication Act 2000 section 3, contravened its right to freedom of expression protected by the Constitution (article 22). The 2006 Act excluded inter alia political parties from obtaining a broadcasting services licence. The Constitutional Court dismissed the petition on the grounds that limitation in spectrum was a valid justification in law for the 2006 Act. The plaintiff appealed. Its arguments were twofold: That the Constitutional Court was wrong to accept the respondents' argument that the spectrum was a valid justification in law for the 2006 Act, and that the 2006 Act infringed its rights under article 22 of the Constitution.

HELD

1. The right to freedom of expression is not an absolute right, but derogations are subject to constitutional limits.

2. Scarcity of airwaves is not a reasonable ground to justify restriction of the right to freedom of expression.

3. The ban in the 2006 Act does not amount to an impermissible interference with the freedom of expression under the Constitution. Article 22 is subject to

restrictions as may be prescribed by law and necessary in a democratic society.

4. The 2006 Act was an appropriate restriction on the constitutional right. The 2006 Act was therefore not ultra vires as it protects the public interest to allow access to an impartial independent media.

5. Freedom of speech is a privileged human right.

6. Within freedom of speech political expression enjoys high-level protection.

7. Interference with freedom of expression must be “necessary in a democratic society”.

8. What is necessary in a democratic society implies the existence of a pressing social need.

9. The fact that there is access to other modes of communication does not justify denial of expression in a particular mode.

10. Article 22 of the Constitution does not guarantee the right of access to broadcast media.

11. Article 22 guarantees right to expression in available media but not the right to advertise political views nor to own or operate a media platform.

12. A blanket restriction on certain types of expression in the broadcast media is permissible.

13. (Obiter) A ban on political parties having broadcast licences should be effected in accordance with the constitutional obligation of the state to ensure independent regulation of the media. There is a state responsibility to establish a regulatory body, which will ensure accountability of all involved in the broadcast media, both private providers and those that operate from public funds.

14. (Obiter) The right to disseminate party political ideas through privately run broadcast stations is a negation of the democratic values enshrined in the Constitution.

JUDGMENT: Appeal allowed in part.

Legislation cited
Constitution, Preamble; arts 1, 22, 46, 168
Broadcasting and Telecommunication Act 2000, s 3
Broadcasting Corporation Act, Chapter 211A
Constitutional Court (Application, Contravention, Enforcement, or Interpretation of the Constitution) Rules, r 3

Foreign legislation cited
Communications Act (UK), s 321
European Convention for the Protection of Human Rights and Fundamental Freedoms, art 10
International Covenant on Civil and Political Rights 1976, art 19

Foreign cases noted
Bowman v United Kingom (1998) 26 EHRR 1
Castells v Spain (1992) 14 EHRR 445
Groppera Radio AG v Switzerland (1990) 12 EHRR 321
Haider v Austria (1995) 83 A DR 66
Informationsverein Lentia et Autres c Autriche [Arret de 24 nov 1993, Serie A no 276]
Jersild v Denmark (1994) 19 EHRR 1
Lindon, Otchakovsky and July v France (2007) 46 EHRR 761
Lingens v Austria (1986) 8 EHRR 407
Malisiewicz-Gasior v Poland (2006) 45 EHRR 563
Murphy v Ireland (2003) 38 EHRR 212
R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] 1 AC 1312
R v Secretary of State for Home Department, ex p Simms [2000] 2 AC 115
Reynolds v Times Newspapers Ltd [2001] 2 AC 127 200
Stambuck v Germany (2002) 37 EHRR 845
Steel and Morris v United Kingdom (2005) 41 EHRR 403
Verein gegen Tierfabriken v Switzerland (2001) 34 EHRR 159
X v United Kingdom 14 Year book of the ECHR 539

Frank ALLY for the appellant
Ronny GOVINDEN for the respondent

Judgment delivered on 14 August 2010

Before MacGregor P, Hodoul, Domah JJ

The appellant is a political party registered under the Registration of Political Parties (Registration and Regulations) Act. It complained to the Constitutional Court in a Petition (CC No 1/2007), that an amendment to the broadcasting legislation, namely, the Broadcasting and Telecommunications (Amendment) Act 2006, passed by the National Assembly and promulgated by the first respondent, has contravened and is likely to contravene its right to

freedom of expression entrenched in article 22. The petition is supported by an affidavit of Roger Mancienne, Secretary General of the appellant who prayed the Constitutional Court for a declaration that the amendment, principally section 3(3)(c) of the Act, is null and void. The Court dismissed the petition with costs. Hence, this present appeal before us. The Attorney-General has been made a respondent to the petition pursuant to the Constitutional Court Rule (3) (2).

We propose to deal with the issues raised in this appeal in the following manner. In Part I, we shall consider whether the Constitutional Court was correct or not in accepting the main contention of the respondent that the limitation in spectrum was a valid justification in law for the ban provided for in the amendment. In Part II, we shall consider the broader question of such an amendment in its constitutional context. In Part III, we shall decide upon the orders that need to be made in the light of our decisions in Part I and Part II, pursuant to article 46 of the Constitution.

PART I

Article 22 of the Constitution

From the outset, we shall endeavour, for the sake of clarity - and the Constitutional Revision Commission should take notice - to extricate the various laws relevant and material to this appeal. The Constitution of the Third Republic entered into force on 21 June 1993. In article 22, it promulgates every person's "right to freedom of expression". The article reads:

> Every person has a right to freedom of expression and for the purpose of this article this right includes the freedom to hold opinions and to seek, receive and impart ideas and information without interference.

The right to freedom of expression is not an absolute right. Nonetheless, any permissible derogation is still subject to constitutional limitations. It has to be (a) as prescribed by law; (b) necessary in a democratic society and (c) fall under each of the heads specified therein. Thus, article 22(2) reads:

> The right under clause (1) may be subject to such restrictions as may be prescribed by a law and necessary in a democratic society –
>
> (a) in the interest of defence, public safety, public order, public morality or public health;
>
> (b) for protecting the reputation, rights and freedoms or private lives of persons;
>
> (c) for preventing the disclosure of information received in confidence;
>
> (d) for maintaining the authority and independence of courts or the National Assembly;
>
> (e) for regulating the technical administration, technical operation, or general efficiency of telephones, telegraphy, posts, wireless broadcasting, television, or other means of communication or regulating public exhibitions or public entertainment; or
>
> (f) for the imposition of restrictions upon public officers.

The Impugned Broadcasting and Telecommunications (Amendment) Act

In 2006, the Assembly brought about an amendment to the Broadcasting and Telecommunication Act 2000, which in fact is an Act passed in 1991, thus preceding the Constitution, and which came into operation on 23 October 2006 to its section 3. The effect of the amendment was to make provision, inter alia, for those who were entitled to be licensed under the Act and those who were not. The amendment as a whole is not challenged in this appeal. It is only that part which provides for the exclusion of all political parties and persons affiliated to such parties.

The amending Act is transcribed in the statute book as follows:

> 2. The Broadcasting and Telecommunication Act, 2000 is amended in section 3 by inserting the following subsections after subsection (2)
>
> (3) Subject to section (4), a licence referred to in subsection (1) to provide a broadcasting service shall only be granted to a body corporate Incorporated by or under an Act of Seychelles and shall not be granted to an applicant if the applicant-
>
> (a) already holds a licence or directly or indirectly controls or is controlled by a body corporate which already holds a licence;
>
> (b) is a religious organization or a body corporate which is affiliated to a religious organization,

(c) is a Political Party or a body corporate which is affiliated to a Political Party (emphasis is ours);

(d) has been adjudged bankrupt or declared insolvent or has been convicted of sedition or any offence involving fraud or dishonesty.

(4) Subsection (3) shall not apply to any person holding a licence at the time of coming into operation of that subsection as regards the continuation of operations under the licence or the renewal of the licence.

Accordingly, we are principally concerned in this case with section 3(3)(c) which prohibits the licensing authority to grant a broadcasting licence to a political party or a body corporate which is affiliated to a political party. In the judgment of the Constitutional Court delivered by the then Chief Justice, with whom Karunakaran and Renaud JJ agreed, the amendment fell within the permissible derogations. This appeal rehashes the same questions which had been raised below. But the matters in our view goes well beyond as we shall indicate in due course.

The Broadcasting and Telecommunications Act

Before we move on to substantive matters, we might as well iron out a couple of creases having to do with citations. First, the Broadcasting and Telecommunications Act (the Act) (Revised Edition 1991) was enacted in 1991 and in force before the Constitution was promulgated so that if the record refers to the year 2000, that cannot be taken to be the year of the enactment. The Judges of the Constitutional Court should have been duly enlightened on that aspect.

Second, in the 1991 edition of the Laws of Seychelles, there is an explanatory footnote which is intended to be for avoidance of doubt. We did not have much help with that inasmuch as whereas there is only one Broadcasting and Telecommunication Act, the footnote refers to two pieces of legislation: (i) a Broadcasting Act; and (ii) a Telecommunications Act. Be that as it may, of greater significance is the provision that:

> All statutory instruments made and all licences issued under the Act (Cap 199 (sic), 1971 Ed) and in force on commencement of this Act are continued in force unless revoked or amended under this Act.

The argument of the respondents

Now for the main thrust of the argument of the respondents. It rests principally on the content of the affidavit of Dr Georges Ah-Thew (deponent). His stand justifying the prohibition and/or restriction of the appellant's right of expression resides in the scientific and technical calculations. According to him, the prohibition and restriction essentially result from “scarcity of spectrum". In para 8 of his affidavit, he states –

> *in the Seychelles due to technical limitations i.e. available frequencies, only a very limited number of broadcasters can co-exist* in the field of FM broadcasting services, the one sought for by the Petitioner (which the latter contests). [emphasis is ours]

Having accepted that the appellant has a prima facie case, as required under article 46(8) of the Constitution, the trial Judges in their judgment, at page 186, state -

> ... The State seeks to discharge the burden of

> disproving that there has been any contravention as alleged, on the basis of technical reasons given in an affidavit of Dr Georges Ah-Thew, ... The averments in that affidavit have not been contradicted by the petitioner by any counter affidavit of an expert -

The deponent admits that the reason for enacting the amendment was to exclude certain categories of persons, including political parties, from obtaining a broadcasting services licence. As may be noted, the amendment came 14 years after the Constitution came into force. The question that begs an answer is what prompted such a change in the law? The argument of the appellant is that it is a political party and a legal entity duly registered for its function in the democratic process so that like every person whose right is guaranteed under the Constitution, it has a

> right of access to all information relating to that person and held by a public authority which is performing a governmental function and the right to have information rectified or otherwise amended, if inaccurate.

The Attorney-General quotes from the deponent's affidavit as follows:

> I state that Seychelles can only have six FM broadcasting station (sic) according to a scheme last approved by the International Telecommunications Union in 1996, some 14 years ago. Our kind remark on this matter is that whereas the ITU is involved in the elaboration of the scheme, it may not interfere with the allocation of the channels, a matter in respect of which the Republic exercises its sovereignty, without interference from any

source, so that may not be regarded as a legal impediment.

Other than the technical impediment advanced, we do not find any serious legal objection advanced by the deponent in his affidavit. We have tried to find the reasons for the amendment and gone to the "Objects and Reasons" stated in the Bill. We have been none the wiser:

> BROADCASTING AND TELECOMMUNICATION (AMENDMENT) BILL, 2006. (Bill No.9 of 2006)
> OBJECTS AND REASONS
> This Bill seeks to amend the Broadcasting and Telecommunication Acts, 2000 to provide that a licence to provide a broadcasting service may only be granted to a company incorporated in Seychelles and to exclude certain types of bodies from being authorized to provide broadcasting services.
> The amendment will not affect existing licence-holders.

We take the view that had the Bill been more explicit about the bodies and the reasons rather than silent about it, the mischief that followed the amendment may have been well avoided. So much for the price the nation has had to pay for the lack of transparency in the matter. There is a good reason why a Bill contains an Explanatory Memorandum. Vaguely stated objects and reasons arouse suspicion and spoil an otherwise good case for the legislator.

Be that as it may, we shall now address the main ground of the prohibition as advanced by the deponent on behalf of the respondents. According to him, the three unallocated stations (see para [7] supra), should not be allocated at all "for fear of discriminating against future and eventual applicants", a reasoning which we do not comprehend. Even the Attorney-

General seems perplexed:

> I can't understand when (sic) Dr. Ah-Thew said … I state that providing an FM broadcasting service licence to the petitioner would have led to discrimination if other political parties were to ask for a similar broadcasting service licence and had to be refused due to technical limitation.

We bear in mind that in the estimation of the Attorney-General, "...the main difficulty in this country is the limited number of frequencies" (page 7, para [14]).

The "scarcity of spectrum" argument

We must now decide whether scarcity of spectrum is a valid argument in favour of the respondents. In its second ground of appeal, the appellant submits and argues that:

> ... *In any event the argument regarding the scarcity of airwaves as relied upon by the Constitutional Court is not a reasonable ground to justify the contravention of the Appellant's right to freedom of expression.* [emphasis is ours].

That, in our view, is correct and supported by technical, doctrinal and jurisprudential development in this area. We quote hereunder from the case of *Informationsverein Lentia et Autres c Autriche* (Arret de 24 nov 1993, Serie A no 276) which had to consider the issue under article 10 of the European Convention on Human Rights, identical with article *22* of our Constitution:

> 1116. … … … La Cour rappelle qu'elle a fréquemment insisté sur le role fondamental de la liberté d'expression dans une société

démocratique, notamment quand, a travers la presse écrite, elle serf a communiques des informations et des idées d'intérêt général, auxquelles le public peut d'ailleurs prétendre. Pareille entreprise ne saurait réussir si elle, ne se fonde sur le pluralisme, dent l'Etat est l'ultime garant . ... Grace aux progrès techniques des dernières décennies, lesdites restrictions ne peuvent plus aujourd'hui se fonder sur des considérations liées au nombre des fréquences et des canaux disponibles. Ensuite, elles ont perdu en l'espèce beaucoup de leurs raisons d'être avec la multiplication des émissions étrangères destinées a un public autrichien et a la décision de la Cour administrative de reconnaitre la 1egalite de leur retransmission par le câble. Enfin et surtout, on ne saurait alléguer l'absence de solutions équivalentes moins contraignantes; a titre d'exemple, il n'est que de citer la pratique de certains pays consistant soit a assortir les licences de cahiers des charges au contenu modulable, soit a prévoir des formes de participation privée a l'activité de l'institut national. Le gouvernement avançait aussi un argument économique: le marché autrichien ne serait pas de faille à supporter un nombre de stations privées suffisant pour éviter les concentrations et la constitution de «monopoles prives». Selon la Cour, ce raisonnement se trouve démenti par l'experience de plusieurs Etats européens, de dimension comparable a celle de l'Autriche, ou la coexistence de stations publiques et privées, organisés selon des modalités variables et assortie de mesures faisant échec à des positions monopolistiques privées, rend vaines les craintes exprimées. Bref, la Cour considère les ingérences litigieuses

> comme disproportionnées au but poursuivi et partant, non nécessaires dans une société démocratique. L'article 10 (art. 10) a donc été violé (unanimite).

See Vincent Berger, Chef de Division au Greffe de la Cour Européenne de *Droits de I'homme* (5th ed, 1996) p. 417, para. 1116.

More need not be said. We cannot ignore a judgment of the European Court of Justice on Human Rights. It concerns the inadmissibility of scarcity of spectrum as justification for restricting and/or prohibiting the right of expression. In their reference to comparable jurisdictions, the judges overlooked the latest and the salient features in this dynamic area where there have been so many technological, legal and judicial developments to which we shall come to in more detail in Part II.

Indeed, by reason of developments and progress in technology, namely, the possibility of switching from analogue to digital, developments through SAFE and satellite, the possibility of sharing the allocation of spectrum, its scarcity cannot or can no longer be invoked to justify an outright and blanket ban to restrict or deny a person's right of expression. The reasons, if any, have to exist elsewhere.

Our view, therefore, is that the spectrum argument does not hold. The Constitutional Court erred in accepting it as the argument which could have had the effect of determining the number of issues provoked in the application.

PART II

Having decided the invalidity of the spectrum argument, we move on to consider whether the ban could otherwise be upheld in law.

It is the argument of the applicant that the ban against political parties owning a broadcasting station is an unjustifiable interference with the freedom of expression guaranteed under article 22 of the Constitution of the Republic of Seychelles.

The real issue in this appeal is the larger and crucial question whether the ban imposed against political parties is a restriction to freedom of expression which is "necessary in a democratic society."

With respect to case law in this area, the Constitutional Court relied on the same cases as it did for the spectrum argument with which it considered the interpretation of article 22 to be inextricably linked. The judges, for that reason, referred to the cases at their disposal interchangeably addressing the various issues involved: *AK Gopalan v State of Madras* (1950) AIR SC 27 (restriction does not include prohibition); *Narendra Kumar v Union* (1960) AIR (SC) 430 and *Coovejie Bharucha v Excise Commissioner* (1954) AIR (SC) 220; *Supreme Court Reference No 2 of 1982* (1982) Papua New Guinea Reports 214 (restriction includes prohibition); *Indian Express Newspapers (Bombay) Private Ltd v Union of India* (1986) AIR (SC) 515 (content of freedom of expression); *Courtenay and Hoare v Belize Broadcasting Authority* 30 July 1985 Unreported (freedom to use television medium for expression); *Rambachan v Trinidad and Tobago Television Company Ltd* 17 July 1985 Unreported (use of television for political addresses); *Red Lion Broadcasting Co v FCC* (supra); *Cropper: Radio AG v Switzerland* (1990) 12 EHRR 321 (free and fair use of broadcasting media); *Ramesh Thapper v State of Madras* (1950) AIR (SC) 27 (meaning of

public order); *Re New Brunswick Broadcasting Company Ltd and Canadian Radio-Television v Telecommunication Commission* (1984) 13 DLR (4th) 77 (use of public property for freedom of expression); *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal* (1954) AIR (SC) 1236 (interests involved in private broadcasting).

We have noted that the citations of counsel for the appellant stop at 1998, when most of the relevant decisions on the matter are post-2000. If we agreed to follow the decisions counsel for the appellant cited, we would be arresting and freezing development of Seychelles law in a time tunnel, as at 1998 at that – a mischief we seek to spare all concerned in the name of the progress of the nation.

We have to state that a lot has happened in this area in comparative jurisprudence and the case which should stand out is *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, hereinafter referred to as *ADI*. This case is not one dealing with an outright blanket ban against political parties owning or operating from a broadcasting station but the lesser question of parties expressing political views through the media by advertisement or PPA (political party advertising). From the moment we accept that PPA is a lesser mischief than PPB (political party broadcasting station), the relevance of the decision strikes us. The principles applicable to the lesser would apply to the greater as well inasmuch as the mischief found in political advertising is many times more in a political party owning or operating from broadcasting media. The Attorney-General did make reference to this case but, it would appear that the judges decided to clinch the case on the spectrum issue only.

The claimant in *ADI* was a non-profit-making company whose aims included the suppression, by lawful means, of all forms of cruelty to animals, the alleviation of suffering and the

conservation and protection of animals and their environment. In 2005, it launched a campaign entitled: "My Mate's a Primate", with the object of directing public opinion towards the use of primates by humans and the threat presented by such use to their survival. The campaign was to include newspaper advertising, direct mailshots and a television advertisement. However, the Broadcast Advertising Clearance Centre, an informal body funded by commercial broadcasters, did not give clearance on the ground that it was in breach of the prohibition on political advertising in section 321(2) of the Communications Act 2003. It took the view that the claimant was a body with mainly political objects as defined in the Act.

The claimant, then, sought by way of judicial review a declaration that section 321(2) of the Communications Act 2003 was incompatible with article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms as it imposed an unjustified restraint on the right to freedom of political expression. The High Court declined to do so. The claimant appealed to the Court of Appeal which upheld the decision. The matter came up to the House of Lords.

The House of Lords, dismissing the appeal, held that -

(a) protection of the right to freedom of expression included a right to be protected against the potential mischief of partial political advertising which Parliament had been entitled to regard as a real danger,

(b) the prohibition was justified on account of the pressing social need against political advertising on television and radio by reason of the immediacy and impact of such advertising.

This case makes extensive reference to the history of political broadcasts with the relevant legislation and what may be considered to be the relevant live issues in present times. Fifty-four cases have been referred to or cited in argument. They may be traced to the years 1969 to 2007. Each case makes interesting reading in its own right. We would leave it to those concerned to read them at leisure.

We consider that our purpose would be better served if we distilled the propositions of law emerging from the cases by making reference to the cases which are from Commonwealth and European jurisprudence.

First, freedom of speech holds a privileged status in the hierarchy of human rights norms: see *R v Secretary of State for Home Department, ex p Simms* [2000] 2 AC 115 at 126.

Second, account taken of this privileged status, political expression enjoys a high-level protection as a distinct and special category: see *Lingers v Austria* (1986) 8 EHRR 407, para 42; *Haider v Austria* (1995) 83-A DR 66, para 3b; *Malisiewicz-Gasior v Poland* (2006) 45 EHRR 563, para 64; *Steel and Morris v United Kingdom* (2005) 41 EHRR 403, para 88 and *Lindon, Otchakovsky and July v France* (2007) 46 EHRR 761.

Third, it follows from the above that, it would be a violation of the Constitution if there is any interference with the above rights unless that 'identifiable right" is prescribed by law and the aim or aims of such interference is “necessary in a democratic society:" see *Lingens v Austria* (1986) 8 EHRR 407, para 35; *Stambuck v Germany* (2002) 37 EHRR 845, paras 38-39, 50 and *Malisiewicz-Gasior v Poland* (2006) 45 EHRR 563, para 58.

Fourth, what is necessary in a democratic society implies the

existence of a "pressing social need": *Lingens v Austria* (1986) 8 EHRR 407, para 39; *Steel and Morris v United Kingdom* (2005) 41 EHRR 403, paras 87 and 88; *Malisiewicz-Gasior v Poland* (2006) 45 EHRR 563, para 68; *Bowman v United Kingdom* (1998) 26 EHRR 1; *VgT Verin gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159.

Fifth, national jurisdictions have a margin of appreciation in assessing this pressing social need but this is narrowly interpreted to allow political speech an important freedom of expression: *Murphy v Ireland* (2003) 38 EHRR 212, para 67; *Jersild v Denmark* (1994) 19 EHRR 1, para 37, and *Bowman v United Kingdom* (1998) 26 EHRR 1.

Sixth, as regards political expression of a political nature or undertone, law does not admit of freedom of political speech in the absolute: see *Castells v Spain* (1992) 14 EHRR 445, para 46. The scope is wide and the limits narrow. As such, one corollary of the narrowness of appreciation afforded to the national jurisdiction is that it is subjected to "careful scrutiny" or "rigorous examination" by the courts. This is tested by practical and factual realities in the state concerned.

Seventh, a wider margin of appreciation in this area is afforded to religious and commercial interventions as opposed to political interventions: *Murphy v Ireland* (2003) 38 EHRR 212, and *VgT Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159.

Eighth, with respect to the meaning of "expression" in the term "freedom of expression", that connotes ideas, information but also the form of the expression. It is no justification that the claimant has other modes of communication: *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321, para 55, and *VgT Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159, para 77.

Ninth, article 10 – and by extension article 22 of our Constitution - does not guarantee the right of access to broadcast media: see *X v United Kingdom* 14 Yearbook of the European Convention on Human Rights 539, 544.

Tenth, what article 22 guarantees is a right to expression in the available media neither the right to advertise political views nor the right to own or operate a media platform: *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312.

Eleventh, a blanket restriction on certain types of expression in the broadcast media is permissible, such as political advertising *(VgT Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159*)* or religious advertising: *Murphy v Ireland* (2003) 38 EHRR 212.

In sum, Strasbourg jurisprudence requires that any interference with article 10 must be "convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved." See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 200. This jurisprudence reflects the position under article 19 of the International Covenant on Civil and Political Rights 1976. We need to say this on account of the fact that there exists now an international body to assist all those concerned with modem issues arising on the matter of free speech. The organization itself goes by the appellation of article 19 and works for setting the international standards required in this area: see article 19, International Standard Series, March 2002.

The issue of a political party owning a broadcasting station to air its political views is not strictly speaking, in our view, an issue limited to article 22 which guarantees freedom of expression to the citizen. It is a larger issue of the manner in

which we wish to construct and survive in a democracy meant to recognize "the inherent dignity and equal and inalienable rights of all members of the human family as the foundation for freedom, justice, welfare, fraternity, peace and unity". See the Preamble of the Constitution.

Baroness Hale of Richmond at para 49 of the *ADI* case has put the matter directly:

> So this case is not just about permissible restrictions on freedom of expression. It is about striking the right balance between the two most important components of a democracy: freedom of expression and voter equality.

None disputes the rights of political parties, either during election time or before or after, to air their views, to lobby, to take positions in national issues and disseminate them from public or private platforms. But their right to air and disseminate their party political ideas, opinions and views through their own privately-run broadcast station amounts to a negation of the democratic values enshrined in our Constitution. To the same extent, it amounts to a distortion of the free and fair electoral process by creating class divisions in the political rights of citizens. Such a system favours the advantaged against the less advantaged and the rich at the expense of the less rich in a system whose value is based on one person one vote.

At para 52, we read from her part of the judgment:

> Important though political speech is the political rights of others are equally important in a democracy. The issue is whether the ban, as it applies to these facts, was proportionate to the legitimate aim of protecting the democratic rights of others.

The citation continues on the risk of creating two classes of citizens:

> Nor in practice can we distinguish between small organizations which have to fight for every penny and rich ones with access to massive sums. Capping or rationing will not work, for the reasons Lord Bingham gives.

Lord Bingham of Comhill, at para 26, put it so bluntly: the problem was not to be resolved by interpreting statutes but by making a deliberate choice of our system of democracy:

> The problem here is not one which can be resolved by exercise of the interpretative power given to the courts by section 3 of the 1998 Act. Yet the importance of this case to the functioning of our democracy is in my view such as to call for the rehearsal of some very familiar but fundamental principles.

Analogy between the printed press and the radio and television media in this area is treacherous misapprehension. The printed press impacts on the intellect of the citizen to make a choice. Radio and television impacts on the senses and in such an indiscriminate manner as to take over their lives and their thinking processes. At para 30 of Lord Bingham's judgment, we read-

> The question necessarily arises why there is a pressing social need for a blanket prohibition of political advertising on television and radio when no such prohibition applies to the press, the cinema and all other media of communication. The answer is found in the greater immediacy and impact of television and radio advertising.

In the light of the above, we may only come to the conclusion that a ban on political parties owning and operating from a broadcasting media is an interference which is necessary in a democratic society and is permissible. To that extent and to that extent only the impugned amendment is not a violation of article 22. As the *ADI* decision clearly states at para 52:

> While the right to freedom of expression is not absolute, and no one has a right of access to the airwaves.

PART III

In Part I, we decided that the spectrum argument could not be a valid reason for challenging the constitutionality of the impugned provision in this appeal. In Part II, we have decided that the challenged amendment to the law is not a violation of article 22 of our Constitution. In the light of the above, one may take the view that this appeal should rest there and it is to be dismissed. That is not so.

Issues before a Constitutional Court transcend the pure question of interpretation of statutes. In this case, it involved the larger question of article 1 of the Constitution of the Republic of Seychelles. Accordingly, the nature of the order we make should be compatible with article 46(5)(c). This provision empowers the Court, in a Constitutional Court application, to –

> make such declaration or order, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application.

One issue which obviously arose in the application below is

the State's obligation in relation to article 168. This was left untouched by the Constitutional Court.

It is fairly obvious that with an outright blanket prohibition against all political parties owning or operating from its own media, there needed to be a balance created to enhance the citizens' exercise of free speech. That could only be achieved with the setting up of an independent regulatory body which will not only ensure but secure the "fundamental rationale *of* the democratic process" of "competing views, opinions and policies" so that they may be "debated and exposed to public scrutiny" and further that "given time the public will be able to make a sound choice when, in the democratic process, it has the right to choose." See Article 19, International Standard Series, March 2002.

As the International Standards recommend:

> it is highly desirable that the playing field of debate should be so far as practicable level.

This application has highlighted an important lacuna in our media law. The power to ban is not a power to oust but an obligation to accommodate. Any power in a democratic state has to be exercised judiciously and not arbitrarily. The people in the Third Republic stated in article 1 that "Seychelles is a sovereign democratic Republic." One major incident of that is that every power given to everybody or institution should be exercised democratically and not capriciously. Capricious, for those not initiated in the law, in legal parlance is a legal term used in contradiction to judiciousness.

It is our view that the ban may be said to be an exercise in capriciousness unless it is effected in accordance with the constitutional obligation undertaken by the State to set up an independent media to regulate in this area where the issues are legion and specialized attention is needed with the

assistance of other jurisdictions grappling with them.

The independent media – the constitutional context

In article 168 of the Constitution, the people of Seychelles enjoined the State to set up such a broadcasting media herein referred to as the "independent media". The State, including the Attorney-General, has failed to comply with this obligation:

> 168. (1) The State shall ensure that all broadcasting media which it owns or controls or which receive a contribution from the public fund are so constituted and managed that they may operate independently of the State and of the political or other influence of other bodies, persons or political parties.
>
> (2) For the purposes of clause (1), the broadcasting media referred to in that clause shall, subject to this Constitution and any other law, afford opportunities and facilities for the presentation of divergent views.

In our opinion, the creation of an independent authority to ensure that the citizen is kept adequately informed of important national issues touching the citizen is an obligation flowing from article 168 of the Constitution. In our view, there occurred a lop-sided development in the law when the State decided to bring about the 2006 amendment without due regard to its legal obligation to set up the independent body which should have regulated broadcasting in all its aspects. The only manner in which the amendment may be given effect to is by entrusting the responsibility to that independent body.

As may be seen, there was a positive constitutional obligation imposed by the people of Seychelles to do so. Those who took office to administer the public affairs had been bound

when they took office on the day of the swearing in. We also note that there has been a whole period of some seventeen years that the Constitution has been in force. The benefits would be generalized by the creation just as the prejudice has been generalized by the omission.

It is worthy of note that Seychelles Broadcasting Corporation Act, Chapter 211A, enacted on 1 May 1992, before the Constitution came into force provides as follows:

> The State shall, within twelve months of the coming Into force of this Constitution, bring the Seychelles Broadcasting Corporation Act; 1992 into conformity with article 168. (Constitution, Paragraph 5, Schedule 7, Part 1).

All these omissions have caused the lop-sided development where the 2006 Amendment sits uncomfortably.

The right of the freedom of expression of the citizen includes the right of the citizen to be informed and the right to be informed is a right to be properly informed.

We are comforted in our view when we also read the following from the submission of the Attorney-General to the Court:

> What my learned friend (F Ally, Esq) should be agitating for is an independent broadcasting station which should broadcast political views but not filing (sic) a broadcasting station for themselves that is all / have been saying, had no complaints my lords (sic). I am one who believes very strongly, I thought even he would disagree with him complete (sic), I thought he would disagree with that (sic) you say. But I would defend to the date (sic death?) the right to say it. So I am much up hold (sic) the view but the fact

remains.

> I have no complaint and that is why I keep on saying my lords that the struggle of my learned friend should be in fact not to have their own broadcasting station but an independent authority or SBC to air the views of all political parties and I do not think anyone could deny them of their right (pages 134-135, record).

The State must have known, at the time of the 2006 Amendment, what the Constitution required of it, especially in the light of the statement of the Attorney-General. The manner in which other democratic institutions have proceeded to effect the blanket ban is through a regulatory body which is the way to do it: see the Independent Broadcasting Act of Mauritius and the UK legislation on the matter. An independent media acts as a watch-dog to ensure that information in the public domain is diverse, accurate and impartial.

Before concluding, we thought of correcting the record on some of the comments that have been made to the effect that granting a political party a licence to establish and set up a broadcasting service in Seychelles is bound to create ill-will between the different groups of people, outrage public feeling and lead to presentation of programmes which are not accurate or impartial and does not serve the best interest (page 91, record).

We also read in the affidavit of the deponent problems that had arisen in Rwanda and in Germany during the time of Hitler and several other countries where political parties had broadcasting stations and the position in other countries referred to in paragraph 11 above (para 14, C14 record).

He considers that granting a radio station to the appellant

would spark confrontation, hatred and killings. They may be dismissed as personal value judgments especially when we know that Seychelles is not a society divided in two camps as in Rwanda and that the anti-culture of Nazi Germany was never the culture of Seychelles.

Further, it appears that the deponent considers that a radio station under the control of the appellant will become an instrument to instigate hatred and massacres similar to the role played by *"Radio des Mille Colines"* in Rwanda! We presume that such remarks have been made in haste and are the product of imagination. The objective fact is that the history of this country has shown no trace of genocide, no use of machetes and no admiration for Hitler and his policies. What is also a fact is that towards the end of World War II, our people burnt effigies of the Kaiser in public and sang "anti-Kaiser" songs which then became very popular, in private and public places. Hence, when our Constitution speaks of an example of a "harmonious multi-racial society," of "national stability and political maturity despite the pressures of a sadly divided world," the words are warranted by our colonial and past history as well as the way we have chosen to "build a just, fraternal and humane society."

Indeed, the Railey Report (page 164, record), of which we take judicial notice, acknowledged that the Seychelles showed remarkable political maturity in respect of the events investigated by Judge Railey. In the face of excessive use of force by the police - which was admitted - the demonstrators' reply was to have recourse to legal proceedings, putting their trust in the courts of the country.

Some of us may take the view that the scary remarks made are unjustified. And others that nothing may be taken for granted in this day and age. Whatever it be, the construction of democracy today requires perpetual vigilance. But democracy moves in the right direction when it affords the

people a platform that is impartial and independent for the administration and management of media law to meet the complex challenges of modem times.

On this matter, we cite Lord Bingham in the *ADI* case on the State's duty to create a level playing field:

> The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out The bad and the true will prevail over the false. It must be assumed that, given time the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. This is achieved where, in public discussion, differing views are expressed, contradicted, answered and debated. It is the duty of broadcasters to achieve this object in an impartial way by presenting balanced programmes in which all lawful views may be ventilated. It is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than an auction. Nor is it achieved if well-endowed interests which are not political parties are able to use the power of the purse to give enhanced prominence to views which may be true or false, attractive to progressive minds or unattractive, beneficial or injurious. The risk is that objects which are essentially political may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been

> conditioned to accept them. The rights of others which a restriction on the exercise of the right to free expression may property be designed to protect must, in my judgment, include a right to be protected against the potential mischief of partial political advertising.

The right is the right of the people of Seychelles and the requirement is the requirement of the State to give that explicit guarantee of accuracy, integrity, independence and impartiality of information. As has been stated in the paper by Article 19 (article19.org):

> Freedom of information is the free flow of information and ideas which is diverse, accurate and impartial.

It is clear from the above that there is State responsibility involved. It is in the establishment of a regulatory body, a watch-dog organization which will ensure the accountability of all bodies involved in the broadcasting media, not only the private providers but also those that operate from public funds. Political neutrality in broadcasting cannot be attained where the government is itself judge and party to whether it is fulfilling the expectations of the public in discharging its right to information subject to the rights of others and the public interest.

If institutional autonomy and independence in broadcasting is required of private providers the same rule should apply to public providers. The paper by Article 19 (article19.org) states:

> All too frequently, the public broadcaster operates largely as a mouthpiece of government rather than serving the public interest. In many countries, broadcasting was until recently a State monopoly, a situation which pertains in

some States.

For that reason, article 19 sets down a number of principles designed:

(a) to promote and protect independent broadcasting and yet ensure that broadcasting serves the interests of the public;

(b) to regulate in the public interest and yet prevent that regulation from becoming a means of government control;

(c) to prevent commercial interests from becoming excessively dominant; and

(d) to ensure that broadcasting serves the interest of the public as a whole.

It is our view that because of the complexity of these issues, they may only have been addressed by a body specialized and knowledgeable in the area. By avoiding to do so and inserting a blanket provision of ban against political and religious parties, the State in this instance may have been rightly inspired but needed to implement within the framework of article 168. The right way should have been by placing first things first by setting up the independent broadcasting watch-dog first as the Constitution had set down some 16 years ago under which the ban would have applied.

In the light of the above, we allow the appeal in part.

We allow the appeal on the ground that the spectrum argument is not one that holds valid and to the extent that the Constitutional Court relied on it, it does not represent the law as stated in Part I.

However, we confirm the order reached by the Constitutional Court that the ban provided for in the 2006 Amendment does not amount to an impermissible interference with the freedom of the applicant guaranteed under the Constitution, on other grounds than those invoked in Part I.

We, further, hold that the application of the 2006 Amendment without giving effect to the constitutional obligation contained in article 168 would not amount to a judicious exercise of the legal power existing in the 2006 Amendment.

In addition, pursuant to our powers under article 46(5)(c) and (e) of the Constitution, we direct respondent no 3, on a day to be fixed by this Court to report what progress has been made by the relevant authorities to discharge their obligation under article 168 of the Constitution.

In the light of the fact that the appellant has partly succeeded in this case of constitutional importance, we make no order as to costs.

Record: Court of Appeal (Civil No 4 of 2009)

Joubert v Suleman

Karunakaran J
20 September 2010 Supreme Court Civ 210 of 1999

Tort – fault – negligence – contributory negligence – abuse of right –causation - evidence – expert opinion

The plaintiffs were the co-owners and occupiers of a property in Mahe. The three defendants each developed property on a terrace above the plaintiffs. In 1997, during a particularly heavy rainfall, the plaintiffs' house was flooded and destroyed. The plaintiffs alleged that the defendants' developments were the cause of the unprecedented and abnormal level of flooding and claimed damages in respect of loss caused by the flooding.

HELD

1. In order to establish liability under article 1382 of the Civil Code there must be damage, a causal link, and fault.

2. Fault may be the result of a positive act or of an omission.

3. A causal link will be established if an act constitutes the primary cause of the damage. It does not need to be the sole and immediate cause, but must be more than simply a cause amongst a bundle of contributory causes.

4. An owner commits an abuse of the right of ownership if they carry on an activity on their land which causes prejudice to a neighbour if such prejudice goes beyond

the measure of the ordinary neighbourhood obligations.

5. A person is liable not only for the damage caused by their own act but also for the damage caused by the act of those persons for whom they have responsibility.

6. A person is liable not only for the damage that they have caused by their own act but also for the damage caused by things in their custody. There is a presumption of liability raised against the person who has custody of a thing which causes damage. The presumption can be rebutted only if the custodian can prove that the damage was solely due to:
   (a) the act of the victim;
   (b) the act of a third party; or
   (c) an act of God (force majeure).

7. While a defendant may have a remedy against a third party who contributed to the damage, this will not exonerate the defendant from liability toward the plaintiff.

8. Where there has been contributory negligence by a third party, the defendants will only be liable to the extent of their share of responsibility for the damage caused by the primary cause.

9. In any action for damages that is founded upon the fault or negligence of the defendant, if such fault or negligence is also found on the part of the plaintiff or third party that contributed to the damage, the

court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

10. The court has the power to gauge the degree of accuracy and validity of an expert opinion by using the reasons on which the opinion is based as a touchstone.

Judgment: Damages of R 108,000 awarded.

Legislation cited
Civil Code of Seychelles arts 1382, 1384

Foreign legislation noted
French Civil Code

Cases referred to
Attorney-General v Jumaye (1978-1982) SCAR 348
Chariot v Gobine SSC no 5 of 1965
Charlette v Gobine (1969) SLR 200
Coopoosamy v Delhomme (1964) SLR 82
De Commarmond v Government of Seychelles (1983-1987) 3 SCAR (Vol 1) 135
Desaubin v UCPS (1977) SLR 164

Foreign cases noted
Bull. Civ. 1980 III no. 206 Case SCI *Lacouture v Enterprises Caceres*
D.1972. Somm 49, 3 Civ 8 juillet 1971
D 1972 Somm 67. Trib gr inst, Toulouse, 17 Mai 1971
D 1973 Somm 148 Colmar, ler ch 12 Decembre 1972
D 1982 25 *Mandin v Foubert* Cour de cassation
Laneworks Inc v Thiara 2007 CanLII 16449 (Ontario SC)
Ste Mobil Oil Française v Enterprise Garrkjue Tri.gr. Inst Bayonne 14 décembre 1970 JCP 1971 16665

Frank ALLY for the plaintiffs
Philippe BOULLE for the 1st defendant
Keiran SHAH for the 2nd defendant
Conrad LABLACHE for the 3rd defendant

Judgment delivered on 20 September 2010 by

KARUNAKARAN J: The plaintiffs in this suit are co-owners and occupiers of an immovable property, parcel H3594 with a dwelling-house thereon, situated close to a valley on the slope at the bottom of a mountain at North East Point, Mahe. The defendants are and were at all material times, the owners and occupiers of their respective parcels of land situated on top of the mountain above the plaintiffs' property.

It is averred in the plaint that the plaintiffs had been residing on their property for about 12 years prior to the defendants' occupation of their respective properties in the mid-1990s. According to the plaintiffs, on dates unknown before January 1997 all three defendants started developments and constructed their respective houses and facilities on the slope of the terrace above the plaintiffs' property. According to the plaintiffs, due to these developments carried out by the defendants on their properties, torrential rainwater in 1997 changed its course and flowed heavily onto the plaintiffs' land. It flooded the area, bringing down debris and residual materials which damaged the plaintiffs' house and properties, ultimately causing loss, and material and moral damage to them. The plaintiffs further aver that before the development of the said properties by the defendants, they had never been troubled or affected by rainwater or the washing down of residual materials. Furthermore, the plaintiffs aver that the loss and damage caused to their property was due to and occasioned by the defendants' negligence and fault in the care and construction of their buildings and developments of their respective properties. According to the plaintiffs, the following are the particulars of fault which the defendants

committed causing loss and damage to the plaintiffs:

(a) The defendants failed to properly or at all take effective or any measure to control the flow of rainwater and/or residual materials from their properties unto that of the plaintiffs;

(b) The defendants failed to construct proper drainage or at all so as to prevent the flow of rainwater or residual material from their properties unto that of the plaintiffs;

(c) The defendants failed to ensure that diversion of rainwater and residual materials originating from their constructions and developments did not affect the plaintiffs;

(d) The defendants failed to put in place or erect satisfactorily measures to ensure that the diversion of rainwater onto plaintiffs' property was properly controlled; and

(e) The defendants failed to take necessary steps to prevent any adverse effects to the plaintiffs' property and failed to take into account the fact that their development and construction would affect the plaintiffs adversely.

The plaintiffs thus claim that they suffered loss, damage and inconvenience as a result of the fault of the defendants - vide amended plaint dated 2 February 2002. The particulars of the loss, damage and expenses allegedly incurred by the plaintiffs, as per the amended plaint, are as follows:

(a) Damage to furniture, materials and clothes		R 46,000
(b) Damage to terraces and land		R 18,500
(c) Loss of aesthetic value		R 35,500
(d) Moral damages		R 100,000
	TOTAL	R 200,000

The plaintiffs further aver that despite repeated requests the defendants refused or neglected to make good the said loss and damage. The plaintiffs therefore pray the Court to enter judgment in their favour and against the defendants jointly and severally in the sum of R 200,000 with interest on the sum as from the date of plaint and with costs of this action.

On the other side, all three defendants in their respective statements of defence, having completely denied the plaintiffs' claim aver that they did not commit any fault and are not liable to the plaintiffs for any damages whatsoever. The first defendant has admitted in his defence that he is the owner and occupier of a parcel of land at North East Point, but denies each and every allegation made by the plaintiffs in relation to the construction and development of his property and the particulars of fault and the damages allegedly suffered by the plaintiffs. The second defendant also in his defence denies liability stating that although he is a co-owner of a plot of land at North East Point on which he owns a house and has been living therein since September 1999, the said house was constructed by a licensed building contractor and the construction and development on his property were carried out in accordance with planning law and approval by relevant authorities. Further the second defendant has averred in his defence that since he has built his house within an approved housing estate and not a sole developer, all

infrastructures were built by the estate promoters, the Government of Seychelles. Moreover, the second defendant has averred that he is bound to receive rainwater flowing down his land from land of higher elevation. He therefore cannot be responsible for water flowing down from his land or through his land to the land of lower elevation. He did nothing to increase the burden of land on lower level. He has built adequate storm water drains and gutters to control the flow and channel the water flow. Further, in the alternative, if at all the court finds him liable, it should apportion his responsibility in proportion to his development of the estate.

The third defendant, a company, although it admits in its defence that it is the occupier of a piece of land at North East Point since 1996, denies its alleged ownership. It also denies all the allegations made by the plaintiffs in relation to its construction and development of the property and the alleged fault and the damages suffered by the plaintiffs. The third defendant also denies liability stating that although it is using that plot of land to put up certain structures and maintain them for telecommunication purposes, it did not commit any fault causing damage whatsoever to the plaintiffs' property or to that of anyone in the neighbourhood. Hence, the third defendant also totally denies the plaintiffs' claim. In the circumstances, all three defendants thus deny liability and seek dismissal of this action.

The essential facts which transpire from the evidence adduced by the parties are these:

It is not in dispute that the first plaintiff, Mrs Marie-Therese Joubert is the owner of the property parcel H3594 at Carana, Mahe and has been living there with her family for the past 14 years. The first defendant, Mr Ebrahim Suleman owns and lives on an adjacent property lying on a higher terrace above the plaintiffs' property. The second defendant, Mr Franky Adeline also owns and lives in another property adjoining and

above the first defendant's property, whereas the third defendant, Cable & Wireless (Seychelles) Ltd, is using another plot of land on top of the mountain lying just above the second defendant's property. It is also not in dispute that the third defendant has installed and is using a telecommunication tower on that plot of land.

The plaintiff testified that in December 1997 during the torrential rain that admittedly caused heavy flooding all over Mahe, the rainwater from the higher grounds of land above her property gushed into, flooded and destroyed her property. Since she came to live on her property, the rainwater from higher terrain had never run down onto her property causing such deluge and destruction. It was an abnormal and unprecedented incident. Hence, she went up the mountain to find out where the rainwater was coming from and why. As she reached the higher terraces, she noticed the first defendant having flattened the terrain, was building his house on his property and the construction work was in progress. She went further up to check and observed the second defendant was also in the process of developing his property and the third defendant had already developed the land, and had its telecommunication tower installed on the property. The first plaintiff further testified that each time it rained the water came down, flooded and eroded her property. The rainwater that was coming down from the third and second defendants' land had created some sort of gutter on the sloping terrain and the water flowed through it and directly reached her property. This problem continued until the Seychelles Housing Development Corporation constructed a gutter to control the water. According to the plaintiffs, the problem due to diversion of the watercourse occurred only after the defendants started developments on their properties and the plaintiffs had never experienced that problem before.

During the torrential rain that lashed Mahe in 1997, the rainwater from the defendants' properties that gushed out

brought down lots of soil, debris and other material onto the plaintiffs' land and destroyed her house, swept away her bed, furniture and other household objects. The superstructure of the house was extensively damaged. Consequently, the SHDC pulled down the entire damaged structure of the house and had to build a new one at the cost of R 142,000 to house the plaintiffs' family on higher ground on the same property. According to the first plaintiff's observation and logic, the rainwater gushed out and took a destructive course because of the defendants' fault, in that the defendants while developing their respective properties and building their houses, failed or neglected to build a proper gutter to control and regulate the course of rainwater that overflowed from their properties. As a result, the rainwater gushed down, flooded and destroyed her house and other movable objects kept inside the house. She also produced a photo album containing 33 photographs showing the location of her house, the terraces, the course taken by rainwater, the debris brought down by the rainwater, the extensive damage caused to the house etc. According to her estimate, the cost of the wall and other structures that were damaged by the rainwater would be around R 150,000; the damage to her furniture, materials and clothes R 46,000; the damage to her land and terraces R 18,500; and for the loss of aesthetic value of her land R 35,500 Furthermore she testified that she and the second plaintiff also suffered morally, underwent mental anguish and inconvenience as a result of that incident and hence claims moral damages in the sum of R 100,000. Moreover, the first plaintiff testified that now the situation has been remedied since SHDC has constructed a new house on higher ground and a retaining wall to control the flow of the rainwater at the cost of R 166,965. This wall had to be built to prevent the soil from coming down further from the upper terraces due to the flow of rainwater.

In cross-examination, the first plaintiff reiterated that she never cut the terrace nor built her house on the valley obstructing

the natural and original course of the rainwater coming down from the terraces of the defendants. She also stated that she did not commit any fault in cutting the terrace or in building her house on the watercourse passing through the valley. She denied that she was responsible for damage to her house and property. According to her, she had built the house a long time before the occurrence of the catastrophe and it had never been the case before the defendants had started developments on their land. The testimony of the first plaintiff in cross-examination reads thus:

> I did not cut the terrace. It was the Government that built the gutter. The Government acquired part of my land to build a gutter and now when the water comes down it no longer affects me. They built the gutter after I had been affected. Had they built the gutter I would not have been affected since I have been living there for all my life and I have never been affected ... I do not know whether the Government or Planning is guilty but the water has affected me. Government (through) SHDC sold me the land and the house. I had finished paying my loan for the land and the house collapsed and I had not yet finished paying SHDC and they had to give me another house.

Mr Pierre Rose (PW2), the husband of the first Plaintiff (PW1), also testified, corroborating the evidence given by PW1 on all material particulars and relevant facts. He also identified the photographs and described the location of their house, the terraces, the watercourse, the debris brought down by the rainwater, the damage caused to the house etc.

Mr Patrick Joubert (PW3), the son of the plaintiffs, also testified in support of the case for the plaintiffs. He stated that a couple of weeks after the alleged incident he filmed the

location of the properties and the damage caused to the plaintiffs' property using his brother's video camera. As he testified, he played the tape on a VCR machine and showed the images to the Court. Indeed, the testimony of PW3 in this respect runs thus:

> This film was taken after the rainfall. I am playing the tape in pause or slow motion. You can see the path where the rainwater passed to reach our house. You can see the top of the hill wherefrom the rainwater originated to reach our house. There are bushes and tall grass over which the rainwater passed. On the piece of land uphill, there was no wall before. At the top again you can see the house of one of the defendants. It was being built at the time of the incident. On Mr Adeline's piece of land, there was no wall, no building. There were only broken pieces of rocks and leaves. The Tower of Cable and Wireless has been erected on the red earth road. It is at the top. There are tall trees there. Somewhere near there is downhill where a strip of road built by Cable and Wireless and not finished. No gutter or branch for the water to pass.

In view of all the above the plaintiffs claim that they suffered loss and damage in the total sum of R 200,000 and so seek judgment in their favour jointly and severally against the defendants.

On the other side, the first defendant Mr Ebrahim Suleman testified in support of his defence. According to him, although he is and was at material times, the owner of the land title H3830 situated above the plaintiffs' property, he did not commit any fault by carrying out development or construction works on his property in such a way to cause damage to the

plaintiffs' properties. The said works were indeed, carried out by an independent building contractor, Mr Herman Maria, whom he had retained for the construction of his house. He further testified that there was a heavy rainfall during the construction time and the first plaintiff approached him while he was in his shop and complained that the construction works carried out on his property was the cause of flooding and damage to her house. That time, by sheer coincidence, the building contractor Mr Herman Maria was also present in his shop. He told the first plaintiff that since her property lies on the valley, it is bound to get the rainwater from the higher grounds. However, the rainwater the plaintiff was complaining of did not come from the first defendant's property. Besides, Mr Suleman testified that since his property is located on a sloping terrace, his building contractors had to cut the terrace, build a retaining wall and do filling to level the ground on his property. In any event, according to the first defendant, the Government of Seychelles had already developed that area - "Carana Estate" - by putting up an estate road by cutting terrain and other infrastructure before the defendants started construction of their houses and other structures. Mr Herman Maria also testified in support of the case for the first defendant.

According to Mr Maria, he built the house on the first defendant's property according to drawings approved by the Department of Planning. He admitted that he had to cut the slope in order to put up a retaining wall and filled inside the wall. There is a valley behind the wall. Mr Ferdinand Berlouis, a building designer retained by Mr Suleman also testified that since the first defendant's property is located on a slope, they had to put up a retaining wall and fill the ground level. This was done by using shovels and spades, not machines with a view to minimising the damage to the terrace. In the circumstances, Mr Suleman contended that he did not commit any fault and is not responsible for the alleged flooding and damage to the plaintiffs' property.

Mr Brassel Adeline, who was then working as the Construction and Maintenance Manager with SHDC testified that in 1997, following a complaint from the plaintiffs he visited the house of the plaintiffs at North East Point. He observed a number of cracks in the foundation of the wall. Subsequently, he requested a technician of SHDC, Mr Mark Agripine, to examine the condition of the house. The technician reported that since the plaintiffs' house had been built in a valley, its foundation should have been stronger. It should have been built in concrete with steel bars. However, since they did not use concrete with steel bars, cracks had appeared in the foundation wall. According to him, the erosion and soil movement caused by the rainwater would have affected the foundation of the house and hence cracks would have appeared. In any event, SHDC pulled down the damaged house and built a new house for the plaintiffs on higher ground. Mr Steve Serret, who was then working as Senior Planning Officer with SHDC, also testified that he visited the plaintiffs' house on three occasions but did not see any damage. Ms Greta Simara, an ex-employee of SHDC, also testified in support of the defence case. She produced a report dated 12 November 1996 prepared by the technician, Mr Agripine, following a complaint made by the plaintiffs regarding the defects in the house.

In view of all of the above, the defendants contend that they are not liable in law either jointly or severally to compensate the plaintiff for the alleged loss and damage. Therefore, the defendants seek dismissal of the suit with costs.

I meticulously perused the pleadings and examined the evidence on record including the documents produced as exhibits in this matter. I also watched the visual presentation from a recorded video cassette played in open court by PW3 showing the geographical and topographical location of the suit-properties in issue with panoramic views filmed a couple of days after the alleged mishap. The Court also had the

opportunity of visiting the *locus in quo* where it observed the location of the plaintiffs' house in relation to the defendants' properties and the valley in question. The Court also noted the constructions made on the defendants' properties including a long retaining wall on the first defendant's property, which has evidently been built cutting the terraces on the slope of the mountain. It also noted the developments and constructions made on the second defendant's property as well as a telecommunication tower erected on the leasehold land held in the third defendant's use and custody. The Court also noted the gradient of the valley going down from the defendants' properties towards the house of the plaintiffs.

The essence of the case of the parties in this matter is:

> Undisputedly, the plaintiffs' house was constructed about 12 years prior to the defendants' development, construction, use and occupation of their respective properties. The major construction works on the properties of the defendants such as cutting of terraces, putting up retaining walls, leveling of the ground, construction of houses and installation of a telecommunication tower were all carried out in the mid-1990s. The plaintiffs basically allege that consequent upon the said developments and constructions made on top of the mountain, the rainwater accumulated there during heavy rains, diverted its original/natural course, poured down, flooded and damaged the plaintiffs' properties situated at the lower level on the slope of the mountain. According to the plaintiffs such flooding was unprecedented and abnormal, which resulted in material loss, damage and inconvenience to them. The plaintiffs therefore, sue all three defendants conjointly for damages

based on a common cause of action. However, the defendants deny liability in toto stating in essence, that there was no *causal link* between their acts of development and construction on their properties *and* the damage allegedly suffered by the plaintiffs.

Be that as it may, as I understand the pleadings and the evidence on record, it appears to me that there are two limbs to the common cause of action relied upon by the plaintiffs in this matter. They are:

(i) the defendants as owners and or occupiers of their respective parcels of land are responsible for their unlawful acts namely, *abuse of their rights of ownership,* which is a fault under article 1382 of the Civil Code and through those acts caused damage beyond the measure of the ordinary obligations of neighbourhood. The third defendant, Cable and Wireless, is also liable being a co-author of the fault of the first and the second defendants; and

(ii) The defendants as custodians of their respective parcels of land with all its contents and accumulated flow of rainwater thereon, are liable for the damage it caused to the plaintiffs under article 1384-1 of the Civil Code of Seychelles.

In the light of the above dichotomy of cause of action, I carefully examined the submissions of counsel touching on the several questions of law and fact. I diligently analysed the contentious issues and the relevant provisions of law.

To my mind, the following are the fundamental questions that arise for determination in this suit:

1. Did the defendants as owners of their respective

parcels of land or superstructures thereon, commit any fault under article 1382 by abusing their rights of ownership resulting in or causing damage to the plaintiffs' property exceeding the measure of the ordinary obligations of neighbourhood?

2. Did any third party, to wit: (i) the Government of Seychelles, which developed the "Carana Estate" or (ii) the building contractors who were engaged by the defendants to put up buildings or structures on their respective properties or both jointly, commit any 'fault" in terms of article 1382 of the Civil Code in the course of developing the estate or constructing the building on defendants' properties and in that, did they cause or contribute to the diversion of watercourse through the valley in such a way that is detrimental to the plaintiffs' property? If yes,

3. Are the defendants vicariously or otherwise liable for the damage caused to the plaintiffs' property by the fault of those third parties?

4. Was the damage caused by the properties the defendants had in their custody at the material time either as proprietors or custodians or otherwise? If yes,

5. Are the defendants liable for the damage caused to the plaintiffs by those properties held in their respective custody in terms of article 1384 (1) of the Civil Code?

6. Was the damage caused solely due to the fault of the defendants or third parties or partly due to contributory negligence on the part of the third parties including the plaintiffs' builders, who had

constructed the plaintiffs' house on the valley? If so;

7. What is the extent or degree of contributory negligence, if any?

8. What is the legal impact of such contributory negligence on the quantum of damages awardable to the plaintiffs? And

9. What is the quantum of damages the plaintiffs are eventually entitled to, if any?

Before one proceeds to find answers to the above questions, it is important, first to ascertain the position of law relevant to the issues that arise for determination.

In fact, the first limb of the cause of action mentioned supra is based on the principle of fault under article 1382, the most famous of all the articles of the Civil Code. As A G Chloros has rightly observed in his book *Codification in a Mixed Jurisdiction,* in the Civil Code of Seychelles this principle has been expanded substantially beyond the brief statement of the principle of liability for fault. The original article found in the French Code is preserved in paragraph (1), but four other paragraphs have been added to it. The object was to incorporate in our Civil Code principles which require definition. Thus, it is evident that three elements are required in law in order to establish liability. They are - (i) damage (ii) a causal link and (iii) fault. In French law these principles were worked out by the jurisprudence; but, if the law was to be simplified, it was essential to reduce to the minimum the need to go beyond the Code and resort to the French principles and jurisprudence. Nevertheless, the expansion of article 1382 as Chloros has rightly observed in his book did not occur arbitrarily but is based upon the French jurisprudence which it has sought to replace. Hence, in this matter, the court inevitably resorts to the French law and jurisprudence on this

subject.

Having said that, paragraph 2 of article 1382 defines fault on the basis of principles adopted by the French doctrine. This paragraph stresses that fault may be the result of a positive act or of an omission. Paragraph 3 incorporates a definition of abuse of rights. This is implied in the French law of contract but in a long process of case law development supported by the doctrine, abuse of rights acquired the status of an independent tort.

Having thus identified the position of law on the abuse of rights, which is nothing but a fault under our Civil Code, I will now proceed to examine the evidence on record to find out whether all three elements (mentioned supra) are present in the instant case in order to establish liability against the defendants either under article 1382 or under article 1384-1 or simultaneously under both articles of the Civil Code of Seychelles.

Element no (i): damage

It is not in dispute that the plaintiffs' house did sustain damage due to abnormal flooding and overflow of rainwater. I believe the plaintiffs in every aspect of their testimony pertaining to the devastation and the resultant damage caused to their properties. This is corroborated by the real evidence adduced through photographs and video recordings. The plaintiffs evidently had to relocate and construct a new house availing a fresh housing loan from the SHDC; the household items such as beds, sofas, chairs, etc were also swept away by the flood that came down from the properties of the defendants. Hence, I find on evidence that the plaintiffs did suffer material loss and damage due to flooding caused by the rainwater that came down from the defendants' properties. In the circumstances, I conclude that the first element of damage required for establishing liability is present in the instant case.

Element no (ii): a causal link

Now, the most important and the most contested issue in this matter is whether there has been a causal link between the development cum construction works carried out by the defendants on their properties and the damage that occurred to the plaintiffs' property. In other words, whether the development and construction works carried out by the defendants on their properties solely caused or contributory caused the overflowing of rainwater that damaged the plaintiffs' property. This alleged causal link is the crucial area at issue, the determination of which, in my humble view, requires the opinion of an expert in the field of land developments on mountainous terrain and the flood hazards to the low-lying areas. This subject obviously involves a specialised technical study to assess the effect of land development vis-a-vis its adverse impact on the environmental, geographical and climatic factors leading to flood hazards in the neighbourhood. In passing, it is pertinent to note that an expert's opinion on any subject is relied and acted upon by the Court only for the reason/s given by the expert in validation of his opinion, to the satisfaction of the Court. The Court presumably, has the power and wisdom to gauge the degree of accuracy and validity of the expert opinion on the touchstone of the reasons on which that opinion is based. Only upon such satisfaction, may the Court rely and act upon that opinion. However, unfortunately, in the instant case, there is no expert's opinion available on this crucial issue save the views expressed by non-expert witnesses. In the circumstances, the Court inevitably has to form its own opinion, nevertheless based on valid reasons to adjudicate upon the issue. With this approach in mind, I diligently scrutinised the entire evidence on record so as to form an informed opinion based on valid reasons in order to resolve the issue of the alleged causal link, in this respect.

Firstly, I believe and accept the testimony of the first plaintiff, a

percipient witness on her conclusion as to the alleged cause and effect of the entire flood episode. Evidently, her conclusion is based on her personal observation of facts and the chain of events that took place over a period of time, starting from the development of land on the mountaintop by the promoters, until it eventually culminated in the abnormal flooding and destruction of her property. Although she had been residing on her property in the low-lying area for about 12 years prior to the defendants' acts of development and construction on their properties, she had never before during torrential rain, observed or experienced or suffered such a devastating flow of rainwater from the higher ground where the defendants' properties are situated. Secondly, I note, all three defendants have leveled or flattened their respective terrain on top of the mountain, effectively changing its gradient and thereby increasing the area of flat surface for catchment of the rainfall. A flat mountain top would obviously, lead to more accumulation or floating volume of rainwater per square foot/per second than cliff-like sides and would cause overflow. Thirdly, none of the defendants have built any gutters on their properties or at any rate have not made adequate and effective provisions within the measure of the ordinary obligations of neighbourhood to regulate, control or distribute the flow of rainwater falling down from their respective properties. Fourthly, on a balance of probabilities, it seems to me, that the promoter, Government of Seychelles, which originally developed and sold the plots to the defendants, and the Planning Authority that granted approval for the constructions on the defendants' properties, did not foresee where they ought to have reasonably foreseen and assess the flood hazards posed to the low-lying terrain due to such land developments on a cliff-like mountaintop with high-angle slopes. They presumably did not develop any flood hazard map and the land development priority map for identifying the potential flood spots or make necessary and/or sufficient provisions reasonably to avert such hazards.

For these reasons, I am of the opinion that although the defendants' acts of development and construction on their properties do not constitute the sole and immediate cause for the damage to the plaintiffs' property, they obviously constituted the primary cause, not simply "a cause" amongst the bundle of the contributory causes such as negligence on the part of the promoters or Planning Authority or contractors or other third parties. Hence, I find on the evidence and conclude that there exists the necessary causal link and proximity between the acts of the defendants and the damage caused to the plaintiff's' property.

Element no (iii): fault

The defendants or their predecessor-in-title or the employees or préposé of the defendants, who carried out the alleged acts including the flattening of their respective land on the steep mountaintop, construction of buildings and retaining walls thereon, failed to reasonably foresee the said flood hazard or at any rate, failed to make necessary provision for proper gutter/s to control or regulate or distribute the potential accumulation of rainwater so that its flow would not cause floods and devastation to the residents and properties in the neighbourhood, especially of the low-lying areas. In my judgment, the alleged acts of the defendants in this respect were the primary cause for the damage caused to the plaintiffs' property. The defendants in that process obviously failed to take necessary precaution and reasonable care in the use of their rights of ownership. They, in my view, exceeded the measure of "the ordinary obligations of neighbourhood" in this respect. As far as liability is concerned, I find that the acts of all three defendants in combination constituted the primary cause for the damage, albeit there are secondary causes contributed by the third parties. As owners of their respective parcels of land or superstructures thereon, the defendants abused their rights of ownership that resulted in loss and damage to the plaintiffs. Is it a fault in law?

Yes, it is. Indeed, an owner of land commits a fault under article 1382, known as an "abuse of his right of ownership", if he carries on an activity on his land which causes prejudice to a neighbour if such prejudice goes beyond the measure of the ordinary obligations of neighbourhood. Herein, it is relevant to note that in the case of *Desaubin v UCPS* (1977) SLR 164, the Court held, as summarised in the headnote:

> Under the Seychelles Civil Code, although an attempt had been made in article 1382 to define and restrict the notion of “fault” , the equivalent of “faute" in the French Civil Code, and the definition of “fault” in the Seychelles Code seemed to require an element of imprudence or negligence or an intention to cause harm, it appeared from paragraph 3 of article 1382, as well as from sect 5 (2) of the Seychelles Code, that there was nothing exclusive in such definition and that the concept of “fault” had not been curtailed within the narrow compass of the definition in the Seychelles Code. Hence the legal position had not been changed by the enactment of the new article 1382.
>
> Under the French Civil Code, the principle evolved… is that the defendant is liable in tort only if the damage exceeds the measure of the ordinary obligations of neighbourhood.
>
> Negligence or imprudence in not taking the necessary precautions to prevent a nuisance are not indispensable for liability which may exist even where the author of the nuisance has done all he could to prevent it, and the damage is the inevitable consequence of the exercise of the industry.

However, the defendants in the instant case though they appear to have acted in the exercise of their legitimate right of use and enjoyment of their respective properties, have indeed acted causing detriment to the owner of the property in the neighbourhood. By increasing the flat surface of catchment, triggering the accumulation and allowing the unregulated flow of rainwater from their properties, the defendants have exceeded the measure of "the ordinary obligations of neighbourhood" and have caused the damage to the plaintiffs. This is obviously a fault in terms of article 1382(3) as discussed supra. The third defendant is also the co-author of the fault of the first and second defendants in this respect. Therefore, I find that all three defendants are jointly liable in terms of article 1382(1) of the Civil Code, which reads:

> Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.

Moreover, the first defendant also testified that he is not personally responsible for the fault, if any, committed by the independent building contractor, Mr Herman Marie, whom the former had engaged for services, that is, for the construction of his house. Mr Hermann Marie in turn testified to the effect that he is not personally responsible for the fault, if any, committed by the Planning Authority as Mr Marie carried out every detail of the construction as per the plan and design approved by the Planning Authority.

As I see it, whatever the degree of contributory negligence on the part of the building contractors or other third parties, the fact remains that the defendants are liable not only for the damage they caused by abuse of their rights of ownership but also for the damage caused by the act of negligence/fault of their employees/servants/préposés/agents for whom the defendants are vicariously responsible in terms of article 1384(1) of the Civil Code, which reads:

> A person is liable not only for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody.

Although Mr Herman Marie was an independent contractor employed by the first defendant to construct the house according to the plans and drawings approved by the Planning Authority, still the first defendant is in law jointly and severally liable with the contractor for the prejudice suffered by the plaintiffs as co-author of the fault of the first defendant: vide D.1972. Somm 49, 3 Civ 8 juillet 1971.

In the circumstances, I find that the defendants are liable for the fault or negligence of any of their employees, workers, agents or servants that caused damage to the plaintiffs' property.

Having said that, I hold that a person is liable not only for the damage that person has caused by his or her own act but also for the damage caused by things in the persons custody. The owner of land is its custodian and also he or she is custodian of everything attached thereto or situated or accumulated or stored thereon including soil, debris, residual material, rainwater, etc, as he or she has and never loses the use, direction and control of the land, its contents or of the constructions and other operations thereon: vide (i) *de Commarmond* (1983-1987) 3 SCAR (Vol 1) 155; *(ii) Coopoosamy* (1964) SLR 82 at 86 and (iii) Trib Gr Inst de Toulouse, 17 mai 1971, D 1972 Somm 67.

In fact, liability under article 1384(1) is 'near absolute'. There is a presumption of liability raised against the person who has the custody of the thing by which the damage is caused. Such presumption may be rebutted in three cases only, that is, if the person against whom the presumption operates can prove that the damage was solely due: (1) to the act of the victim; or

(2) to the act of a third party; or (3) to an act of God (force majeure) external to the thing itself, per Sauzier and Goburdhun JJ in *de Commarmond* (aide supra). However, in the instant case, the defendants have not rebutted the presumption by adducing evidence or at any rate by any substantive evidence, to prove that the damage was solely due to any of the said three factors.

It is pertinent to note herein that the application of article 1384(1) of the Civil Code to cases of damage arising from land development and construction works on adjoining land is supported by other authorities vide: (i) Lalou *Traite de a Responsabilite Civile*, para 1205 and 1206; and (ii) *Ste Mobil Oil Française v Entreprise Garrkjue,* Tri gr inst, Bayonne, 14 décembre 1970 JCP 1971 16665.

It is also the case of the defendants that any loss or damage occasioned to the plaintiffs' property arose through the plaintiffs' own fault or those of their agents, préposés, employees or contractors in the construction of their house on the valley obstructing the watercourse. In this respect, it is true that in 1996, that was, about a year before the flood episode, the plaintiffs made a complaint to the SHDC regarding some cracks found on the walls of their house. Following that complaint Mr Mark Agripine, a technician, from the SHDC inspected the plaintiffs' house and submitted a report dated 12 November 1996 to SHDC stating that those cracks had appeared due to structural defects in that, the builder who originally constructed the plaintiffs' house did not use strong foundations, though such foundation was reasonably necessary since the house was located on the valley close to the watercourse. In the circumstances, I find that the plaintiffs also through the negligence of their builders/contractors have certainly added to the contributory causes that resulted in the damage to their house.

I gave careful thought to the line of defence raised by the

defendants attributing or imputing fault on the part of third parties such as the promoters of the estate, independent contractors etc. As I see it, the defendants may have a remedy against those third parties but such defence cannot in law exonerate the defendants from liability towards the plaintiffs as this is not a defence under article 1384(1). Although the defendants were at liberty to join the independent contractors in guarantee as co-defendants in this suit, they did not choose that course of action for reasons best known to them. See D 1973 Somm 148 Colmar, ler ch 12 Decembre 1972.

As stated above, the first limb of the cause of action is based on article 1382(3) and the second rests on the application of article 1384(1) of the Civil Code. The only defence open in this case for the defendants to dispute liability with regard to both limbs is proof by the defendants that the damage was caused solely either -

(i) by the act of the plaintiff, or
(ii) by the act of a third party for whom the defendants were in law not responsible, or
(iii) act of God (force majeure).

Upon the evidence, I find the defendants have not established any such defence. However, it is necessary to analyse in some detail the "contributory negligence" raised by the defendants and its legal effect on the plaintiffs' claim for damages.

Contributory negligence

For the reasons stated hereinbefore, I find that (i) the Promoter of Carana Estate, (ii) the Planning Authority, (iii) the building contractors of the defendants, and (iv) the building contractor who constructed the plaintiffs' house on the valley close to the watercourse, all hereinafter collectively referred to

as the third parties, have directly or indirectly through their imprudence, put in their respective share of the contributory causes, de hors the primary cause for the damage caused to the plaintiffs. In the circumstances, I hold that the defendants are jointly liable but only to the extent of their share of responsibility to the damage caused by the primary cause. Therefore, I find there is divided responsibility (responsibilité partagée) as propounded by Sir Campbell Wylie CJ (as was he then) in *Chariot v Gobine* SSC no 5 of 1965. Hence, the plaintiffs would lose their right to damages to the extent of the contributory negligence of their own contractor and that of the third parties who have put in their respective share of the contributory causes leading to the damage and so I find.

Although the English law of tort recognises contributory negligence on the part of the plaintiff or any third party as a valid defence against tortious liability, our law of delict under article 1382 or 1384 of the Civil Code does not seem to have expressly recognised the concept of contributory negligence as a defence against liability. Is then, contributory negligence available under article 1384(1)? The French commentators and the jurisprudence have answered that question in a positive way. It does exist under article 1384(1) and by the same token it should also in my considered view, exist under article 1382 (1) to (4).

In support of this proposition, we find for instance, in *Dalloz Encyclopedie de Droit Civil* 2nd ed Tome VI, Verbo Responsabilité du Fait des choses inanimées, note 573, which provides that -

> 573. Alors que le fait d'un tiers ne peut normalement entraîner qu'une exonération totale de la responsabilité du gardien, a l'exclusion d'une exonération partielle, le fait ou la faute de la victime pourra entraîner aussi bien une exonération partielle qu'une exonération

> totale de la responsabilité, le problème ne se présentant pas de la même façon que pour le fait d'un tiers.

This refers to article 1384(1). This is what the commentators have said and again in Mazeaud *Traité Theorique et Pratique de la Responsibilité Civile,* Tome II, note 1527 at page 637:

> Aujourd'hui les arrêts affirment que le gardien doit être exoneré partiellement, dans une mesure qu'il appartient aux juges du fond d'apprécier souverainement, si le fait relève à l'encontre de la victime, quoique non imprévisible ni irrésistible, a cependant contribué à la production du dommage.

This being so, since contributory negligence may be pleaded in a claim founded on article 1384(1) from which our article 1383(2) has been inspired, then that defence may also be pleaded in a claim based on article 1383(2) because, as I have stated supra, that article in our Code Civil has been borrowed from article 1384(1) of the French Civil Code.

At the same time, it is interesting to note that as Laloutte J observed in *Attorney-General v Jumaye* (1978-1982) SCAR 348, in article 1383(2) in relation to motor accident cases, an attempt has been made to solve by legislation one of the difficulties which had arisen in France in connection with collision with motor vehicles. According to his interpretation, that legislature has removed contributory negligence from being raised as a defence to liability under article 1383(2). Be that as it may, in the case of D 1982 25 *Mandin v Foubert*, Cour de cassation, the Court in view of article 1382 of the Code Civil held thus:

> Given that a person whose fault, even if criminal, has caused damage is partially relieved of

liability, if he proves that fault on the part of the victim contributed to the harm

Besides, it is a recognised principle in French jurisprudence that when a complainant, or any person for whom is responsible, is found to have contributed to the damage caused the courts are free to decide the extent to which each party is liable for the damage. Vide, Bull civ 1980 III no 206 Case SCI *Lacouture v Entreprises Caceres.* Indeed, in any action for damages that is founded upon the fault or negligence of the defendant, if such fault or negligence is found on the part of the plaintiff or third party that contributed to the damage, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively. See, *Lanworks Inc v Thiara* (2007) CanLII 16449 (Ontario SC).

Having regard to all the circumstances surrounding the causal link discussed supra, in my judgment, the third parties are jointly 20% responsible for the damage on account of the contributory causes they authored through their imprudence, to the damage caused. Obviously, for the said 20% of the contributory causes, the defendants are not responsible. Hence, I hold them liable only to the extent of 80% of the actual damage caused to the plaintiffs. For these reasons, the consequential damages payable by the defendants should be reduced by 20% on the actual loss and damage sustained by the plaintiffs in this matter.

Having scrutinized the claims under different heads for loss and damage, I find the quantum claimed by the plaintiffs in the sum of R 100,000 for moral damages and R 35,500 for loss of aesthetic value are excessive, unreasonable and exaggerated. In my meticulous assessment, the quantum should be reduced to R 50,000 and R 20,500 respectively. Having said that, in the absence of any pleadings in the defence, *a fortiori* in the absence of any other evidence on

record to the contrary, I hold that the plaintiffs did suffer actual loss and damage as follows:

(a) Damage to furniture, materials and clothes	R 46,000
(b) Damage to terraces and land	R 18,500
(c) Loss of aesthetic value	R 20,500
(d) Moral damages	R 50,000
TOTAL	R135,000

As found supra, the defendants are liable only to the extent of 80% of the actual damage caused to the plaintiffs. Hence, the defendants are jointly liable to pay only R 108,000 (ie 80% of R 135,000) to the plaintiffs towards loss and damage and I so hold.

In the light of the reasons and findings given hereinbefore, I will now proceed to answer the fundamental questions in the same numerical order in which they stand formulated supra.

1. Yes; the defendants as owners of their respective parcels of land or superstructures thereon, committed a fault under article 1382 by abusing their rights of ownership causing damage to the plaintiffs' property having exceed the measure of the ordinary obligations of neighbourhood.

2. Yes; the third parties namely: (i) the Promoter, the Government of Seychelles, which developed the "Carana Estate", (ii) the Planning Authority, which gave approval for constructions on cliff-like mountaintop without necessary conditions or making provision for flood hazard, and (iii) the building contractors who were engaged by the defendants to put up buildings or structures on their respective properties, all committed a 'fault' in terms of article 1382 of the Civil Code in the course of developing the estate or constructing buildings on the

defendants' properties and in that, they did cause and contribute to the diversion of the natural watercourse through the valley in such a way causing a "flood hazard" that was detrimental to the plaintiffs' property.

3. Yes; the defendants are vicariously liable for the damage caused to the plaintiffs' property by the fault of the building contractors who were engaged by them for the construction of buildings or structures on their respective properties. However, they are not liable for the contributory negligence of the other third parties such as the Government of Seychelles, Planning Authority, etc.

4. Yes; the damage was caused by the properties, which the defendants had in their custody at the material time either as proprietors or custodians or both.

5. Yes; the defendants are liable for the damage caused to the plaintiffs by the properties held in their respective custody in terms of article 1384(1) of the Civil Code.

6. The damage was caused not solely or totally due to the fault of the defendants or third parties, but partly due to contributory negligence on the part of the third parties including the plaintiffs' builders, who had imprudently constructed the plaintiffs' house on the valley close to the watercourse.

7. The extent or degree of such contributory negligence of those third parties, in my assessment reduces the defendants' tortious liability by 20%.

8. The legal impact of such contributory negligence of

third parties accordingly, would reduce the claim or quantum of damages awardable to the plaintiff by 20%.

9. The plaintiffs are hence, entitled to damages only in the sum of R 108,000 payable by all three defendants jointly. This sum obviously constitutes 80% of the actual loss and damage the plaintiffs suffered, and the same is awarded in respect of all and every claim made by the plaintiffs against all three defendants in this matter.

In the final analysis, I therefore enter judgment for the plaintiff in the sum of R 108,000 against all three defendants jointly, apportioning liability in equal proportion, with interest on the said sum at 4% per annum, the legal rate, as from the date of the original plaint and with costs of this action.

Record: Civil Side No 210 of 1999

Simeon v Attorney-General

Egonda-Ntende CJ, Renaud, Gaswaga JJ
28 September 2010 Constitutional Court 1 of 2010

Constitutional principle – separation of powers – minimum sentences – right to dignity

The petitioner was sentenced to 10 years imprisonment for drug trafficking. The petitioner claimed that the setting of minimum sentences by the legislature was a breach of the separation of powers, and that the term of 10 years imprisonment was a breach of the petitioner's right to dignity.

HELD

1. In a constitutional case there is a duty on the petitioner to establish a prima facie case in respect of the allegations of contravention or risk of contravention of the constitutional provisions. That done, the evidential burden will shift to the state to show that there is no contravention or risk of contravention of the impugned constitutional provisions.

2. The setting of a minimum sentence by the legislature is not a contravention of the separation of powers.

3. A term of imprisonment will not be deemed cruel, inhuman or degrading treatment if it is proportional to the seriousness of the offence.

Judgment: Petition dismissed.

Legislation cited
Constitution
Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994, rule 3(3)
Misuse of Drugs Act, s 29, sch 2

Foreign legislation noted
Constitution of Mauritius
Constitution of Namibia
Constitution of the Republic of South Africa (1996)
Arms & Ammunitions Act 1996 (Namibia)
Canadian Charter of Human Rights
German Basic Law, arts 92, 97
Road Traffic Act (Mauritius), s 52
Stock Theft Act 1990 (Namibia)

Cases referred to
Alphonse v Republic SCA 6/2008 (unreported)
Hackl v Financial Intelligence Unit Const 1/2009, CM 10
Napoleon v Republic Const Court 1/1997
Simeon v Attorney-General Crim A 23/2009, LC 348

Foreign cases noted
Ali v Republic [1992] 2 All ER 1
Attorney-General v Dow [1992] BLR 119
Dadu v State of Maharashtra [2000] 8 SCC 437
Dodo v State (2001) 4 LRC 318
Douce v State [2005] SCJ 238
Hinds v The Queen [1977] AC 195
Keaton v Attorney-General (1963) LR 170
Labonne v State [2000] MR 65
Latimer v Queen [2001] 1 SCR 1
Laviolette v State SCR 7069 of 2006 (unreported)
Parlling v Corfield [1970] HCA 53; (1970) 123 CLR 52
Philibert v State of Mauritius (2007) SCJ 274
R v Latimer [2001] SCC 1
R v Manumulo (1990) AD 56

R v Smith [1987] 1 SCR 1045
Ramtohul v State [1992] MR 204
Rangasamy v State [2007] SCJ 232
Re Corporal Punishment: Ex Parte Attorney-General (1992) LRC 515
S v Makwanyane (1995) ZACC 3
S v Petrus (1984) BLR 14 CA
S v Toms [1990] ZASCA 38; 1990 (2) SA 802 (AD)
S v Vries (CR 32/96) [1996] NAHC 53 (Namibia High Court)
State v Likuwa [2000] 1 LRC 600
State v Vries [1997] 4 LRC 1
State of Mauritius v Khoyratty [2006] UKPC 13
US v Brown (1965) USSC 129; 381 US 437,443 (1965)

Basil HOAREAU for the petitioner
Ronny GOVINDEN for the respondent

Judgment delivered on 28 September 2010 by

EGONDA-NTENDE CJ: I have had the benefit of reading in draft the judgment of Gaswaga J. For the reasons he has given I agree that this petition should be dismissed.

As Renaud J also agrees, this petition is dismissed with no order as to costs.

RENAUD J: I had the benefit of reading the draft of the judgment drawn by my brother Duncan Gaswaga. I concur with that judgment.

GASWAGA J: Aaron Simeon lodged a petition against the Attorney-General in his capacity as representative of the Government of Seychelles in terms of rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994 for the following orders:

(i) Declaration that section 29 and the Second Schedule of the Misuse of Drugs Act have contravened articles 1 and 119(2) of the Constitution and the petitioner's interest has been affected by the said contravention;

(ii) Declaration that article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 29 and the Second Schedule of the Misuse of Drugs Act;

(iii) Declaration that section 29 and the Second Schedule of the Misuse of Drugs Act are inconsistent with articles 1, 119(2) and 16 of the Constitution and hence are void;

(iv) Declaration that the sentence of 10 years imposed on the petitioner is unconstitutional and void and order the immediate release of the petitioner.

The facts

The facts as deposed by the petitioner in his affidavit of 13 January 2010 and presented before the Court are that the petitioner was charged and convicted of the offence of trafficking in a controlled drug contrary to section 5 of the Misuse of Drugs Act read with sections 14(d) and 26(1) as amended by Act 14 of 1994 and punishable under the Second Schedule of the said Act read with section 29 of the same, and sentenced to ten (10) years in prison after he had been found in possession of 2.44 grams of diamorphine (heroine) which gives rise to the rebuttable presumption of the accused having possessed the said drug for the purpose of trafficking.

Whereas these facts are not disputed by the respondent, the Attorney-General vehemently objects to the petition being filed.

The issues

Two issues have been raised by the parties:

(1) Whether the provisions of section 29 and the Second Schedule of the Misuse of Drugs Act Cap 133 contravene articles 1 and 119(2) of the Constitution; and

(2) Whether article 16 of the Constitution has been contravened in relation to the petitioner by section 29 of the Misuse of Drugs Act Cap 133 and the Second Schedule of the Misuse of Drugs Act.

Petitioner's case

The petitioner avers that at the trial of the case against the petitioner, Dr Jakharia the drug analyst testified that the total weight of the drug (powder) was 2.4 grams but only 2% of it was diamorphine. That the sentence of ten years imposed on the petitioner by the Supreme Court on 14 October 2009 was disproportionate to the offence with which the petitioner was convicted, having regard to the total weight of the drug 2% of which was actually diamorphine and the fact that the petitioner was a first offender.

In support of the petition it was submitted by counsel that the mandatory sentence of ten years imposed on the petitioner contravenes the principle of separation of powers entrenched in our Constitution (vide article 1) and the independence of the judiciary provided for under article 119(2). According to article 1 Seychelles is a "sovereign Democratic Republic". It observes a separation of powers amongst the three organs of

state namely the Executive, Legislature and Judiciary. He referred to the case of *State of Mauritius v Khoyratty* [2006] UKPC 13, wherein section 1 of the Constitution of Mauritius which is similarly worded to our article 1 was interpreted by the Privy Council. Section 1 provides that "Mauritius shall be a sovereign democratic state, which shall be known as the Republic of Maurtius". The court held that section 1 lays down the doctrine of separation of powers.

In addition the case of *Ali v Republic* [1992] 2 All ER 1 was cited. This case illustrated the importance of the doctrine of separation of powers.

As to whether a mandatory minimum sentence could be set out in a law by the legislature, the petitioner's counsel cited the authority of *Philibert v State of Mauritius* (2007) SC 5274 which answered that question in the affirmative. He then invited the Court to differ from this position since it was not bound by that authority and instead hold that the legislature was in contravention of the principle of separation of powers. That by so doing the legislature interferes with the discretion of the judiciary which is unable to impose a sentence lower than the prescribed minimum sentence even in deserving cases whose circumstances may warrant such lesser sentence. It was also submitted that the legislature was at liberty to prescribe a range of sentences other than mandatory sentences to be imposed by the judiciary.

That generally given the circumstances of the case and specifically the antecedents of the petitioner as indicated above, the sentence of ten years breached the petitioner's right not to be subjected to inhuman or degrading treatment or punishment. It is the petitioner's contention that the trial judge was compelled to impose the minimum mandatory ten year sentence thereby contravening the principle of proportionality which amounts to cruel and degrading treatment or punishment. He supported this position with the authority of

Philibert v State of Mauritius (2007) SCJ 274.

Counsel concluded his submission with a prayer that this court holds that separation of powers has been breached or in the alternative, that article 16 has been breached in relation to the petitioner.

Respondent's case

On the other hand the respondent contends that if the petitioner's submission is upheld such judgment will have far-reaching consequences on the justice system of this jurisdiction given that there are more than one hundred offences pending before the Courts in which the accused have been charged with drug trafficking and therefore attracting the rebuttable presumption and minimum mandatory sentence. Further, that there are numerous offences under the Penal Code falling in the same category also pending before the Courts and quite a number of people already convicted and serving time in the Montagne Posée prison facility as a result of convictions from such cases which relied on the provisions and principles sought to be impugned now.

Contrary to the petitioner's submission the respondent contends that the provisions of section 29 and the Second Schedule of the Misuse of Drugs Act, Cap 133 (hereinafter referred to as 'the Act') do not contravene articles 1 and 119(2) of the Constitution. It was argued that the Court has unfettered discretion when it comes to matters of sentencing. In support of this position is the South African authority of *S v Bruce* [1990] ZASCA 38; 1990 (2) SA 802 (AD) at 806H-807C which held that the legislature was at liberty to decree a mandatory sentence that the courts in turn will be obliged to impose. Following the principles in the said case it was submitted that in respect of punishment for crimes there is no separation of powers between the legislative and judicial arms of government but what exists is interdependence within the

two. For further discussion on the interdependence between the judiciary and the legislature we were referred to the case of *Dodo v State* (2001) 4 LRC 318 where the question `whether a mandatory sentence of life imprisonment for a murder conviction conflicted with the provisions of the South African Constitution' was entertained.

In addition, the interdependence between the two arms, according to the constitutions of most democratic countries, means that there is no absolute separation of powers between the judicial and legislative functions when it comes to the framework of sentencing.

The executive has a general duty to ensure that law abiding persons are protected as a whole from persons about to or who breach the law. The respondent relied on *Patrick Reels v Queen*, *Attorney-General v Dow* [1992] BLR 119, *Dadu v State of Maharashtra* [2000] 8 SCC 437*, Jeffrey Napoleon v Republic* Const Court 1 of 1997, and *Philibert* (supra) and urged the court to follow the principles enshrined therein.

It was also submitted that by enacting provisions of minimum mandatory sentences in the Misuse of the Drugs Act the legislature was doing it for the public good, law and order in this country as well as carrying out its mandate to create an offence and the penalty applicable. The Court does not create offences nor enact sentences. It simply interprets the law as enacted.

On the second issue the Attorney-General argued that the sentence imposed on the petitioner is neither inhuman nor degrading. He submitted that according to the *Oxford Dictionary* 'Inhuman' means "destitute of natural kindness or pity brutal, unfeeling, cruel, savage, barbarous" or, in short "cruel" or "brutal" and also made reference to *Ex Parte Attorney-General: Re Corporal Punishment* (1992) LRC 515 at 522, *S v Vries* (CR 32/96) [1996] NAHC 53 (Namibia High

Court) at 15, and *S v Petrus* (1984) BLR 14 CA at 40-41.

It was stated that the legislature mandated to prescribe minimum mandatory penalties cannot enact any punishment that would amount to cruel, inhuman or degrading treatment as this will conflict with article 16 of the Constitution. On this point the authorities of *State v Vrice* [1997] 4 LRC 1 and *Dodo* (supra) were cited. In the latter case it was stated that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime as this could be inimical to the rule of law and to the constitutional state and, in particular to the Bill of Rights. In other words the court may impose any sentence but it must not be disproportionate to what would be appropriate.

It is further contended for the respondent that for a court to consider whether a sentence is inhuman or degrading one must note that (1) a statutory minimum sentence of imprisonment is *per se* not unconstitutional and (ii) it will be however regarded as unconstitutional and amounting to inhuman and degrading punishment if it is grossly disproportionate to the severity of the offence. A sentence will only be a violation when it is so unfit having regard to the offence and the offender involved. The decision as to whether the sentence is disproportionate or falls foul of a given law involves the exercise of a value judgment by the Court which should be based not on a subjective consideration but on objective factors with regard being had to the norms applicable in the society of Seychelles and the conspectus of values in civilized democracies of which Seychelles is one. Reference was made to the Canadian case of *Robert Latimer v R* [2001] 1 SCR 1; *S v Stephanus Vries* (CR 32/96) [1996] NAHC 53 (Namibia High Court); and *R v Smith* [1987] 1 SCR 1045.

Discussion of the issues

Before resolving the issues at hand I find it imperative to say something about the burden of proof and standard of proof in constitutional cases. Article 130(7) is pertinent and reads -

> Where in an application under clause (1) or where a matter is referred to the Constitutional court under clause (6), the person alleging the contravention or risk of contravention establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State.

In *Hans Josef Hackl v Financial Inteligence Unit (FM and AG)* Constitutional Case No 1 of 2009, CM 10, para 60, it was stated by Egonda-Ntende CJ that the duty on the petitioner is to establish a prima facie case in respect of the allegations of contravention or risk of contravention of the constitutional provisions, upon which the evidential burden would shift to the State to show that there is no contravention or risk of contravention of the impugned constitutional provisions.

Issue one

I shall start with the first issue 'whether the provisions of section 29 and the Second Schedule of the Misuse of Drugs Act contravene articles 1 and 119(2) of the Constitution'. The issue basically deals with the question of separation of powers and section 29 is relevant. It states:

> (i) The Second Schedule shall have effect, in accordance with subsections (2) and (3), with respect to the way in which offences under this Act are punishable.

Sub-section (2) refers to the Second Schedule of the Act which is basically a chart laying out the different provisions creating the controlled drug-related offences, descriptions of the general nature of the offences and the respective punishments according to class of the drug, unauthorized manufacture, import, export or traffic in relation to quantity of the controlled drug.

Section 29(2)(f) particularly will be reproduced given its central importance in this petition:

> in columns 3, 4, 5, 6 and 7 a reference to a period gives the maximum or, subject to subsection (3), minimum term of imprisonment as is specified and reference to a sum gives the maximum or minimum fine as is specified.

As already indicated above article 1 lays down the principle of separation of powers (vide *Khoyratty* (supra)) while article 119(2) re-emphasises the independence of the judiciary in the following terms:

> The judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles.

Mr Hoareau had submitted that sentencing was a matter for the judiciary and not for any other organ of the state and that by prescribing mandatory minimum sentences the legislative organ had transgressed into the territory of the judiciary and assumed a judicial function which contravened the doctrine of separation of powers enshrined in articles 1 and 119(2) thereby affecting the petitioner's interests. Mr Govinden submits that there is no contravention of the said provisions and further that the judiciary enjoys unfettered powers to impose any sentence prescribed by law, including minimum mandatory sentences which the legislature is indeed

mandated and at liberty to prescribe.

The Constitutional Court of South Africa in *Re Certification of the Constitution of the Republic of South Africa* (1996) ZACC 26 at para 109 said -

> The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. *No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.* In Justice Frankfurter's words, "[t]he areas are partly interacting, not wholly disjointed". [Emphasis added]

The Appellant Division of the Supreme Court of South Africa had this to say on the matter in the cases of *S v Toms and S v Bruce* [1990] ZASCA 38; 1990 (2) SA 802 (AD), per Smakberg JA:

> The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court (of *R v Manumulo and Others* (1990) AD 56 at 57). The courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat

> related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is fruity entrenched in our law.

Commenting on the terms in which the South African Constitution has provided for the nature and process of punishment in light of the doctrine of separation of powers, Ackermann J's observations in the *Dodo* case, para 22-26 were found to be quite instructive:

> (22) There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other. *When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so.* No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the legislature to determine what conduct should be criminalized and punished. Even here the separation is not complete, because this function of legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.
>
> (23) *Both the legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity.* They have a general interest in* sentencing policy, penology and the extent to which correctional institutions are used to further the,

various objectives of punishment: 'The availability and cost of prisons, as well as the views of these arms of government on custodial sentences, legitimately inform policy on alternative forms of non-custodial sentences and the legislative implementation Thereof. Examples that come to mind are the conditions on, and maximum periods for which sentences may be postponed or suspended.

(24) The executive and legislative branches of state have a very real interest in the severity of' sentences. The executive has a general obligation to ensure that law-abiding persons are protected, if needs he through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily integrity and increases with the severity of the crime.

(25) In order to discharge this obligation, which is an integral part of constitutionalism, the executive and legislative branches must have the power under the Constitution to carry out these obligations. *They must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society.* The legislature's objective of ensuring greater consistency in sentencing is also a legitimate aim and the legislature must have the power to legislate in this area. The legislature’s interest in penal sentences is implicitly recognized by the Constitution.

(26) The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It

> cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the adapt a general principle to individual case. This power must be appropriately balanced with that of the judiciary. What an appropriate balance ought to be is incapable of comprehensive, abstract formulation, but must be decided as specific challenges arise. *In the field of sentencing, however, it can be stated as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional state.* It would a fortiori be so if the legislature obliged the judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights.

A similar scenario to the one in this case occurred in Mauritius in the case of *Philibert* (supra) to which both parties have referred this court. While answering the question whether mandatory sentences offend section I of the constitution as it infringes the separation of powers which is implicit in the declaration that 'Mauritius shall be a sovereign democratic state' the Court placed considerable reliance on the passage by Lord Diplock at pages 225-226 in the case of *Hinds v The Queen* [1977] AC 195. It reads:

> The power conferred upon the Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law. see

Constitution, Chapter III, section 20(1). The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power, and subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out. In the exercise of its legislative power, Parliament may, if it thinks fit, prescribed a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as, for example, capital punishment for the crime of murder. *Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without minimum,* leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of this case.

Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of gravity of the offender's conduct in the particular circumstance of this case…

In this connection their Lordships would not seek to improve on what was said by the Supreme Court of *Ireland Deaton v Attorney-General and the Revenue Commissioners* (1963) IR 170, 182-183, a case which concerned a law in which the choice of alternative penalties was left to the executive.

> There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fix penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and application of that rule is for the courts ... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive…

In the cases of *Labonne v State* [2000] MR 65 which was in relation to a minimum sentence for unlawful possession of firearm and/or ammunition, and *Laviolette v State* SCR No 7069 of 2006 it was held that the National Assembly of Mauritius was free to impose by enactment a minimum sentence in respect of offences. But the court also observed that *Laviolette* can hardly be considered as a case where the law imposes a mandatory minimum sentence in view of section 52 of the Road Traffic Act which gives a discretion to the court not to impose the minimum sentence laid down where there are “special reasons" which dictate otherwise vide *Rangasamy v State* [2007] SCJ 232, *Ramtohul v State* [1992] MR 204 and *Douce v State* [2005] SCJ 238. The *Hinds* case (supra) was quoted with approval in *Labonne*.

It is now clear that the separation of powers under our Constitution, just like other liberal, democratic societies listed above, although intended as a means of controlling government by separating or diffusing power, is not strict; it embodies a system of checks and balances designed to prevent an overconcentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest. Even when a constitution contains a provision explicitly mandating strict separation of powers, it behoves us to read the rest of the document to ascertain what sort of separation that particular charter actually imposes. See *Dodo* (supra) paras 16- 18.

Strengthening the position of the Parliament in making informed policies with regard to prescribing punishment, McIntyre J in the case of *R v Smith* [1987] 1 SCR 1045 at [98] stated:

> The formation of the public policy is a function of Parliament. It must decide what aims and objectives of social policy are to be, and it must specify the means by which they will he accomplished. It is true that the enactments of Parliament must now be measured against the Charter, and where they do not come within the provisions of the Charter, they may be struck down. This step, however, must not be taken by the courts merely because a court or a judge may disagree with a parliamentary decision but only where the Charter has been violated. Parliament has the necessary resources and facilities to make a detailed inquiry into relevant considerations in forming policy. It has the capacity to make a much more extensive inquiry

> into matters concerning social policy of the court. It may test public opinion, review and debate the adequacy of its programs and make decision based upon wider consideration, and infinitely more evidence that can, ever be available to a court.

It is worthy of note that many other open and democratic societies like ours have permitted the legislature to limit the judiciary's power to impose punishment, and have not found such exercise to be in breach of the separation of powers. For example the United States of America, in *US v Brown* [1965] USSC 129; 381 US 437,443 (1965) where it was observed that:

> If a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.

Canada, where it is implicit in the jurisprudence of the Supreme Court that mandatory minimum sentences are not regarded as being inconsistent with any separation of powers doctrine, see *R v Latimer* [2001] SCC 1 File No 26980, 18 January 2001 (unreported); Australia, see *Parlling v Corfield* [1970] HCA 53, (1970) 123 CLR 52; Germany, see article 92 and 97 of German Basic Law, also Currie “Separation of powers in the Federal Republic of Germany’ in (1993) 41 American Journal of Comparative Law 201; New Zealand; United Kingdom; India; Namibia, see *State v Likuwa* [2000] 1 LRC 600 and *State v Vries* [1997] 4 LRC 1; Mauritius; Swaziland; and South Africa.

The court in *Philibert* had also emphasized that –

> the provision of a mandatory sentence in the law

> is therefore in a twilight zone within which the sovereignty of both the legislature and judiciary to act within their respective domain must be acknowledged and respected.

Mr Hoareau urged us not to consider this authority and that it was not binding on the court. I respectfully disagree. This Court fully endorses the authority of *Philibert*. Equally, the Court subscribes to the views and position taken on the subject-matter in the above-cited cases dealing with constitutional provisions *in pari materia* to ours.

Accordingly, on issue one I find that section 29 and the Second Schedule of the Act do not contravene articles 1 and 119(2) of the Constitution.

Issue two

With regards to the second issue, whether article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 29 of the Misuse of Drugs Act and the Second Schedule of the Act, I find it necessary to first bring into purview the provisions of article 16 (right to dignity):

> Every person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.

Given the circumstances of the case and those in relation to the accused himself, as outlined above, can it be said that the sentence of ten years inflicted on the petitioner amounted to cruel, inhuman or degrading treatment or punishment? The Attorney-General has adopted the dictionary definition of the word 'inhuman'. In the case of *Dodo*, the Court, quoting extensively from *Latimer*, stated that in the phrase "cruel, inhuman or degrading" the three adjectival concepts are

employed disjunctively and it follows that a limitation of the right occurs if a punishment has any one of these three characteristics. This imports notions of human dignity. Human dignity of all persons is independently recognized as both an attribute and a right in the Constitution and is woven, in a variety of other ways, into the fabric of our Bill of Rights. The impairment of human dignity, in some form and to some degree, must be involved in all three concepts. In *R v Smith* [1987] 1 SCR 1045 at [57] Lamer J pointed out that the measurement of the effect of a sentence is often a composite of many factors including but not limited to its length, nature and the conditions under which it is served.

From the facts I note that in this case the petitioner's major concern is about the effect of the duration of the minimum sentence of ten years, and therefore the freedom aspect of the right in question and its relation to human dignity is crucial. An inquiry into the proportionality between the nature and seriousness of the offence and personal circumstances of the offender to length of punishment lies at the very heart of human dignity. On this point see also *S v Makwanyane* (1995) ZACC 3, paras 94, 197 and 352-6.

In *Latimer*, the Supreme Court, referring to section 12 of the Canadian Charter of Human Rights which is similar to our article 16 set the criteria to be used whether the punishment prescribed is so excessive as to outrage the standards of decency.

Dealing with a similar issue in *Philibert*, the court referred to a case by the High Court of Namibia *State v Vries* [1997] 4 LRC 1 wherein the accused had been sentenced to eighteen months in prison by the Magistrates Court for the theft of a goat in May 1995, and the sentence suspended *in toto.* On review, the High Court questioned the sentence as it did not comply with section 14(1)(b) of the Stock Theft Act 1990 which provided for a minimum mandatory sentence of three

years' imprisonment for a second and subsequent conviction of stock theft (the accused had a previous conviction in 1969 for stealing a sheep), which according to section 14(2) could not be suspended. The issue was whether the prescribed minimum sentence was in conflict with article 8(2)(b) of the Constitution of Namibia (similar to our article 16) which provides that "no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". It was held by the Full Bench that:

> whether the minimum sentence imposed by section 14(1)(h) of the Stock Theft Act infringed the protection against cruel, inhuman or degrading treatment guaranteed by Article 8(2)(b) of the Constitution of Namibia required a *value judgment which was one not arbitrarily but judicially arrived at by reference to prevailing norms* .. Legislative provision for a minimum sentence was not unconstitutional per se, not being necessarily in violation of the constitutional guarantee against cruel and unusual punishment.
>
> However, although judicial policy was generally opposed to mandatory sentences because they could bring harsh and inequitable results, none the less mandatory minimum sentences were not unconstitutional provided that they were considered to be appropriate sentences in all the circumstances. In respect of mandatory minimum sentences, the court had to look at the facts of each case before it and determine what a proper sentence would have been. *The appropriate sentences so determined had then to be measured* against the mandatory one. That the sentence was excessive in the view of the court hearing the matter was not sufficient to

declare it unconstitutional.

> *If the comparison revealed disparity between the appropriate sentence and the mandatory sentence so great that would warrant interference on appeal but for the statutory provision, then the constitutional guarantee would have been infringed,* It then fell to be determined whether it was only the sentence imposed on the individual accused which need to be struck down as unconstitutional, or *whether the imposition of a mandatory minimum sentence would be startlingly or disturbingly inappropriate with respect to hypothetical cases which could be foreseen as likely to arise commonly.* If the latter was answered in the affirmative, then the provision was unconstitutional; if the sentence legislated was not shocking in reasonable hypothetical cases it would not be impugned. (emphasis mine)

It was noted from the facts that that section excluded a Court from suspending any portion of the minimum mandatory sentence. Furthermore, there was no limit on the number of years which may elapse between the date of the last previous conviction and the offence in respect of which the minimum penalty had been applied. There was also a failure to distinguish between kinds of stock. The previous conviction for stock theft dated back to 1969 whereas the second conviction which triggered the minimum sentence occurred in 1995. It was held that a sentence of 3 years was startlingly inappropriate in all the circumstances and it was readily foreseeable that hypothetical cases would arise commonly in which imposition of the minimum sentence would also be shocking.

However, as it was not the imprisonment per se which was

unconstitutional but only the minimum prescribed period of imprisonment the whole of section 14(1)(b) was not unconstitutional. Instead the section would be read down in such a way that upon a second or subsequent conviction an offender would have to undergo a period of imprisonment which would be at the discretion of the court but which the Court would not be able to suspend because of section 14(2). It followed that section 14(2)(b) of that Act was unconstitutional in so far as it provided for mandatory minimum sentences of not less than three years. The sentence of 18 months' imprisonment was reduced to 6 months.

It followed similarly in *State v Likuwa* [2000] 1 LRC 600 the High Court of Namibia held that section 38(2)(a) of the Arms & Ammunitions Act 1996 which provided for a minimum mandatory sentence of imprisonment for a period of not less than 10 years for importing, supplying or possessing armament without permit contrary to section 29(1)(a), (b), (c) of that Act was unconstitutional on the ground that it infringed article 8(2)(b) of the Constitution of Namibia. The Court held that while a sentence of ten years' imprisonment for certain contraventions of section 29(1) might not be an inhuman or cruel punishment in some circumstances, there could be no doubt that such a lengthy sentence in other circumstances (such as where the rifle was obtained and possessed merely for the protection of livestock) would be. The accused who worked with livestock and farmed for a living was found in possession of a rifle and was 21 years old and a first time offender. On successful appeal against the constitutionality of the mandatory minimum sentence, his sentence was reduced to two years' imprisonment.

Applying the principles to the facts, the Attorney-General submitted that the punishment of ten years even for a first offender cannot be regarded as excessive or disproportionate to the offence of trafficking in a class A drug, having regard to

the offence itself and the circumstances of the society in which it was committed. That a class A drug causes damage to society in direct and indirect ways, by imposing burdens on the individual consumers especially addicts, their families, the health and criminal justice systems as well as persons involved in the trafficking. Moreover, the need to protect members of the public cannot be overemphasised, yet the traffickers are well aware of the prevalence of the scourge and consequences, involving long jail terms in case of a conviction. The Attorney-General also stated that in some democracies similar to ours drug trafficking and related offences carry more severe sentences like capital punishment. That due to the influx of such cases in the country it was clearly the intention of the legislature to act in the public interest and reduce or curb the trafficking with severe minimum sentences.

The Attorney-General supported this submission with the authority of *Terrence Alphonse v Rep* SCA No 6 of 2008 in which the Seychelles Court of Appeal said:

> On the point that the sentence of 10 years imprisonment is harsh and excessive the argument has no merit either. It is not insignificant to note here that drug related crimes do not affect the individual consumer only but society at large. In offences such as the one which the Appellant was convicted the obvious victims are the Seychellois people at large. One needs to consider what are the consequences of drug related offences, to the people of Seychelles, to its economy, to its law and order enforcement mechanism, to its social and moral values in the short, immediate and long term. Obviously a genuine consideration would lead to an irresistible conclusion that drug related offences are serious offences which should call

> for severe punishment. Some jurisdictions have in their statute books severe punishment for drug related offences. That is not a mere coincidence.

I have also looked at the facts of this case and the aggravating as well as extenuating factors as advanced by counsel. Going by these facts and in light of the above principles it cannot be said that the sentence of ten years imposed was excessive and not proper even when measured against the mandatory sentence so prescribed. Neither can one say that the imposition of the minimum ten year sentence was startlingly or disturbingly inappropriate with respect to hypothetical cases which could be foreseen as likely to arise commonly. Therefore, the sentence legislated was not shocking in reasonable hypothetical cases and cannot be impugned. It was the minimum while the maximum was pitched at thirty years and, was arrived at after the Court conducted an inquiry considering all the pertinent factors.

As long as one is convicted for the offence of trafficking in a controlled drug as prescribed by the Act, like in the instant case, it cannot be said that a sentence of ten years is excessive or startlingly or disturbingly inappropriate. Instead the amount or weight of the drug will trigger an increment in the duration of the sentence starting from or in excess of ten years. Indeed a sentence of ten years or more is ordinarily a long period of time for one to spend in a prison facility.

But a long prison term is not necessarily a cruel, inhuman or degrading treatment or punishment as long as it is proportional to the seriousness of the offence. It is worthy of note in the present case that even if a comparison was to reveal a great disparity between the appropriate sentence and the mandatory sentence causing infringement of the constitutional guarantee to warrant an interference on appeal, then only the sentence imposed on the individual accused, and not the mandatory minimum sentence, would be struck

down.

However, the situation at hand is to some extent somewhat different from the Namibian cases of *Likuwa* and *Vries* (discussed above) where the provision for minimum mandatory sentences were declared unconstitutional and struck down. Unlike in the present case, in *Vries* the minimum mandatory sentence of 3 years was startlingly inappropriate in all circumstances and it was readily foreseeable that hypothetical cases would arise commonly in which imposition of the minimum sentence would also be shocking.

As I have stated the petition is concerned with the length of the sentence which, according to the petitioner, is not proportional to the offence committed and therefore amounts to cruel, inhuman or degrading treatment or punishment. However, apart from alleging, he has not established to the required standard that any of the three concepts outlined in paragraph 1351 has affected his dignity. The said punishment or sentence does not outrage the standards of decency in the circumstances of the case.

From the foregoing discourse I find that article 16 has not been contravened by the imposition of a minimum mandatory sentence of ten years. In the circumstances it suffices to say that the sentence in question neither amounts to cruel nor inhuman or degrading treatment or punishment. Consequently, I hold that the provisions of section 29 and the Second Schedule of the Misuse of Drugs Act, Cap 133 do not contravene article 16 of the Constitution.

I wish to note at this juncture that there are changes in the circumstances of the petitioner which were caused by the recent Court of Appeal judgment in *Aaron Simeon v Attorney General* SCA No 23 of 2009 that had been lodged to the said court concomitantly with this petition. I further note that the petitioner's conviction for trafficking was set aside and

substituted with that of possession and his sentence fixed at seven years imprisonment.

For the reasons indicated I hold that the petitioner's claim is without merit and I would dismiss it in its entirety but without any order regarding costs.

Record: Constitutional Case No 1 of 2010

Republic v Bistoquet

Gaswaga J
30 September 2010 Supreme Court Crim 24 of 2008

Criminal procedure – change of plea

The accused pleaded guilty to a charge of an act intended to cause grievous harm. During a plea in mitigation, the accused applied to withdraw the guilty plea and have a full trial.

HELD

1. Where an accused person pleads guilty to a charge, the court has discretion to allow a change of plea from guilty to one of not guilty, provided that such change of plea is made before sentence is passed or before a final order disposing of the case is made.
2. An accused will be allowed to change his or her plea to one of not guilty where his or her guilty plea was entered through ignorance or misunderstanding.

Judgment: Application allowed.

Legislation cited
Penal Code (Cap 158)

Foreign cases noted
Adnan v R (1973) EA 445
Kamundi v R (1973) EA 540
Lapi v Uganda MB 88/55
Maumba v Republic (1966) EA 167
Okello v Republic (1969) EA 378
R v Egalu (1942) 9 EACA 65
R v Field (1943) Cr App R 151

R v Guest [1964] 3 All ER 385
R v McNully [1954] 1 WLR 933
S (an infant) v Manchester City Recorder [1969] 3 All ER 1230

Mr David Esparon for the republic
Mr Antony Derjacques for the accused

Ruling delivered 30 September 2010 by

GASWAGA J: The accused herein stands charged with one count of acts intended to cause grievous harm contrary to section 219(a) and punishable under section 219 of the Penal Code (Cap 158). The particulars allege that Vincent Roy Bistoquet, a labourer at Anse Royale, Mahe on 9 March 2008 at Anse Royale with intent to do grievous harm unlawfully wounded Yvon Reddy.

He pleaded guilty to the said charge after some time and also admitted the facts presented by the prosecution whereupon the court convicted him. It was, during a plea in mitigation that the Court asked his counsel whether he had explained to the accused the sentence prescribed by the law in respect of this offence, that the defence counsel changed his mind and applied for an adjournment of the case to another date to continue with the mitigation, which was granted. At the next sitting, presumably after reconsidering the severity of the offence and corresponding sentence, defence counsel applied to withdraw the guilty plea which had been tendered by the accused so that the case could go through a full trial.

That application was resisted by the prosecuting State counsel on the ground that since a conviction had been properly entered it was impossible to withdraw the guilty plea.

Mr Derjacques contended that indeed the accused pleaded guilty to the charge but prior to the court convicting him he advised the accused on the possibility of being liable to

imprisonment for life whereupon he sought an adjournment to further advise his client on the matter. He also submitted that at the time of taking the plea, the accused was not aware or failed to comprehend the entire elements of the sentence and the resulting consequences. He therefore moves the court to exercise its discretion to vacate the guilty plea and instead call upon the accused to plead afresh.

In support of this application Mr Derjacques cited the case of *R v Field* (1943) Cr App R 151 (See *Archbold*, 42nd ed para 4-57) where it was held that an accused who is not represented must understand the elements of the crime while he or she is pleading and if there is no mistake, the court cannot allow a change of plea. See *R v McNully* [1954] 1 WLR 933. But if the defendant pleads guilty and it appears to the satisfaction of the judge that the defendant rightly comprehends the effect of the plea, the defendant's confession is recorded and sentence forthwith passed (see *Archbold*, 42nd ed par 4-58).

I am unable to agree with this submission since it appears to me that at the time of taking the plea the accused seemed to have clearly understood the nature and effect of the kind of plea he tendered. No error was occasioned in this exercise.

This is further strengthened as the accused all through the proceedings enjoyed the services of an able and brilliant counsel who must have advised him on the nature of the plea to tender and the sentence prescribed.

In my view, I do not think the problem is with the plea that was tendered but with the possible sentence of life imprisonment which must have scared the accused on second thoughts during mitigation when the court asked his counsel whether he had explained to him the prescribed sentence. This presupposes that contrary to defence counsel's contention a conviction had already been entered on record. It would therefore mean that in light of the above authorities, counsel

continues with the mitigation which will be followed by sentencing and the matter is closed forthwith. Besides the cited authorities seem to work against, rather than support, the accused's case.

In short, the above-cited authorities tend to suggest that once a plea of guilty (also known as a confession) is properly taken and entered on the record (charge clearly read out, and explained to accused in a language he understands and comprehends as well as admit the elements of the offence as discerned from the facts summed up and presented by the prosecution) without any mistake, then that plea of guilty or confession cannot be changed. Not every accused who wants to change what is clearly an unequivocal plea of guilty should be allowed to do so at his own convenience. See *R v Yonasani Egalu* (1942) 9 EACA 65, and *Adan v R* (1973) EA 445.

I should stress at this point that a plea of guilty has two apparent effects: first of all, it is a confession of fact; second, it is such a confession that, without further evidence the court is entitled to and indeed in all proper circumstances will act upon it and it will result in a conviction.

From the research done it appears that there are no provisions providing for a plea to be changed, but there are equally no provisions to prevent a plea being changed before the court becomes *functus officio* - a Latin phrase meaning "having discharged a duty, authority to act further is exhausted". In relation to court proceedings it really means that once a court has finally determined a case it has no more power to adjudicate upon it again. The question is at what stage of criminal proceedings does a court become *functus officio?* For example, a plea of guilty can be retracted, but is it permissible after a conviction has been entered by a Judge or Magistrate? The authorities seem to agree that when a court has determined a case by passing sentence following a plea

of guilty it is *functus officio* so that, even if the accused wishes to change his or her plea the court has no power to permit the accused to do so. For instance in *Lapi v Uganda* MB 88/55, immediately after a Magistrate convicted and passed sentence on the appellants, the appellants insulted him and he increased their sentences each to 71/2 years from *7* years imprisonment. On appeal it was held that as soon as the Magistrate convicted and sentenced the appellant he had become *functus officio and* had therefore no jurisdiction to alter either the conviction or the sentence.

However, it would appear it is still arguable whether in East Africa a court is *functus officio* after recording a conviction but before passing sentence (as is the position in the instant case). In other words, does the court have discretion to allow the accused to change his plea to one of not guilty after convicting him on a plea of guilty? Originally the East African Court of Appeal held the view that having convicted an accused on his own confession a Judge or Magistrate had deprived himself of all powers save the power to pass sentence. This was in the case of *Okello v Republic* (1969) EA 378. In this case the High Court of Kenya was following a decision of the Court of Appeal in *Yusufu Maumba v Republic* (1966) EA 167, a case from Tanzania. In *Maumba*, the appellant pleaded guilty to five counts and was convicted accordingly. The Magistrate deferred sentence until after trial of the 6th count. Subsequently the prosecution withdrew the 6th count and sought to amend the charge. After explaining the amendments to the appellant the Magistrate convicted and sentenced him to a term of imprisonment and corporal punishment. His appeal to the High Court was dismissed. On further appeal, the Court of Appeal held:

> The trial Magistrate had convicted the appellant and he had no power to quash the conviction, nor did he purport to do so. While that conviction remained in force the appellant could not be

> charged with or convicted of what was substantially the same offence. Therefore the proceedings which followed the first conviction were without jurisdiction and are a nullity. We strengthened in our opinion by the case of *R v Guest* which shows that in England a court which has convicted an accused person is "functus officio" except as regards the power to pass sentence.

However, the English case of *R v Guest* [1964] 3 All ER 385 which "strengthened the opinion" of the Court of Appeal in *Maumba's* case was overruled by the House of Lords in *S(an infant) v Manchester City Recorder and Others* [1969] 3 All ER 1230. The facts of this case are that the court adjourned to obtain a medical report as to the mental condition of the accused (an infant), now appellant who had pleaded guilty and was convicted. At the resumption of the hearing his counsel applied for his plea of guilty to be changed to one of not guilty. The Magistrates refused the application on the ground that they were *functi officio.* The appellant applied to the Divisional Court for an order of certiorari bring up quash the appellant's conviction and for an order of mandamus directing the trial court to enter a plea of not guilty and to proceed with the trial of the case. The Divisional Court dismissed the application but gave leave to appeal to the House of Lords. Allowing the appeal the House of Lords held:

> a court of summary jurisdiction which had accepted a plea of guilty to an offence charged is not in law debarred from permitting at any time before sentence a plea of not guilty to be substituted.

Until this case, in English law Magistrates had no power to allow a change of plea after conviction. According to the House of Lords however, the Law Lords saw no reason why a

different rule applied to powers of Magistrates in summary proceedings. This was the decision which was followed by the Court of Appeal of Eastern Africa later in 1973, departing from the 1966 case of *Maumba*.

In the real life of a Judge's time in court, it not infrequently happens that on the first occasion the accused pleads guilty or indicates that he is pleading "guilty". But on a subsequent occasion he reconsiders his plea and wants to change it to one of "not guilty". In such a case he may be allowed to do so. The law is such that where an accused person pleads guilty to a charge, the court has a discretion to allow him to change his plea from one of guilty to one of not guilty, provided that such change of plea is sought to be made at any stage of the trial before sentence is passed or before a final order disposing of the case is made. See B D Chipeta, *A Magistrate's Manual*.

The case of *Kamundi v R* (1973) EA 540 fortifies this position. What transpired in this case is that after convicting the appellants on purported pleas of guilty, the Magistrate adjourned to allow the prosecution to produce the criminal records of the accused persons. At the next sitting the appellants' advocate submitted that the pleas of guilty were ambiguous. The Magistrate held that the pleas were unequivocal on their own conviction and refused to allow the appellant to change his plea.

On second appeal, it was argued that a magistrate should be able to alter a plea of guilty at any time before pronouncing sentence. The Court held, at page 545:

> The whole purpose and intention of the Criminal Procedure Code is to see that justice is done, and justice cannot be effected if a plea of guilty is entered as the result of ignorance or misunderstanding. The court must have a judicial discretion to allow a change of plea

> before it has finally disposed of the case. It is common practice to allow the accused person during the course of trial to change his plea of not guilty to one of guilty and we can see no reason why the court should not have similar powers to change a plea of guilty to one of not guilty. A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in *Manchester City Recorder* case that this can be when the court disposes of a case by a verdict of not guilty or by passing sentence or making some order finally disposing of the case.

I am persuaded by the above reasoning of their Lordships and this court endorses the *Karnundi* and *Manchester City Recorder* cases. It therefore follows that this application will be allowed.

Be that as it may, it must be observed that the decision of a court in a criminal matter as to the guilt of an accused person is either an acquittal or a conviction. That decision is reached either upon an admission of the truth of the charge, which is a plea of guilty, or after hearing the entire evidence; and one could argue, that only an appeal court has power to alter such a finding. However, it would appear that the wide interpretation given to the word "conviction" by the House of Lords is to safeguard against the possibility of an accused person having to suffer a penalty as a result of a conviction based upon an equivocal plea of guilty or a plea of guilty by mistake.

Accordingly, the earlier conviction entered herein based on a plea of guilty is vacated and the accused called upon to answer to the charges afresh. I so order.

Record: Criminal Side No 24 of 2008

Beoliere Aqua (Pty) Ltd v Air Seychelles Limited

Karunakaran J
4 October 2010 Supreme Court Civ 214 of 2007

Contract – third party breach

The plaintiff entered into a contract with the defendant for the transportation of air cargo. The defendant agreed to transport cargo from South Africa to the Seychelles, with a delivery date of 18 April 2007. The cargo was delayed and arrived on 25 April 2007. The plaintiff claimed damages for the delayed arrival of the cargo. The defendant denied responsibility for the delay and made a counterclaim for freight costs charged in respect of the cargo.

HELD

Where a defendant is not directly or vicariously responsible for a breach of contract, and the breach was caused by the acts of a third party who was not the agent, servant or préposé of the defendant, the defendant will not be liable to compensate the plaintiff for the breach.

Judgment: Plaint dismissed. Counterclaim allowed.

Divino SABINO for the plaintiff
Kieran SHAH for the defendant

Judgment delivered on 4 October 2010 by

KARUNAKARAN J: The plaintiff has brought this action against the defendant claiming damages in the sum of R 63,250 for a breach of contract by the defendant. On the other side, the defendant in its statement of defence, having completely denied the plaintiff's claim, not only seeks dismissal of the plaint but also makes a counterclaim against the plaintiff in the sum of R 7,457.92 contending that the plaintiff owes the said sum to the defendant towards freight costs charged in respect of air cargo the defendant transported for the plaintiff.

It is not in dispute that the plaintiff is a company registered in Seychelles and engaged in the business of producing and selling mineral water in plastic bottles; incidental thereto, it also manufactures plastic bottles for the purpose of bottling the water. The defendant - Air Seychelles - is an airline company registered in Seychelles and engaged in the business of airline services of transporting passengers and freight flying to and from domestic and international destinations.

Mr Austin White, the Managing Director of the plaintiff company testified that his company manufactures its own plastic bottles, fills them with spring water and markets them for sale. According to Mr White, the company's own production of bottles is crucial to the day-to-day running of the business. He stated that without bottles they had no business. To manufacture those bottles, they need a raw material - a thermoplastic polymer called Poly-Ethylene Terephthalate commonly known by its acronym PET, which the plaintiff company used to import from overseas. In February 2007, the company was about to face a production crisis as its stock of "PET" had depleted. In order to sustain its daily production the company had to import urgently the said raw material by air cargo from Boxmore in South Africa. For

an immediate airlifting of the cargo from South Africa to Seychelles, the plaintiff had retained the services of the defendant airline, which agreed to transport and effect delivery of the cargo consignment to the plaintiff in Seychelles on a particular date. However, according to the plaintiff, the defendant did not deliver the entire consignment of 7 cartons on the agreed date but delivered only 2 cartons and the remaining 5 cartons a couple of days later. Mr White further testified that the defendant subsequently accepted responsibility for the delay in the transportation and agreed to compensate the plaintiff by offering a concessionary rate of freight next time when the plaintiff required such services from the defendant.

A couple of months later - that was in April 2007 - the plaintiff was in urgent need of an air compressor, an essential piece of equipment required for the daily production of the plastic bottles. This equipment had to be imported from South Africa to Seychelles by air cargo. Therefore, the plaintiff immediately contacted its suppliers in South Africa called "Abac Air Compressors (SA) (Pty) Ltd" for procurement. The suppliers agreed to supply and export the compressor weighing 1600 kg, uplifting the same from Johannesburg to the plaintiff in Seychelles by air cargo. The plaintiff approached the defendant company for freight services to transport the cargo. Following various telephone conversations between the plaintiff company and the defendant's official M Jim Bonnelame on this matter, the defendant through an email dated 7 March 2007 made an offer to the plaintiff in respect of the transportation of the cargo. The email admittedly sent by the defendant to the plaintiff - exhibit Pl- reads:

> From: Jim Bonnelame [mailto:
> jimbonnelame(ai)alrsetichelles.com
> Sent: 07 March 2007 12:14
> To: beolaqua(ontelvision. net
> Subject Cargo Complaint - A WB 061-20813085

T7K2226 JNBISEZ

Dear Sir,
Reference is made to below email regarding the above as well as over various telephone exchanges on the matter.
We wish to extend our apology for the chain of events and misconnections that has caused the above shipment to be excessively delayed. We had good intentions to reroute your shipment over LHT but unfortunately the first carrier did not transfer the shipment to Air Seychelles in good time.
We are extremely embarrassed at the turn of events as it is not Air Seychelles Policy to have such negative levels of customer service.
In view of the above, we will offer as compensation a concessionary freight rate of USD 1.00 on your next shipment from JNB based on 1600 Kilos. Please, advise as when you placed your next order.
Please, accept our assurance that we shall give our utmost attention to your future consignments in order that this unfortunate experience will not repeat itself.
Thanking you
Jim

The plaintiff replied by an email dated 11 April 2007:

Dear Mr. Bonnelame,
We wish to take you up on this free offer of 1600 kg free cargo for USD1 and use part of it on next Wednesday flight 18th April 2007 from J'burg. The cargo will only be approximately 600 Kg leaving 1000 Kg still in credit. Please, confirm this is ok and let me know what steps I need to take to book it officially.
Regards,

Austin White
Beoliere Aqua (Pty) Ltd

In response to the above, the defendant company through Mr Jim Bonnelame sent the following reply:

> Dear Mr. White,
> Thank you for email wit regard to our offer pertaining to the above mentioned. This is to confirm our agreement to proceed with your next order as stated in your email below. Kindly, request your agent to contact our GSA office on the following address for booking purposes of your shipment.
> Aviation GSA International Pty Ltd.
>
> ... J'burg

Mr White further testified that the defendant, in breach of the said agreement, failed to bring the cargo (the compressor) into Seychelles on 18 April 2007. The cargo arrived in Seychelles a week later on 25 April 2007.

Having thus testified, Mr White admitted in cross-examination that the freight forwarding agent Jonen Freight Pty Ltd was the one involved in the preparation of airway bills and export documentation and forwarding the cargo to the defendant – the airline's agent Aviation GSA International Pty Ltd in Johannesburg, South Africa. According to Mr White, he did not know whether it was the defendant company or Abac Air Compressors (SA) (Pty) Ltd responsible for appointing Jonen Fright Pty Ltd as the cargo forwarding agent. Also he admitted that the freight forwarding agent is the one responsible for signing and completing the airway bill before the cargo is uplifted. He also admitted that the goods cannot be exported by the suppliers in South Africa unless and until the customs formalities are completed. As regards the

counterclaim of the plaintiff, Mr White testified that according to his own interpretation and understanding of the email sent by the plaintiff in exhibit P1, the plaintiff had agreed to charge the defendant only US$1 as freight for air transportation of the entire cargo of 1600 kg from South Africa to Seychelles.

Moreover, according to the plaintiff, the defendant was aware that the cargo was necessary for plaintiff's day-to-day running of the business and was aware that any delay in the delivery of it would result in loss of business for the plaintiff. As a result of the defendant's breach, the plaintiff could not manufacture the plastic bottles for 5 and a half days. This caused loss of earning for 5 and a half days' production time at the rate of R 11,500 per day, the total loss of which amounts to R 63,250.00. Therefore, the plaintiff claims that the defendant is liable to compensate the plaintiff for the said loss and so seeks judgment against the defendant with costs accordingly.

On the other side, DW1, Mr Christopher Samsoodin, an employee of the defendant company, testified in essence that he has been working with the defendant company as Head of Cargo Section for the past 32 years. It is the normal practice in the export trade that when a supplier exports goods to a customer/consignee in a foreign country, it is the consignee or the supplier who contacts the forwarding or shipping agent, which in turn accepts the cargo from the supplier and does all the logistics and prepares documentation with regard to the shipment or transportation of the cargo. It is the responsibility of the forwarding agent to apply for and get customs clearance from the country of origin, complete the airway bills, and book and deliver the cargo to the carrier's agent for uplifting/transportation to the country of destination. In the instant case, although the supplier Abac Air Compressors (SA) (Pty) Ltd had delivered the cargo containing the compressor to the forwarding agent Jonen Fright Pty Ltd for transportation on the defendant's flight of 18 April 2007 to

Seychelles, the forwarding agent did not, rather could not, complete the necessary export documentation since the supplier had failed to provide the required Export-Code Reference Number to the forwarding agent. Consequently, the forwarding agent Jonen Fright Pty Ltd could not complete the export documentation formalities and deliver the cargo to the Air Seychelles' agent Aviation GSA International Pty Ltd in Johannesburg in time, that is, before the departure of its 18 April flight for transportation from Johannesburg to Seychelles. In fact, the forwarding agent did not give any airway bill to the crew or captain of that particular flight for the transportation of the cargo. After the plane left Johannesburg the cargo was still in Johannesburg. When the defendant received a call from the plaintiff enquiring about the cargo, the defendant found out the reason for the delay and took immediate steps to reroute the cargo via Paris using the earliest available flight so as to arrive in Seychelles on the morning of 25 April 2007. Thus, Mr Samsoodin testified that the defendant was not responsible for the delay as it was the responsibility of the shipper/supplier/forwarding agent to comply with the laws South Africa for the cargo to be exported to Seychelles and deliver the cargo to the carrier in good time for transportation. This they failed to do and caused the delay and the defendant is not at all responsible for the loss and damage if any, the plaintiff might have suffered. Hence, the defendant seeks judgment dismissing the plaint with costs.

On the issue of counterclaim, Mr Samsoodin - DW1 - testified that the defendant company never agreed to render freight service free of costs to the plaintiff as compensation for the delayed arrival of 5 cartons of PET cargo on the previous occasion of February 2007. Mr Samsoodin testified in essence that the plaintiff had misread the contents of the email - exhibit P1 - sent by the defendant offering a concessional rate. The plaintiff wrongly assumed that the defendant agreed to transport the entire cargo of 1600 kg for only US$1 whereas it was only the rate per kg that has been

quoted at the rate of US$1. In the circumstances, the defendant claims the sum of R 7,457.92 towards freight costs in respect of the air cargo the defendant transported for the plaintiff on 25 April 2007.

The plaintiff's action in this matter is obviously based on a breach of contract. It is not in dispute that the parties had entered into a contract of transportation in respect of air cargo, whereby the defendant agreed to bring the cargo from South Africa to Seychelles by its flight scheduled to arrive in Seychelles on 18 April 2007. However, the said cargo did not arrive in Seychelles on the scheduled flight but a week later, which was on 25 April 2007. Now, the plaintiff claims damages for the delayed arrival of the cargo, alleging breach of contract by the defendant. The defendant denies responsibility for the delay, contending that the freight forwarding agent did not deliver the cargo with necessary documents to the defendant in time so as to be loaded onboard the scheduled flight of 18 April 2007. As regards the plaintiff's claim against the defendant the crucial question that arises for determination is this: Was the defendant directly or vicariously responsible for the delayed arrival of the cargo in question?

Indeed, it involves a question of fact and the answer to which can be found only from the evidence on record. I carefully perused the entire evidence including the documents adduced by the parties in this matter. I also had the opportunity to observe the demeanour and deportment of the witnesses, while they deposed in court. I gave diligent thought to the submissions made by counsel on both sides. Firstly, on the question of credibility, I believe the defendant's witness Mr Samsoodin, the Chief of Air Seychelles Cargo Section in every aspect of his testimony. He appeared to be a truthful witness. Especially, I believe his testimony as to why, how and under what circumstances the delay occurred in transporting the cargo from South Africa to Seychelles. I

believe Mr Samsoodin in that, the freight forwarding agent Jonen Freight Pty Ltd, the agent of the supplier was the one responsible and so involved in the act of preparing the airway bill, export documentation and of forwarding or entrusting the cargo to the defendant airline's agent Aviation GSA International Pty Ltd in Johannesburg, South Africa for transportation to Seychelles. His testimony in this respect was very cogent, reliable and consistent. The plaintiff's witness Mr White also admitted in cross-examination that he did not know whether it was the defendant company or Abac Air Compressors (SA) (Pty) Ltd responsible for appointing Jonen Fright Pty Ltd as the cargo forwarding agent. Also he admitted that the freight forwarding agent is the one responsible for signing and completing the airway bill before the cargo can be uplifted. He also admitted the fact that the goods cannot be exported by the suppliers in South Africa unless and until the customs formalities are completed and the cargo is delivered to the carrier's agent by the cargo forwarding agent with proper and necessary documents. In the circumstances, I find on the evidence that the freight forwarding agent Jonen Freight Pty Ltd did not deliver the cargo with the necessary documents to the defendant in time so as to be loaded onboard and transported by the scheduled Air Seychelles flight that left Johannesburg on 18 April 2007 for Seychelles. Therefore, I conclude that the defendant was not directly or vicariously responsible for the delayed arrival of the cargo in question and such delay was caused by the act/s of third parties who were not the agent/servant/préposé of the defendant company. Hence, I find that the defendant is not liable to compensate the plaintiff for any loss or damage, which the plaintiff might have suffered due to delayed arrival of the said cargo. Having said that, I note the defendant company has taken all reasonable and necessary steps as a prudent carrier, to transport the cargo with minimal delay by using the next available flight to Seychelles. Obviously, the plaintiff's claim against the defendant in this matter is devoid of merit. Hence, the plaint is liable to be dismissed.

Now, I will proceed to examine the counterclaim made by the defendant against the plaintiff in this matter. The whole issue of counterclaim revolves around the interpretation given to the words used by the defendant in its email exhibit P1 sent to the plaintiff making an offer of a concessional freight rate for the transportation of cargo in question. It is plain and evident from exhibit P1 that the defendant company never agreed to render any freight service free of costs to the plaintiff as compensation for the delayed arrival of 5 cartons of PET cargo in February 2007. The defendant has simply made an offer through exhibit P1, which reads:

> We will offer as compensation a concessionary freight rate of US D 1.00 on your next shipment from JNB based on 1600 Kilos.

Indeed, the meaning of the words used by the defendant in the given context is plain, clear and simple. Any reasonable reader of exhibit P1 would undoubtedly understand that the defendant has agreed to apply the concessional rate of US$1 per kilogram only in respect of 1600 kilos of cargo, which the plaintiff had intended to import from Johannesburg to Seychelles. No reasonable person would construe and equate the above offer of a concessional rate to an offer of transport free of charge. Also it is pertinent to note that the crucial term “rate” used by the defendant in its natural and ordinary sense would mean and means that the concessional rate was offered only per kilogram of cargo. The plaintiff has wrongly assumed that the defendant had agreed to transport the entire cargo of 1600 kg for only US$1 whereas it was only the rate per kg that has been offered at US$1. In the circumstances, I find that the defendant is entitled to claim the sum of R 7,457.92 from the plaintiff towards the freight costs in respect of 631 kgs of cargo (vide exhibit D5 - the Airway Bill), which the defendant transported on 25 April 2007 from South Africa to Seychelles.

Having considered the entire evidence in this matter, I find on a preponderance of probabilities that the defendant was not responsible for the delayed arrival of the cargo on 25 April 2007 from South Africa to Seychelles. The defendant cannot be held liable for the delay. In my judgment, the defendant was therefore not in breach of any contract nor committed any act amounting to a breach of contract in the special circumstances in which the prejudice was caused to the plaintiff. Accordingly, I find the defendant not liable in damages. On the contrary, I find that the plaintiff is liable to pay the sum of R 7,457.92 to the defendant for the freight costs in respect of 631 kgs of the cargo the defendant transported for the plaintiff on 25 April 2007 from South Africa to Seychelles. Wherefore, I enter judgment as follows:

(i) I dismiss the plaint;

(ii) I allow the counterclaim of the defendant ordering the plaintiff to pay the sum R 7,457.92 to the defendant; and

(iii) I make no order as to costs.

Record: Civil Side No 214 of 2007

Majah v Majah

Karunakaran J
6 October 2010 Supreme Court Div 127 of 2008

Court procedure – jurisdiction - family law – divorce

The parties had been married for 25 years. The wife petitioned for divorce. The respondent claimed that the court had no jurisdiction as the marriage was an Islamic marriage, and the court was not an Islamic court. Furthermore, the respondent claimed that the petitioner did not have any right to come before the court because of her position as a Muslim wife.

HELD

1. The Supreme Court of Seychelles has unfettered jurisdiction to entertain a petition and grant any relief in accordance with domestic law.

2. The fact that a petitioner is a Muslim woman does not remove her rights to petition the court. No other law or practice, whether customary or religious, can take away the jurisdiction conferred on the court by the Constitution.

3. The Supreme Court of Seychelles has unlimited original jurisdiction in all civil matters under article 125(1)(b) of the Constitution of Seychelles

4. Although a party may subscribe to a personal law, for example Islamic law, they are still subject to the personal law of the

land. Their marriage, divorce and civil status are governed by the law of the land.

5. A marriage will be dissolved if it is just and necessary to do so.

Judgment: Petition allowed.

Legislation cited
Constitution, art 125(1)(b)
Civil Status Act
Matrimonial Causes Act

Lucy POOL for the petitioner
Nichol GABRIEL for the respondent

Judgment delivered on 6 October 2010 by

KARUNAKARAN J: This is a petition for divorce, which indeed, has opened up an appalling vista on the conflict of personal law and the clash of civilizations. The petitioner, Hameeda Rashidah Majah, a middle-aged Muslim lady has applied to this Court for a dissolution of her marriage with the respondent, on the ground that the marriage has irretrievably broken down since the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him continuing the marriage.

The respondent, who was duly served with the notice of the petition, put in appearance in Court through his counsel Mr Gabriel and contested the matter. Accordingly, he filed an answer to the petition dated 12 January 2009 objecting to the grant of divorce. It is contended therein by the respondent that all the allegations made by the petitioner in her petition are not true, reliable or correct. Moreover, it is the contention of the respondent that this Court, since based on Western ideology, has no jurisdiction to dissolve any Islamic marriage

and grant a divorce, when the parties are Muslims. Hence, the Court proceeded to hear the case on the points of law as well as on the merits. Both parties testified in support of their respective stance on religious and factual issues.

The petitioner was duly represented by counsel Ms Pool throughout the proceeding. In a nutshell, the petitioner testified that she was lawfully married to the respondent on 27 June 1985 at the Central Civil Status Office Victoria, Mahe, Seychelles (vide exhibit P1) having solemnised the Islamic marriage. After the marriage the parties lived and cohabited as a wedded Muslim couple at Pte Larue, Mahe. The petitioner is employed as a cleaner at the Libyan Embassy, whereas the respondent is self-employed. Both the petitioner and the respondent are Seychellois nationals, domiciled and resident in Seychelles. Both are Muslims professing Islam. There are six children born of the marriage. The last two children are still minors. The petitioner categorically testified that her marriage has broken down irretrievably because of unreasonable behaviour on the part of the respondent. According to the petitioner, although the parties had been married for over 24 years, only in the past three years has the marriage been on the rocks. The respondent has been treating the petitioner with persistent cruelty and neglect causing her mental torture and hardship. The respondent did not even allow her to sleep on the mattress. He took the mattress away from the bedroom and forced her to sleep on the floor. He also stopped giving her maintenance and refused to provide even important things a woman needs for her personal use including sanitary towels. He also used to hide everything from the bathroom such as toothpaste and body soap. He never gave money for her to buy things for her personal use. He was always telling her to go out of the matrimonial home so that he could bring his other wife, whom the petitioner referred to as the "white-wife", into the house to replace the petitioner. He used to insult her in front of the children, who were also afraid of his violent behaviour and

attitude. Moreover, the petitioner testified that the respondent even asked her to go out and sell her body for money to buy things in order to meet her personal needs. She also testified that he neglected the family and failed to provide maintenance for the petitioner and for the children. Also, the petitioner stated that the respondent used to tell her that since he is a Muslim, he had a right to have sex whenever he wants: for four, five or even six times in a day. Whenever the petitioner refused to accommodate his sexual desires, the respondent got wild and used to threaten her with violence. Moreover, she stated that the respondent used to snore very loudly at night and she could not sleep in the same room with the respondent. As a result of the ill-treatment, the petitioner became hypertensive, fell sick and could not even sleep at night. Consequently, the petitioner was forced to leave the matrimonial home and is now living with her parents. The petitioner testified that despite several attempts with the assistance of the Imam, the religious leader, they could not succeed in a reconciliation. The petitioner thus testified that there is no possibility at all for reconciliation. Therefore, she asks the Court for an order dissolving the marriage of the parties and to render justice by granting divorce in her favour.

On the other side, the respondent testified in essence that all the allegations made by the petitioner against him are false and incorrect. According to the respondent, he has always provided maintenance as a good husband and treated the petitioner with love and affection for more than 25 years. The respondent also stated that he is now providing adequate maintenance to the family including the minor children since the petitioner had lodged a complaint with the Family Tribunal. He is now paying R 1200 every month for the maintenance of the minor children. The respondent further testified that since this court is not an Islamic court and the petitioner is a Muslim wife she cannot bring her husband, the respondent, before this Court for a divorce or separation or *talaq.* According to him, the petitioner does not have the right to come before this

court in order to seek a divorce. Moreover, he testified that his personal law (Islamic law) allows polygamy and he can have another wife in addition to the petitioner. He could bring that wife into his family and have engagement with her. According to Islamic law, he is not committing any sin in doing so. His existing wife, the petitioner, has no right to complain against the polygamy practiced by the husband, the respondent. He stated that polygamy was his privilege and he had a right to do so as per Qur'anic injunction. He further stated that men in Islamic law have the authority over women in all aspects of life. The crucial aspect of the evidence given by the respondent ran thus -

> I put a proposition to her (petitioner) regarding all the allegations and false charges that she has brought me here for. I told her "let us go the Imam Idris, I know him, we went to University together, he is the best man" as we don't have a proper Jamaat here. I think she does not have the proper education regarding the religion even though she is in that religion. A lot of Seychellois people come into this religion but they don't have the basic knowledge of the religion. I am very sorry for those Seychellois people... I suggested to her that we did not have to come to a civil court. I told her we are wasting the time of the court. This is a European court. We have a Muslim affair. We should go to the Jamaat. But she went to the wrong Jamaat, not a man of experience. I put a complaint to the Imam and he told me that according to the Muslim law she does not have a right except under extreme circumstances.

For these reasons, the respondent urged the court not to grant divorce in favour of the petitioner and to dismiss the petition.

I meticulously perused the evidence adduced by the parties in this matter. I diligently examined the points of law relevant to the issues joined by the parties. First of all, I note that there is conflict of law; that is, between the personal civil law (*lex loci* and *lex fori*), which is universally applicable to all in Seychelles irrespective of their religious belief, faith and worship, and the personal Islamic law applicable to the marriage of the parties. As I see it, although the parties were married under Islamic law being Muslims, they are still subject to the personal law of the land (*lex loci* and *lex fori*), since their marriage has been solemnised and registered under the Civil Status Act in accordance with the law of the land. In the circumstances, I find that the Supreme Court of Seychelles has unfettered jurisdiction to entertain this petition and grant any relief in accordance with domestic laws, particularly the Matrimonial Causes Act. In my view, although there appears to be a conflict of personal laws in this matter, since both parties are Seychellois nationals, resident and domiciled in Seychelles, they are undoubtedly, subject to the laws of Seychelles. Their marriage, divorce and civil status are obviously governed by the *lex loci* and *lex fori*. In the circumstances, I decline to accept the contention of the respondent that the petitioner being a Muslim woman has no right to come before this Court for divorce. I also reject the respondent's contention that this court has no jurisdiction to entertain the petition for divorce in this matter. At this juncture, it is pertinent to observe that the Supreme Court of Seychelles has unlimited original jurisdiction in all civil matters in terms of article 125(1)(b) of the Constitution. Obviously, no other law or any practice, whether customary or religious in this country can take away that jurisdiction conferred on this Court by the Constitution. No attempt by anyone to whittle it down in the name of religion, culture, tradition or custom can be entertained by this Court.

Having said that, in essence, the defence raised by the respondent in this matter, constitutes three components,

namely:

(1) The respondent being a Muslim, as a man and as her husband, has the legal right in Islamic law to oppress the petitioner on account of her gender as a woman and of her status as his wedded wife;

(2) The respondent being a man and husband of the petitioner, has an unconditional right or freedom in Islam, to practise polygamy; and

(3) The credibility of the evidence given by the petitioner pertaining to the breakdown of marriage.

The appalling argument advanced by the respondent on the first two components challenges the civil rights and status of the petitioner, as a wife and as a woman in Islamic society. This indeed, raises two fundamental questions, which I believe, require candid answers so as to demystify the false impression and misapprehension of the Islamic teachings as wrongly portrayed by some, including the respondent in this matter. The questions are:

1. Does Islam discriminate and oppress women in society?

2. Does Islam permit polygamy unconditionally in favour of men causing social injustice to the detriment of women's rights and equality in society?

In answering the first question - vide *Discover Islam* (edited by Al-Jumuah - ISBN 9960-9406-7-5) - one must differentiate between the teachings of Islam and the practice of some Muslims. Although some Muslim cultures oppress women, that often reflects local customs that are inconsistent, if not contrary to Islamic teachings. Islam expects its adherents to

uphold the rights of women, to protect their social status, marriage, family life and prevent their degradation in every way. Islam further holds that women are equal to men in their origin, their humanity, their honour and their accountability before God.

The idea that Islam treats women as second class citizens worth half a man is nothing but a myth. Islam elevated the status of women over 1,400 years ago by declaring them the sisters of men, giving them the right to education to the highest level, the right to choose a husband, the right to end an unhappy marriage, the right to inheritance, and in general, the rights of a full citizen of the state. Not only material and physical rights, but those of kindness and consideration are equally specified and significant in Islamic law.

According to Islam, men and women are two equally important component parts of humanity, and the rights and responsibilities of both sexes are equitable and balanced in their totality. The Qur'an confirms that men and women are equal in the sight of God. They are one of another male or female as the male comes from the female and the female comes from the male, vide Qur'an 3:1951. The roles of men and women are complementary and collaborative. Although their obligations might differ in certain areas of life in accordance with their basic physical and psychological differences, each is equally accountable for their particular responsibilities. Ignoring these differences is surely unrealistic, but there is no reason to assume from them that one sex is either superior or inferior to the other in any way as the respondent wrongly assumed against the petitioner in this case.

Under Islamic law, when a Muslim woman gets married she does not surrender her maiden name, but keeps her distinct identity unlike in some other religions. In a Muslim marriage, the groom gives a dowry to the bride herself, and not to her

father. This becomes her own personal property to keep, invest or spend and is not subject to the dictates of any of her male relatives. The Qur'an places on men the responsibility of protecting and maintaining all of their female relatives. It means, as well, that a man must provide for his wife and family even if she has money of her own. She is not obliged to spend any of her money towards the maintenance of her family. This relieves a woman of the need to earn a living, but she can work if she chooses to do so or if her circumstances warrant it.

The family, like any other organisation, needs order and leadership. The Qur'an states that the husband has a "degree" of authority over his wife, which means guardianship. It is important to note, however, that guardianship is in no way a licence to be a tyrant within the household. Rather, it is a burden of responsibility for the husband to care completely for his wife and children. Hence, it is so evident that the answer to the first question should be in the negative. That is: Islam does not oppress women in any manner whatsoever; nor does it grant a license to any man for that matter - let alone a husband - to discriminate, exploit, mistreat or ill-treat any woman either in one's family or in society. However, it is deplorable to note that some men like the respondent in the instant case, who mistakenly or wrongly believe in male chauvinism, do so in the guise of religion. A non-believer, who is ignorant of Islam, is closer to the truth than a believer, who believes what is wrong. Ignorance is preferable to error!

I will now proceed to find the answer to the second question on the issue of polygamy raised by the respondent in this matter. As I see it, unless one goes into the theological and philosophical labyrinth of the major religions of the world, it is not easy to find the answer in the proper perspective. Please, forgive me for my inevitable embarkation upon a sensitive area of clashing culture and human civilisation.

It is truism that in Islam, a limited form of polygamy is permitted; whereas polyandry is completely prohibited. In contrast to Islam, one will not find a limit for the number of wives in the Jewish Talmud or the Christian Bible or the Hindu Epics and in the pantheon of Hindu gods. According to these scriptures, there is no limit to how many women a man may marry. Therefore, polygamy is not something exclusive to Islam as generally perceived by many but it has been practiced by early Hindus, Christians, Jews and Baha'is as well. Even in the Baha'i faith, there are pages in *Baha'u'llah's Kitab-i-Aqdas* that suggest that two wives are permitted. It is therefore, wrong to single out and portray the people of a particular religious denomination as protagonists or promoters of polygamy.

Be that as it may, according to the Talmud, Abraham (ie Ibrahim) to whom Allah said "I will make thee an Imām [a leader] to the Nations" vide Qur'an Part l Surah II Al-Baqarah V 124 had indeed, had three wives, while King Solomon had hundreds of wives. The practice of polygamy continued in Judaism until Rabbi Gershom Ben Yehudah (955-1030 CE) issued an edict against it. The Jewish Sephardic communities continued the practice until as late as 1950, when an Act of the Chief Rabbinate of Israel extended the ban on marrying more than one wife, thus prohibiting the practice for all Jews. In the early teachings of Christianity, men were permitted to take as many wives as they wished, since the Bible placed no limit on the number of wives a man could marry. It was only in recent centuries that the Church limited the number of wives to one and so did the Hindus.

At a time when men were permitted an unlimited number of wives, Islam limited the number to a maximum of four. Before the Qur'an was revealed, there was no upper limit for polygamy and many men had scores of wives. The Koran gives a man permission to marry two, three or four women, on the condition that he deals with all of them equitably,

benevolently and justly, as indicated by Allah's statement in Qur'an Sūra IV Nisāa v 3:

> Marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then [marry] only one...

It is not incumbent upon Muslims or upon the respondent or anyone for that matter to practice polygamy. In fact, in Islam, taking an additional wife is neither encouraged nor prohibited. Incidentally, even Baha'u'llah (with the highest reverence to the Glory of God), who had three legally wedded wives during his lifetime also stated that monogamy brings tranquility to a marriage, and that plurality should be conditional upon justice.

Furthermore, a Muslim who has two, three or four wives may not be a better Muslim as compared to a Muslim who has only one wife. John Esposito, a professor of religion and international affairs and Islamic studies at Georgetown University, writes:

> Although it is found in many religious and cultural traditions, polygamy is most often identified with Islam in the minds of Westerners. In fact, the Qur'an and Islamic Law sought to control and regulate the number of spouses rather than give free license.

He further continues thus:

> The Qur'an allows a man to marry up to four wives, provided he can support and treat them all equally. Muslims regard this Qur'anic command as strengthening the status of women and the family, for it sought to ensure the welfare of single women and widows in a society whose male population was diminished by warfare, and to curb unrestricted

polygamy. (Vide: 12 John Esposito, *Islam: The Straight Path*, Oxford University, 1988, p 97).

There are certain circumstances which warrant the taking of another wife. For instance, if there is a surplus of unmarried women in society, especially during times of war when widows are in need of shelter and care. Infant mortality rates among males are higher when compared to that of females. During wars, there are usually more men killed than women. Statistically, more men die due to accidents and diseases than women. The average life span of females is also generally longer than that of males. As a result, at any given time in practically any given society, there is a possibility of shortage of men in comparison to women. Therefore, even if every single man got married to one woman, there would be millions of women who would still not be able to find a husband.

In Western society, it is not uncommon for a man to have girlfriends, or if he is married, to have extramarital affairs. Seldom is this practice scorned, despite the harms that stem from it. At the same time, polygamy is banned in Western society although it produces none of these adverse effects; rather it preserves the honour and chastity of women. Within a second, third or fourth marriage the woman is a wife, not a mistress; she has a husband who is obliged by Islamic law to provide for her and her children, not a "boyfriend" who may one day cast her aside or deny knowing her if she becomes pregnant and at times even deny the innocent child a legitimate paternity.

There is no doubt that a second wife who is lawfully married and treated with honour is better off than a mistress without any legal rights or social respect. A child born of wedlock is better placed than a child born without legitimate paternity. Islam strictly prohibits and penalises prostitution, fornication, and adultery and permits polygamy under strict conditions,

obviously out of social necessity. At the same time, in Islam, polygamy is neither desirable nor recommendable. In any event, Islam prohibits additional wife/s when there is a likelihood of fear that the man in question would not be able to do justice for more than one wife. Hence, I find the answer to the second question also in the negative. That is: Islam does not permit polygamy unconditionally in favour of men causing social injustice to the detriment of women's rights and equality in society. If a man/husband opts for an additional wife, he ought to satisfy the precondition that he has the ability to do justice between his wives respecting their rights and equality of status in the family and in society.

In my judgment, the respondent in the instant case has obviously failed to do justice to the petitioner through his polygamous approach to life. His justification of polygamy though based on Islamic jurisprudence, does not appeal to me in the least, since he did not satisfy the necessary conditions spelt out in the Qur'an Sūra IV Nisāa v 3 and so I find.

Finally, on the question of credibility, I believe the petitioner in every aspect of her testimony. Whatever be the merits and demerits of the arguments advanced by the respondent based on his religious belief and misconceived ideas on Islamic teachings, the fact remains that his marriage with the petitioner has, to say the least, practically come to an end; the parties have been living apart for more than three years. In the circumstances, I find on a balance of probabilities that the marriage has irretrievably broken down due to unreasonable behaviour on the part of the respondent. The petitioner cannot therefore, reasonably be expected to live or continue to live or resume cohabitation with the respondent. I am equally satisfied that there is no possibility of reconciliation between the parties. Therefore, it is just and necessary that the marriage should be dissolved and I do so accordingly.

Therefore, I hereby dissolve the marriage of the parties and

grant a conditional order of divorce, which may be made absolute, after the expiry of six weeks from the date hereof.

Record: Divorce Side No 127 of 2008

Republic v Ali

Burhan J
3 November 2010 Supreme Court Crim 14 of 2010

Piracy- attempted piracy – applicable law

The accused were charged with piracy. They had attempted to board and take over a ship but were stopped before they could physically do so. They argued that they should have been charged with attempted piracy, and that the charge of piracy could not be established because no boarding of a ship occurred.

HELD

1. Piracy is governed by the law of England as at 29 June 1976.

2. Definitions in respect of piracy are not exhaustive, but are subject to change to reflect changing social conditions.

3. A frustrated attempt to commit piracy is still piracy.

Judgment: Accused convicted.

Legislation cited
Constitution, art 19
Penal Code, ss 23, 65, 377

Foreign legislation cited
Convention on the High Seas
Merchant Shipping and Maritime Security Act 1997 (UK)
Piracy Act of 1837 (UK)
Tokyo Convention Act 1967
United Nations Convention on the Law of the Sea

Cases cited
R v Mohamed Ahmed Dahir Cr 51/2009 (unreported)

Foreign cases cited
Bolivia Republic v Indemnity Mutual Marine Assurance Co [1909] 1 KB 785
In re Piracy Jure Gentium [1934] AC 586

J Lloyd State counsel for the Republic
Frank Elizabeth for all the accused

Judgment delivered on 3 November 2010 by

BURHAN J: All the above-mentioned accused were charged as follows:

> Statement of offence
>
> Piracy contrary to section 65 and section 377 of the Penal Code read with section 23 of the Penal Code and punishable under section 65 of the Penal Code.
>
> Particulars of the offence,
>
> Abid Ali, Oman Hali Omar, Ahmed Hussein, Ahmed Abdi, Aziiz Aziz Abdi, Mohamed Abdi Farah, Mohmed Momud, Hasom Ibrahim, Mohamed Abdigani Noor, Ahmed Mohamed Ismail and Said Abdisamad on the 5th of March 2010 on the high seas with common intention, attempted to seize a ship, namely the Intertuna II by violence or putting those in possession of such ship in fear.
> The eleven accused denied the aforementioned charge and trial against them commenced on 6 September 2010.

The law

Prior to analysing the evidence led in this case, it would be pertinent to set out the law contained in section 65 of the Penal Code of Seychelles.

Section 65 of the Penal Code of the Republic of Seychelles reads as follows:

> Any person who is guilty of piracy or any crime connected with or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force.

The phrase "time being in force" according to established principles and case law refers to the common law prevailing in England as at 29 June 1976 (hereinafter referred to as the relevant time) when Seychelles attained independence from the United Kingdom. A similar interpretation was followed by Gaswaga J in the case of *Mohamed Ahmed Dahir* Criminal Side No 51 of 2009.

Section 377 of the Penal Code of Seychelles defines the term "attempt" while section 23 of the Penal Code of Seychelles reads -

> when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

In relation to the meaning or definition of piracy, it would be pertinent in light of section 65 of the Penal Code to follow the

definitions or meanings given to it under the English law at the relevant time.

In 1909 in the case of *Bolivia Republic v Indemnity Mutual Marine Assurance Co* [1909] 1 KB 785 at 802, Kennedy LJ defined it for the purposes of a policy as meaning persons who plunder indiscriminately for their private gain, and not persons who simply operate against the property of a particular State for a public political end.

In the landmark case of *In re Piracy Jure Gentium* [1934] AC 586 at 600 the Privy Council did not venture to define piracy but stated:

> A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurisconsults were expressing their opinions.

Therefore it follows that definitions in respect of piracy are not exhaustive but subject to change in order to bring it in line with prevailing situations either not thought of or non-existent when defined earlier.

Halsbury's Laws of England, 4th ed as revised in 1977, vol 18 at 787 para 1536 sets out the meaning of piracy in international law at the relevant time as follows:

> Piracy in international law (piracy jure gentium) was defined by the Convention on the High Seas, and this definition forms part of the law in England

The Convention on the High Seas (Geneva, 29 April 1958) defines piracy in articles 15 - 17 as follows:

Article 15

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(c) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(d) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

Article 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17

> A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that Act.

Halsbury's Laws of England (supra) at 787, further refers to the fact that by virtue of section 4 of the Tokyo Convention Act 1967 (an Act of the UK Parliament) this definition contained in articles 15 -17 of the Convention formed part of the law of England.

In regard to the municipal law and the international law applicable to piracy the Privy Council had this to say *In re Piracy Jure Gentium* (supra) at 589 -

> With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, *it is also recognized as extending to piracy committed on the high seas by any national on any ship* because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but "hostis

> humani generis" and as such he is justiciable by any state anywhere: Grotius (1583-1645) "De Jure Belli ac Pacis," vol. 2, cap. 20, --- 40. (emphasis added)

Even *Halsbury's Laws of England* (supra) 787 paragraph 1535 states: “By customary international law, a pirate is hostis humani generis and is subject to universal jurisdiction”.

Halsbury's Laws of England (supra) 789 paragraph 1539 further reiterates this position:

> The English Courts have jurisdiction to try all cases of piracy jure gentium in whatever part of the high seas and upon whosoever's property it may be committed and whether the accused are British subjects or the subjects of any foreign state with whom Her Majesty is at amity.

It is pertinent to mention at this stage that the municipal law in England in force in regard to piracy was the Piracy Act of 1837 which was eventually superseded by the Merchant Shipping and Maritime Security Act 1997 which incorporated into English law the United Nations Convention on the Law of the Sea 1982 (UNCLOS).

The case for the prosecution and the defence

The case for the prosecution was that on 5 March 2010, Intertuna II (also referred to in the proceedings as Intertuna Dos), a Spanish fishing vessel registered in the Seychelles was fishing in the high seas with two of its own smaller boats deployed to sea, when the alarm was sounded by the lookout on duty Mr Karim Dioufe that another small boat was travelling at high speed towards their vessel. Immediately the captain of the vessel Captain Josu Arrueispizua sounded the alarm and all the crew members of the ship made their way down to

the bottom of the ship which was the usual security drill and all doors were locked. The only persons on the deck of the ship were the captain and the security personnel.

According to the evidence of Mr Foggin the leader of the security team, the approaching vessel, referred to as a skiff was blue in colour and coming at a high speed which he estimated to be about 15 to 20 knots. He stated he had experienced three pirate attacks before and using his binoculars, he observed that there were four persons aboard the approaching skiff. The two persons in front of the skiff had a ladder with hooks and two more persons were behind them armed with Klashnikov rifles. He and the other security officer Mr Daren Nickson had come to the conclusion that the Intertuna II was in danger and had begun firing warning shots at the approaching skiff. The warning shots had gone unheeded and the skiff had continued to approach at high speed. The security officers on board the Intertuna II had then begun to fire directly at the approaching craft. After a while the shooting had its desired effect and the skiff had turned and gone back in the direction it had come from.

Thereafter he had seen the first skiff join two other vessels. He noticed that one vessel was larger than the other which was also a skiff. He stated in his experience in piracy, it was usual and common practice for small skiffs to be associated with "larger mother vessels" also referred to as whalers and it was the mother vessel which usually acted as a support vessel for storing fuel, supplies and carrying personnel. Both skiffs had thereafter approached the Intertuna II at high speed. Once again warning shots had been fired to no avail and it was only direct firing at the two skiffs that made the crafts stop their approach and turn back.

On reaching the whaler, the persons from the skiffs had transferred themselves onto it. One skiff was tied to the whaler while the other was left adrift. Witness Mr Foggin

stated they had opened fire because he felt that the crew, the vessel and his life were in danger. The other security officer Mr Nickson testified to the fact that at one stage he saw gun flashes from the weapons in the hands of the persons in the skiff but no one was injured nor was the vessel damaged. Witness William Mangan of the Public Security and Support Wing Seychelles testified that with his 17 years' experience in handling guns he could state that some of the AK47s produced in court had been fired due to the carbon deposit in the barrel and the cylinder tube of the guns.

Meanwhile the captain of the vessel Intertuna II, Captain Josu Arrueispizua had called for help on the radio and a Cisna aircraft had flown in and dropped smoke bombs on the pirate vessels. The Cisna at his request had done an expanded circle overhead and went as far as he could see which was the distance from the bridge wing to the horizon which he said was usually approximately 8 miles and reported that there were no other suspect vessels sighted by them. The Cisna aircraft he stated was with them for about 1 hour 15 minutes and thereafter helicopters had arrived soon after the Cisna had left. The radar on Intertuna II also showed that other than these three vessels there were no other suspect vessels in the vicinity.

The pilot and the officer in charge of the helicopter Helios, Mr Sylvain Baise testified to the fact that he was on board the French Naval Ship (FNS) Nivose which was concerned with anti-piracy marine patrolling of the area and responded to a call from Intertuna II in his helicopter Helios. When he arrived he noticed an empty skiff with a ladder inside and a whaler towing another skiff. In the area there was another Spanish plane and another helicopter (Vulcan) from the Italian Marines. He had stayed in the area for about 10 minutes and left to refuel. Thereafter he had taken off again to intercept the whaler which was towing the skiff.

The witness further stated he intercepted the whaler by flying the helicopter above it and making a sign for it to stop. He identified all the photographs taken from the helicopter Helios that day. Thereafter the officers of the FNS Nivose had boarded the whaler. He stated that the zone he flew through was about 10,000 nautical miles and there were no other whalers or skiffs in that zone. Pilots of the helicopter Vulcan, Walter Germana and the Cisna aircraft, Juan Barberon gave evidence and identified photographs taken by them at the scene. From their evidence it is apparent that the whaler towing the skiff was constantly monitored.

Jean Rene Drovin chief of the protection brigade stated at approximately 13.30 GMT he prepared his boarding team for an operation. They had left in two rigid boats one called Hurricane and the other Zodiac. He was on the Zodiac with four other officers while there were five other officers in the Hurricane. They saw the helicopter Helios about a knot away and went towards it. When they approached the helicopter they saw the whaler beneath with 11 persons on board. His crews were fully armed and the persons on the whaler had offered no resistance and obeyed all commands given in English and by signs. They had taken the 11 persons aboard the FNS Nivose and placed them at the back of the warship, as there were 11 more persons arrested earlier who had already been placed in the front of the ship. Thereafter they had searched the whaler and found seven AK47s and two RPGs and ammunition. They had also found fuel cans and a ladder with hooks. The witness identified through photographs the whaler, the skiff and all the exhibits taken into custody.

Witness Nicolas Pendriez the legal officer on board FNS Nivose stated he was present on the Nivose at the time the persons aboard the whaler were transferred to the Nivose. He was responsible for photographing and identifying the persons and exhibits. He identified the weapons and

ammunition taken into custody from the whaler, the videos showing the Helios circling the whaler and the boarding team approaching the whaler and the photographs, a map depicting the history of the interception and the ladder retrieved from the skiff. He further identified the photographs of the accused as those taken by him. He also identified the notebook and the loose documentation taken into custody from the whaler and a GPS of Garmin 72 also taken into custody from the whaler.

Witness Ian Delfgou stated he received photographs taken from the Cisna and helicopters Helios and Vulcan. He had compared the photographs taken by the aforementioned three aircraft at different times of the incident and had marked the similarities of the vessels and the cargo on board to identify these were the same vessels which were involved in the aborted attack on the Intertuna II and had subsequently been intercepted by FNS Nivose and its crew. In order to show the similarities of the two pictures he had marked the similarities in similar colours and written within a box to depict same. He stated that some of the colours had changed due to the copy being compressed.

Mr James Tirant stated that all the exhibits relevant to this case were handed over to him and kept in his custody and they had not been tampered with. He identified the phones, weapons, photographs and other exhibits in open court. He stated that at the time of receipt of the exhibits the seals were intact. He had tested the weapons for fingerprints but there were none. Thereafter the statements given to the police by all of the accused were produced. The statement of the 1st accused was admitted only after a voir dire was held, as there was an objection in respect of its voluntariness, which was overruled by a ruling dated 22 September 2010. Thereafter a Somali translator gave evidence translating the documents which were in the Somali language to the language of the court.

When one considers the case for the defence all the accused exercised their right to remain silent. It is to be noted that in terms of article 19(1)(h) of the Constitution of the Republic of Seychelles, no adverse inference should be drawn by the court from the exercise of the right to silence by the accused. Both counsel thereafter made oral submissions.

Analysis of the case for the defence

On analysing the defence case as set out in the submissions by counsel for the accused and that arising from the cross-examination of witnesses, one of the defence contentions is that the accused's names were incorrectly stated in the charge sheet and that there was no signature of a process server to the effect that the summons containing the charge was served on the accused. One should take note that the reason why the process server signs the said document is for the information of court that summons have been duly served. When the summons containing the charge is handed over in open court there is no necessity for such service to be signed by the process server concerned. The record shows that time was given for the accused to consult their counsel prior to the amended charge being read out. The amended charge was read over to all the accused in the presence of their counsel and thus this court is satisfied that no prejudice has been caused to the accused by this procedure.

With regard to the names of the accused being incorrectly spelt, as correctly pointed out by counsel for the prosecution, the name of each of the accused was called out several times in open court during the trial and pre-trial stages, and each accused acknowledged and responded to the name read out. Had there been any discrepancy in the spelling of their names, it should have been the duty of counsel for the accused to have brought this to the notice of court and the corrections made and not to rely on such trivial technicalities

to have the accused acquitted. For the purposes of the record, the correct names of the accused appear in the caption of the judgment as set out in their statements produced in court.

Another ground urged by counsel for the accused was that it was the officers on board the Intertuna II that opened fire and attacked the persons on the skiff and that there was no evidence that the crew were put in fear by the acts of the persons of the skiff. If one is to follow the steps taken by the captain of Intertuna II, the crew and members of the security team, one would see that the entire crew abandoned their work and went down below deck and shut themselves in till the "all clear" was given and the fact that the captain radioed for help are all acts indicating fear of acts of piracy from armed persons on the fast approaching skiffs.

Even the fact that the security team took up positions and fired warning shots at the fast approaching skiff with armed gunmen, shows the security team too was acting, as they were in fear of an act of piracy from the armed personnel on board the skiffs. The leader of the security team Mr Foggin specifically states he opened fire as he felt the security of the crew, vessel and his life were in danger. It is clear the captain felt this way too as he had radioed for help. This court is satisfied that the actions of the armed persons on the skiffs were indicative of acts of piracy on the Intertuna II and the actions of the crew, captain and the security personnel were that of persons in fear of such acts of piracy namely illegal acts of violence, detention or any act of depredation.

Counsel has also urged the court that the amended charge sheet of 3 September 2010 is faulty and the statement of offence does not charge the accused with attempted piracy and even if the prosecution evidence was to be accepted that the charge of piracy could not be established as no physical boarding or taking over of the ship had ever occurred. Firstly

the statement of the offence specifically refers to section 377 of the Penal Code which defines what attempt to commit an offence is. Therefore it cannot be said the accused have not been charged with attempt to commit piracy.

When one considers the evidence in this case, the fact that the skiffs came at a high speed towards Intertuna II despite warning shots being fired, the fact that the persons aboard the skiffs were armed with Klashnikov rifles and were carrying a hooked ladder, obviously for boarding purposes and repeated the "charge" for a second time, even after being turned back once by the shooting of the security team, the only conclusion one can come to is there was an attempt by those on board the skiffs to commit illegal acts of violence, detention or some act of depredation on the crew and vessel Intertuna II.

When one refers to the case of *In re Jure Gentium* (supra) it was held:

> actual robbery is not an essential element in the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium.

It is obvious that the evidence in this case sets out a frustrated attempt to commit piracy. For the aforementioned reasons the contention of counsel bears no merit.

Counsel for the defence also contended that there was a mix-up of the accused taken into custody by the officers of the FNS Nivose as they had arrested three groups of persons including another group of 11 Somalis. However the evidence of the prosecution is that they had specifically kept those arrested separately, photographed them and in fact fixed coloured bands on them for identification purposes. This evidence was not tarnished in anyway despite the lengthy cross-examination of witnesses. I cannot see any merit in the

defence suggestion that there was a mix-up, when there is clear and uncontradicted evidence by the prosecution that all precautions had been taken to avoid same.

Counsel also submitted that the arrest of the whaler containing the accused was illegal in all respects. When one considers the facts of this case, it is clear that the FNS Nivose responded to the call for help from the captain of the Intertuna II and had intercepted the whaler containing the accused who had been involved in the attempted act of piracy on the Intertuna II. Thereafter the crew of FNS Nivose had taken the 11 accused aboard the Nivose and held them and thereafter made arrangements for them to be transported via Djibouti to Seychelles to be tried. It cannot be said by any stretch of imagination that by responding to a call for help from Intertuna II in respect of an act of piracy or attempted piracy, and by intercepting the whaler with the pirates aboard and by holding them aboard the Nivose, that such acts violate the norms of international law. Both articles 19 and 21 of the Convention on the High Seas and article 107 of UNCLOS 1982 provide for such intervention.

Therefore this court is of the view that in the case of the offence of piracy which offence attracts universal jurisdiction, if the pirates were held on board FNS Nivose in order to hand them over to judicial authorities for arrest and detention and the pirates were in fact eventually taken to the appropriate country to be handed over, as was done in this instant case, holding them for the necessary period of time for the naval vessel to get the pirates to the relevant country, where the formalities of arrest and judicial proceedings are to commence, cannot be considered to be illegal and not a violation of any norms of international law.

With regard to the jurisdiction to try this case as the law of England is operative as mentioned earlier, *Halsbury's Laws of England* (supra) 787 paragraph 1535 states:

> By customary international law, a pirate is hostis humani generis and is subject to universal jurisdiction.

Further page 789 para 1539 reiterates this position and read together with the decision *In re Piracy Jure Gentium,* which also accepts the position that pirates are *hostis humani generis* (enemy of mankind) and subject to universal jurisdiction, this court is satisfied that it has jurisdiction to hear this case.

Analysis of the evidence of the prosecution and conclusion

When one considers the evidence led by the prosecution it is established by the evidence of the captain of Intertuna II Josu Arrueispizua that on 5 March 2010 about 8.30 GMT (Seychelles time 11.30) the vessel Intertuna II was in international waters when the said skiffs with armed persons approached the vessel at high speed. It is to be noted that the term "High Seas" is defined in Article 1 of the Convention on the High Seas and reads as follows:

> The term “high seas” means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

He explained that there were differences in respect of the position at given times due to the fact that the boat would have drifted a distance while it was stopped. He corroborates the evidence of Mr Foggin given in respect of the incidents relating to the approach of the skiffs with armed persons and steps taken by the security team to repulse same. Witness Darren Nickson too testified giving details. Even though subject to lengthy cross-examination, this court is satisfied that no material contradictions arose to disbelieve the

evidence given by these witnesses.

It is apparent when one considers the evidence in this case that the persons on the skiffs were armed, carrying ladders with hooks and did not have prior permission of the captain to approach or board and had kept on approaching at high speed even after warning shots were fired. It is clear these facts establish that the armed persons on board the skiffs were attempting to seize the vessel Intertuna II. It is also obvious that by carrying weapons, they were intending to use violence or instil fear of violence and attempt to seize the ship as stated in the particulars of the offence.

When one considers the evidence that the whaler and the skiffs were seen together and were operating together during the entire incident, it is clear that the personnel on both skiffs and the whaler were acting on a prearranged plan and in a concerted manner during the second approach towards the Intertuna II and soon thereafter even when attempting to leave the scene. This evidence on the concerted conduct of the persons on the skiffs and whalers clearly indicates that they were acting with common intention as set out in section 23 of the Penal Code. It is to be noted that common intention does not always require a prearranged plan, the arrangement may be tacit and the common design conceived immediately before it is executed or on the spur of the moment. The evidence in this case clearly indicates that the persons aboard the whaler and the two skiffs had the common intention to attempt to seize the ship Intertuna II by violence or instil fear of violence and seize the ship.

With regard to the identity of the accused, the legal officer of the FNS Nivose Nicolas Pendriez stated that although there were other persons of Somali origin who were being held aboard the Nivose at the time, after these 11 accused were brought on board, they had kept them separately and tagged them with coloured bands and photographed them. He

identified and produced the photographs taken of the accused arrested in respect of the incident concerning Intertuna II. On perusal of the photographs it is clear that the photographs represent the 1st to the 11th accused in this case.

Further when one considers the statements of the accused there are strong similarities in each of their statements in respect of the place of departure Barawe coast and time of departure. Some accused state they left on 4 March 2010 while some of the accused do not give the date but state in their statement they left the day before they were arrested which would be 4 March 2010. Almost all the accused each state they left in a mother boat and two skiffs owned by one Mohamed Abdirahaman (not an accused). Considering the similarities in this evidence together with the positive identification of Nicolas Pendriez, the defence contention that there was a mix-up of persons taken into custody from different boats at different times is unacceptable and the court is satisfied on the identification of the accused.

Further when one considers the evidence of Mr Ian Delfgou, by comparing the photographs specially taken of the whaler and the skiffs by the Cisna and helicopter Helios and Vulcan near the Intertuna II and photographs of the whaler and the skiff taken by Helios at the time of interception by FNS Nivose, referring to picture 14 photograph P19m, he shows the similarities in order to establish, that the whaler photographed by the Cisna near Intertuna II was the same whaler that was intercepted by Helios and FNS Nivose. In picture 17 photograph P 19p, he shows the similarities in order to establish that the photograph taken by the Cisna of the skiff being towed by the whaler near Intertuna II was the same skiff being towed by the whaler when intercepted by Helios and FNS Nivose. Picture 6, photograph P19f and Picture 7 photograph P19g show similarities of pictures of the whaler taken near the scene by the Cisna and at point of interception by Helios. The evidence of the prosecution also

shows that there were no other similar suspect vessels detected on the radar or by aerial scrutiny for a distance of about 8 nautical miles. Therefore this court is satisfied that the 11 persons on the whaler intercepted by FNS Nivose at 13.30 hrs GMT and produced as accused in this case were the ones who were intending to use violence or instil fear of violence and attempt to seize the vessel Intertuna II.

In addition to all this evidence there is also evidence that 7 AK47 guns, RPGs ammunition and rocket launchers were found in the whaler, in which the accused was arrested. The ammunition and other explosive material was photographed and destroyed as it was hazardous to transport such items. It is unlikely the officers of the Nivose would have introduced this large amount of arsenal in order to frame these accused, as the officers had seen them for the first time and had no motive to frame these particular accused, especially when there is evidence to show that some of the Somalis taken aboard Nivose were released even without being charged.

With regard to the notebook and loose document papers marked as P13 and P18 the fact that it was found on the whaler is established by witness Nicolas Pendriez. This fact is completely independent of the contents of the documents. Therefore counsel's contention that had he known the contents of the documents he would have contested the fact it was found on the whaler is unacceptable. He should have obtained the necessary instructions from the accused whether these documents were on the whaler or not, and if not contested such a fact irrespective of the contents of the documents.

It is clear that other than to say these documents were recovered from the whaler Mr Nicolas Pendriez could not speak to its contents as the documents were in Somali. Therefore for this reason and in addition to the reasons contained in its ruling dated 27 September 2010 this Court

sees no prejudice being caused to the accused by admitting documents P13 and P18 and the relevant translations even though witness Nicolas Pendriez could not be recalled. When one considers the names and other names mentioned by each of the accused in their statements marked in court there are many similarities with the names mentioned in documents P13 and P18 read with the translations of these documents. Further when one takes all this evidence as a whole this court is satisfied that the attempted acts of violence were committed for private ends by the crew or the passengers of a private ship.

For the aforementioned reasons I proceed to accept the uncontradicted and corroborated evidence of the prosecution in this case. I am satisfied that the prosecution evidence proves all the necessary ingredients of the charge beyond reasonable doubt. Therefore I find all the accused guilty as charged and proceed to convict them.

Record: Criminal Side No 14 of 2010

Ponoo v Attorney-General

Egonda-Ntende CJ, Burhan, Dodin JJ
16 November 2010 Constitutional Court 5 of 2010

Constitution – separation of powers – mandatory minimum sentences – independence of the Judiciary

The petitioner was convicted of housebreaking. He was sentenced to five years imprisonment. The sentence was in conformity with section 27A (1)(c)(i) of the Penal Code, which provides for a mandatory minimum sentence of five years for the offence of housebreaking.

The petitioner argued that mandatory minimum sentences were inconsistent with article 119 of the Constitution, which states that the Judiciary must be independent.

HELD

Mandatory minimum sentences do not compromise judicial independence because a sentencing court still has discretion in the imposition of a sentence above the minimum.

JUDGMENT: Petition dismissed.

Legislation referred to:
Constitution
Criminal Code
Penal Code

Foreign legislated noted:
Constituion of Mauritius
Dangerous Drugs Act 2000 (Mauritius), s 419(3)

Cases referred to:
Azemia v Republic Const Court 82/1997
Napoleon v Republic Const Court 1/1997
Simeon v Attorney-General (2010) SLR 280

Foreign cases noted:
Ali v R [1992] 2 All ER 1
Attorney-General v Dow [1992] BLR 119
Dadu v State of Maharashtra [2000] 8 SCC 437
Dodo v State (2001) 4 LRC 318
Ferquson v Queen [2008] 1 SCR 96, [2008] SCC 6
Hinds v Queen [1977] AC 195
Phillibert v State of Mauritius (2007) SCJ 274
Saadi v Italy (37201/06) ECHR 28 February 2008
Singh v State of Punjab [1980] 2 SCC 684
State of Mauritius v Khoryotty [2006] 1 UKPC 13

Basil HOAREAU for the petitioner
C JAYARAJ for the respondent

Judgment delivered on 16 November 2010

Before Egonda-Ntende CJ, Burhan, Dodin JJ

DODIN J: On 25 February 2010, the petitioner, Jean Frederick Ponoo, was convicted by the Magistrate, Laura Zelia, for the offence of breaking and entering into a building and committing a felony therein, contrary to section 291(a) of the Penal Code of Seychelles. The petitioner was a first offender. On 5 March 2010, the Magistrate sentenced the petitioner to a term of 5 years imprisonment for the said offence in conformity with the provisions of section 27A(1)(c)(i) of the Penal Code as read with section 291(a) of the Penal Code, which provides for the imposition of a minimum mandatory sentence of 5 years imprisonment for a person convicted of the above-mentioned offence.

The petitioner lodged a petition to the Constitutional Court in terms of rule 3(3) of the Constitutional Court Application, Contravention, Enforcement or Interpretation of the Constitution Rules 1994, praying the Constitutional Court to declare:

(i) that section 27A(1)(c)(i) and section 291(a) of the Penal Code have contravened article 1 and article 119(2) of the Constitution and hence affected the interest of the petitioner:

(ii) that article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 27A(1)(c)(i) and Section 291(a) of the Penal Code;

(iii) that section 27A(1)(c)(i) and section 291(a) of the Penal Code are inconsistent with the provisions of article 1, article 119(2) and article 16 of the Constitution and are hence void; and

(iv) that the sentence of 5 years imprisonment imposed on the petitioner is unconstitutional and void, hence the Constitutional Court should order the immediate release of the petitioner.

The respondent in his capacity as the representative of the Government of Seychelles responded that the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code do not contravene article 1, article 119(2) or article 16 of the Constitution of Seychelles and hence the mandatory minimum sentence of 5 years imprisonment imposed by the Magistrate does not affect the interest of the petitioner. The respondent

prayed that the Constitutional Court dismiss the petition with costs for the respondent.

In his submission before this Court, counsel for the petitioner submitted that this petition requires the Constitutional Court to consider and make findings on the following two issues:

Firstly, whether the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code contravene article 1 and article 119(2) of the Constitution.

Secondly, whether article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code.

On the first issue, counsel for the petitioner submitted that section 119(2) of the Constitution of Seychelles provides that the judiciary shall be independent and be subject only to the Constitution and other laws of Seychelles and that article 1 of the Constitution of Seychelles states that Seychelles is a sovereign democratic Republic. Counsel argued that article 1 of the Constitution of Seychelles lays down the doctrine of separation of powers which is reinforced by article 119(2) of the Constitution of Seychelles which specifically provides for the independence of the judiciary. Counsel submitted that in view of the provisions of article 1 and article 119(2) of the Constitution of Seychelles, whilst the legislature can provide a range of sentences which can be imposed by the court on a convicted person, the legislature cannot lay down the minimum sentence that can be imposed by a court as such a provision would be an interference with the independence of the judiciary. Counsel relied on the case of *State of Mauritius v Khoryotty* [2006] UKPC 13 in support of the contention that article 1 of the Constitution of Seychelles lays down the doctrine of separation of powers as it is worded similarly to article 1 of the Constitution of Mauritius.

Counsel further submitted that the doctrine of separation of powers between the executive, the legislature and the judiciary is an important concept laid down by the Constitution and has to be respected and applied when enacting laws. Counsel submitted that by imposing a minimum mandatory sentence for the offence with which the petitioner was charged and convicted, the independence of the judiciary was violated which also resulted in the violation of the petitioner's constitutional right. Counsel further submitted that the case of *Ali v R* [1992] 2 All ER 1 supports the doctrine of separation of powers and urged the Court to find that the law setting the minimum mandatory sentence which the court must apply to be a violation of that doctrine.

On the second issue, counsel submitted that article 16 of the Constitution provides that every person has a right to be treated with dignity worthy of a human being and not be subjected to torture, cruel, inhuman or degrading treatment. In that context, the indiscriminate mandatory imposition of a minimum mandatory sentence by the provisions of section 27A(1)(C)(i) and section 291(a) of the Penal Code contravened the principle of proportionality in sentencing the petitioner who was a first offender and therefore amounts to cruel and degrading treatment or punishment. Counsel relied on the case of *Phillibert v State of Mauritius* [2007] SCJ 274 in support of his submission on this issue.

Counsel therefore prayed that this Court find in favour of the petitioner on both issues and to declare that the sentence of 5 years imposed on the petitioner is unconstitutional and order the release of the petitioner from custody.

Principal State Counsel for the respondent made submissions in response to the two issues raised by the petitioner.

On the first issue, Principal State Counsel submitted that the constitutionality of section 27(A)(1)(C)(i) has been raised in

previous proceedings before the Constitutional Court and that on each occasion the Constitutional Court has held that these provisions are constitutionally valid. Principal State Counsel further submitted that the legislative prescription of a minimum mandatory sentence does not violate the principles of independence of the judiciary or the separation of powers because classification of crimes and the prescription of sentences to be imposed are legitimate activities of the legislature.

Principal State Counsel further submitted that the case of *State of Mauritius v Khoryatty* does not support the case of the petitioner and is not relevant to the current petition on account of the facts upon which the *Khoryatty* case was based being substantially different to the current case. In the *Khoryatty* case the Court considered the abolition of bail which denied the judiciary its constitutional role of deciding whether or not to grant bail in any given case whilst in this case the issue to be decided is the issue of minimum sentences which does not take away the power of the judiciary to impose sentences but only sets out the range of sentences which the court can impose. Principal State Counsel submitted that setting the range of sentences which a court can impose is the preserve of the legislature and does not take away the independence of the judiciary. Principal State Counsel submitted that the setting of minimum mandatory sentences is well recognized in democratic jurisdictions where it has been determined to be constitutionally valid. Principal State Counsel referred to the cases of *Dodo v State* (2001) 4 LRC 318, *Attorney-General v Dow* [1992] BLR 119, *Dadu v State of Maharashtra* [2000] 8 SCC 437, *Bach Singh v State of Punjab* [1980] 2 SCC 684. Principal State Counsel submitted that in all these cases it was concluded that the legislation imposing minimum sentences for certain categories of offences did not violate the independence of the judiciary.

On the second issue, Principal State Counsel submitted that a minimum sentence of imprisonment is not in itself unconstitutional. Such sentence can only be considered to be unconstitutional by amounting to inhuman or degrading punishment if it is grossly disproportionate to the severity of the offence. The decision as to whether it is grossly disproportionate to the offence must involve a value judgment based on the objective considerations with due regard given to the contemporary norms operating in Seychelles and the consideration of the acceptable norms and values in civilized democratic societies. Principal State Counsel relied on the cases of *Jeffrey Napoleon v Republic* Const Court 1 of 1997, and *Brian Azemia v Republic* Const Court 82 of 1997 in support of the submission that the minimum sentence prescribed by section 27A(1)(C)(i) and section 291(a) of the Penal Code are necessary for the achievement of valid social aims and are not grossly disproportionate to the offence the petitioner was convicted of.

Principal State Counsel submitted that in order for the Court to find that the minimum sentence imposed on the petitioner amounts to inhuman or degrading punishment, the Court must find that the sentence imposed and the punishment which will result is so brutal, inhuman or degrading, and hence so excessive in nature as to outrage the standards of decency of the community. Principal State Counsel submitted that in this case the high incidences of housebreaking offences and its detrimental effect on society required stringent measures in order to curb such practices and the enactment of the relevant legislation was manifestly intended for the promotion of public good and are not in conflict with the Constitution.

Principal State Counsel concluded that since section 291(a) of the Penal Code does not violate the rights of the petitioner under article 16 of the Constitution and does not infringe upon the principle of separation of powers, this petition is vexatious and must be dismissed with costs.

I start the analysis of this petition by making the following observations.

The constitutionality of mandatory sentences raises difficult and sometimes complex questions when considering this important juncture of constitutional law and sentencing. It is not the first occasion that this court has been petitioned to determine whether the legal obligation placed upon it by law to impose a minimum mandatory sentence amounts to a violation of its independence and its constitutional sovereignty as an equal partner in the country's governing structure and also whether a minimum mandatory sentence is a form of cruel and unusual punishment contrary to article 16 of the Constitution. In considering the issue of proportionality in sentencing, the court is also being asked to determine whether the mandatory sentence is grossly disproportionate to what would otherwise be an appropriate and fit sentence imposed at the court's sole discretion. Each time these issues are raised, this court is being further asked to engage in the judicial review of a democratically enacted law. The court's role and its relationship with the legislature are therefore inevitably brought into question.

Inevitably, the court's decision on whether a mandatory sentence is a cruel and unusual punishment would depend on its approaches to both constitutional law and sentencing and the priority it gives to these competing concerns. Be that as it may, minimum mandatory sentences are generally inconsistent with the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, as they remove part of the discretion of the judges to make what might be considered reasonable exceptions in appropriate cases. However, such inconsistency gives rise to what is predominantly a conflict of laws and does not necessarily mean that a minimum mandatory sentence per se is necessarily unconstitutional.

The first issue raised by the petitioner is whether the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code contravene article 1 and article 119(2) of the Constitution.

Article 1 of the Constitution of Seychelles reads: "Seychelles is a sovereign democratic Republic."

The contention by the petitioner that article 1 lays down the principle of separation of powers among the executive, legislative and judicial arms of government is one that has been well canvassed before this Court. In fact, the respondent admitted the following in paragraph 6 of his defence:

> The averments contained in paragraph 4(i) of the Petition are admitted and further answered that the Constitution provides and envisages proper checks and balances amongst the branches of the Government.

It certainly appears to have been the intention of the framers of the Constitution of the Third Republic that the separation of powers was to be the hallmark of this democratic republic. This principle is not a recent phenomenon in political thinking. French scholar, Charles-Louis de Secondat, Baron de La Brécle et de Montesquieu, (1689 to 1755), in his writings titled *The Spirit of Laws,* argued that concentration of power in one person or a group of persons results in tyranny and therefore there was need for decentralization of power to check arbitrariness. To that end he felt the need for vesting the governmental power in three different organs; the legislature, the executive, and the judiciary. This principle implies that each organ should be independent of the other and that no organ should perform functions that belong to the other. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the

aim sought to be achieved by this principle.

Constitutions with a high degree of separation of powers are found worldwide. However despite the promulgation of this principle, the separation of powers amongst the executive, legislative and judiciary has never and maybe will never be absolute, as practical considerations dictate that there must exist certain interdependence and interactions amongst the three arms of government for the checks and balances envisaged by this same principle to function. Today most political systems might not be opting for the strict separation of powers because that is impracticable to apply strictly but implications of this concept can be seen in almost all the countries in some diluted form. The legislative organ of the State makes laws, the executive enforces them and the judiciary applies them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public. Thus, even when acting in the ambit of their own powers, overlapping functions tend to appear amongst these organs. It follows therefore that the assertions of the petitioner that article 1 of the Constitution of Seychelles provides for a complete separation of powers to the extent of absolute non-interference by the legislature in the affairs of the judiciary is flawed and misconceived.

Article 119(2) of the Constitution of Seychelles states: “The Judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles”.

This article lays even greater emphasis on the independence of the judiciary with a caveat however that such independence is subject to the Constitution *and other laws.*

The issue to be decided is whether that principle of

independence of the judiciary entails the complete segregation of the judiciary from the executive and legislature in all matters and particularly in sentencing, with specific consideration being given to the imposition of minimum mandatory sentences. In line with my findings above in relation to the principle of separation of powers, practical considerations demand that there must be some interdependence amongst the three arms of government. More telling however, is the qualification inserted into article 119(2) qualifying the independence of the judiciary by making that independence subject to the provisions of the Constitution and other laws.

At this point it is worth taking note of articles 46(1) and 46(5)(b) and articles 130(1) and 130(4)(b), which give the Constitutional Court the power to determine the constitutionality and hence the validity of laws enacted by the legislature. It would be tempting therefore to argue, as indeed was the argument of the petitioner, that any law which in effect limits the discretion of the Court in imposing sentences, should be declared unconstitutional and void. Taken at face value, it would appear that there is a contradiction between article 119(2) and articles 46(5)(b) and 130(4)(b) in that on the one hand the Court in its operation is subject to other laws and on the other hand, the Court is empowered to determine whether any law or the provision of any law contravenes the provision of the Constitution. In my opinion this leads to a certain conclusion that the judiciary must be subject to legally enacted laws except where the laws in question are themselves unconstitutional and void. It does not mean however that the requirement to apply a certain range of sentences imposed by legally enacted legislation would be void for infringing the independence of the judiciary or the principle of the separation of powers.

Counsel for the petitioner relied on the cases of *State of Mauritius v Khoryatty* and *Ali v R* in support of his contention

that any law which interferes with the discretion of the Court to impose sentence should be declared unconstitutional and void.

In the case of *State of Mauritius v Khoryatty* the Court concluded that the provision of the Dangerous Drugs Act (of Mauritius) denying the right to bail infringed a number of fundamental principles of the Constitution of Mauritius and was consequently void. In my opinion this decision of the Privy Council is correct in so far as the provision in question attempted to remove from the Court completely any possibility of exercising its judicial function in terms of deciding whether or not a person who has not been convicted for any offence should have his right to liberty arbitrarily curtailed. The same cannot be said however, in relation to the imposition of a sentence prescribed by law on a person who has been convicted of an offence. Furthermore, the provision for a mandatory minimum sentence does not remove completely the discretion of the Court to impose a sentence within the range of the minimum up to the maximum.

In the case of *Ali v R* the circumstances were even more remote from the present case. In that case the law provided that the court in which a person would be tried for the offence of drug trafficking was to be selected by the Director of Public Prosecution. Trial and conviction before the Supreme Court without a jury carried a mandatory death penalty whilst trial and conviction in the Intermediate Court would result in a term of imprisonment and a fine. Hence by use of such a discretionary power the Director of Public Prosecution was able to determine the sentence to be imposed on the individual concerned. The Privy Council was therefore correct to conclude that since the provision removed from the Court its judicial prerogative of sentencing by placing it in the hands of the executive, such provision amounted to a violation of the independence of the judiciary and an aberration of the principle of the separation of powers.

It is therefore evident that the cases of *Khoryatty* and *Ali* do not in effect support the contention of the petitioner on the issues of separation of powers and independence of the judiciary. As quoted from the case of *Hinds v Queen* [1977] AC 195 by this Court in the case of *Aaron Simeon v Attorney-General* (2010) SLR 280 -

> There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of the general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. The Legislature does not prescribe the penalty to be imposed in an individual citizen's case, it states the general rule, and application of that rule is for the courts.

It is therefore concluded that the answer to the first issue of whether the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code requiring the imposition of a mandatory minimum sentence contravene article 1 and article 119(2) of the Constitution is negative. The principle of separation of powers and the independence of the judiciary can be said to have been qualified as indeed it was qualified *ab initio* by article 119(2) of the Constitution but certainly not violated.

The second issue is whether article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code. Article 16 of the Constitution of Seychelles states as follows:

> Every person has the right to be treated with dignity worthy of a human being and not to be

> subjected to torture, cruel, inhuman or degrading treatment.

This article embodies the spirit of articles 1 and 5 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot in Paris. While the UDHR is not a treaty itself, the Declaration was explicitly adopted for the purpose of defining the meaning of the various terms appearing in the United Nations Charter, which is binding on all member states and which Seychelles became a member state on 21 September 1976. The above-mentioned articles read as follows:

> Article 1
>
> > All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
>
> Article 5
>
> > No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

It is worthwhile to begin by first considering the elements and meaning of the notion "dignity worthy of a human being" - and what would amount to torture, cruel, inhuman or degrading treatment.

The dictionary defines dignity as the quality of being worthy of self-respect, self-regard and self-worth.

Dignity in humans involves the earning or the expectation of

personal respect or of esteem. Human dignity is something that is inherently a person's God-given inalienable right that deserves to be protected and promoted by the Government and the community. Human dignity is in itself enshrined as the cornerstone of society from the very beginning of civilization. Thus all social institutions, governments, states, laws, human rights and respect for persons originate in the dignity of man or his personhood. It is even said that dignity is the foundation, the cause and end of all social institutions. Thus all social institutions, governments, states, laws, human rights and respect for persons originate from the concept of dignity of man or his personhood.

In this context any attempt to undermine the dignity of a human being would also undermine the very foundation and support upon which an orderly society is structured.

The 1985 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

> ... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Convention further added the following limitations:

> It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 3 of the European Convention on Human Rights also prohibits torture and inhuman or degrading treatment or punishment. The provision applies, apart from torture as defined by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to cases of severe police violence and poor conditions in detention.

Article 3 states as follows:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

In the case of *Saadi v Italy* (37201/06) ECHR 28 February 2008, the defendant, a terrorism suspect, was facing deportation and alleged torture should he be deported back to Tunisia. The European Court of Human Rights stated thus:

> According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of §3 (of the European Convention on Human Rights). The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.
>
> In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of

> suffering or humiliation connected with a given form of legitimate treatment or punishment.
>
> In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in §3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the convention to allow the special stigma of torture to attach only to deliberate inhuman treatment causing very serious and cruel suffering.

Having considered the widely accepted definitions and interpretations of what could amount to treatment with dignity worthy of a human being and what could amount to torture, cruel, inhuman or degrading treatment, the question now is whether the imposition of a minimum mandatory sentence for the offence of breaking and entering into a building and committing a felony therein, contrary to section 291(a) as read with section 27A(1)(c)(i) of the Penal Code of Seychelles in fact violates the petitioner's right to be treated with dignity worthy of a human being and not be subjected to torture, cruel, inhuman or degrading treatment and hence whether the said minimum mandatory sentence contravenes article 16 of the Constitution of Seychelles.

Counsel for the petitioner relied on the case of *Phillibert v State of Mauritius* in support of his submission that the imposition of such sentence amounts to a contravention of article 16. Principal State Counsel relied on the cases of *Jeffrey Napoleon v Republic* and *Brian Azemia v Republic* in support of his submission to the contrary.

In the case of *Phillibert v State of Mauritius* the court made the following findings:

A law which denies an accused party the opportunity to seek to avoid the imposition of a substantial term of imprisonment which he may not deserve, would be incompatible with the concept of a fair hearing enshrined in section 10 of our (Mauritian) constitution. A substantial sentence of penal servitude like in the present situation cannot be imposed without giving the accused an adequate opportunity to show why such a sentence should not be mitigated in the light of the detailed facts and circumstances surrounding the commission of the particular offence or after taking into consideration the personal history and circumstances of the offender or where the imposition of the sentence might be wholly disproportionate to the Accused's degree of criminal culpability.

We hold and declare that section 222(1) of the Criminal Code and section 419(3) of the Dangerous Drugs Act 2000 (as they read prior to the amendment effected by Act No 6 of 2007) contravened section 7(1) of the Constitution in as much as the indiscriminate mandatory imposition of a term of 45 years penal servitude in all cases contravened the principle of proportionality and amounted to "inhuman or degrading punishment" or other such treatment contrary to section 7(1) of the Constitution.

We are however of the view that the impugned section 222(1) of the Criminal Code and section 41(3) of the DDA were unconstitutional only in so far as they provided for a substantial mandatory prison sentence of 45 years and that the relevant sections should be read down in such a way that upon conviction an offender

> would be liable to a prison sentence in the discretion of the Court but which would carry a maximum of 45 years.

The case of *Phillibert* clearly stipulates that a mandatory sentence per se does not amount to cruel, inhuman or degrading treatment. It may only amount to cruel, inhuman or degrading treatment if the length and severity of the sentence is such that it violates the principle of proportionality and removes all discretion from the Court to impose any other term whatsoever. In the present case, the minimum mandatory term of *5* years imprisonment cannot be compared in terms of severity to the fixed term of 45 years that was applicable in the *Phillibert* case.

Furthermore, in the present case, the Court retained much discretion to impose any sentence ranging from the minimum mandatory of 5 years to the maximum allowable sentence of 14 years.

In the Canadian case of *Michael Esty Ferquson v Queen* [2008] 1 SCR 96, [2008] SCC 6*,* the Court in confirming the principle and importance of proportionality in sentencing as an element to be considered in determining whether a mandatory minimum sentence amounts to cruel, inhuman or degrading treatment had this to say:

> The test for whether a particular sentence constitutes cruel and unusual punishment is whether the sentence is grossly disproportionate. As the court has repeatedly held, to be considered grossly disproportionate, the sentence must be more than merely excessive. The sentence must be so excessive as to outrage standards of decency and disproportionate to the extent that Canadians would find the punishment abhorrent or

intolerable.

In both the cases *Jeffrey Napoleon v Republic* and *Brian Azemia v Republic* the Court followed the similar reasoning as in the *Michael Esty Ferquson* case and in each case the mandatory sentence prescribed by section 27A(1)(c)(i) of the Penal Code was found not to be grossly disproportionate as to outrage the standards of decency of the Seychellois community and hence did not amount to torture or cruel, inhuman or degrading treatment. Considering that the circumstances of this case are similar to the above-mentioned cases of *Jeffrey Napoleon* and *Brian Azemia* I find no reason to deviate from the principle elucidated in these cases.

In conclusion, the question of whether article 16 of the Constitution has been contravened in relation to the petitioner by the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code must be answered in the negative.

In consequence of the above findings I therefore find;

i. that section 27A(1)(c)(i) and section 291(a) of the Penal Code have not contravened article 1 and article 119(2) of the Constitution and therefore have not affected the interests of the petitioner;

ii. that article 16 of the Constitution has not been contravened in relation to the petitioner by the provisions of section 27A(1)(c)(i) and section 291(a) of the Penal Code;

iii. that section 27A(1)(c)(i) and section 291(a) of the Penal Code are consistent with the provisions of article 1, article 119(2) and article 16 of the Constitution and are therefore valid; and

iv. that the sentence of 5 years imprisonment imposed on the petitioner was properly imposed and is valid.

I find that the petitioner's claims are therefore without merit and I would dismiss them accordingly.

I would make no order for costs.

EGONDA-NTENDE CJ: I have had the benefit of reading in draft the judgment of Dodin J. I agree that this petition should fail.

As Burhan J also agreed that this petition should fail, this petition is dismissed. Each party shall bear its costs.

BURHAN J: I had the benefit of reading the draft of the judgment drawn by my brother Dodin J. I concur with the said judgment.

Record: Constitutional Case No 5 of 2010

Elizabeth v President Court of Appeal

Egonda-Ntende CJ, Gaswaga, Burhan JJ
29 July 2010 Constitutional Court 2 of 2009

Constitution – fair trial – frivolous and vexatious proceedings

Following the decision of the Court of Appeal in *Frank Elizabeth v The Speaker* (14 August 2009), the Speaker of the National Assembly wrote to the President of the Court of Appeal seeking clarification of the Court of Appeal's order. The President of the Court of Appeal called the parties together and then made a statement indicating that the order applied to the future. The petitioner challenged the process in the Constitutional Court, claiming that his right to a fair hearing had been contravened by the President. In those proceedings, the Attorney-General made preliminary objections to the effect that the petitioner's challenge was frivolous and vexatious and disclosed no cause of action, and that in any event there was no breach of the right to a fair trial.

HELD

1. For a constitutional petition to disclose a cause of action it must be shown that the petitioner enjoyed a constitutional right, that the right had been violated, and that the defendant was liable for the violation.

2. A frivolous and vexatious claim is one with no chance of success.

3. (Obiter) A petitioner who is dissatisfied with the decision of a single judge of the Court of Appeal has the right to seek a decision of the full Court of Appeal.

JUDGMENT: Objection upheld.

Legislation cited
Constitution, art 119(3)
Code of Civil Procedure

Foreign legislation referred to
Constitutional Court Civil Procedure Rules in East Africa, rule 2(2)
English Rules of the Supreme Court, order 25 rule 4

Cases cited
Bessin v Attorney-General (1950) SLR 208
D'Offay v Louise SCA No 34 of 2007 (unreported)

Foreign cases cited
Auto Garage v Motokov (No 3) [1971] J EA 514
Hubbuck & Sons v Wilkinson, Heywood and Clark [1899] 1 QB 86
Worthington & Co Ltd v Belton (1902) 18 TLR 438

Frank ELIZABETH appearing in person
Ronny GOVINDEN, Attorney-General appearing for both respondents

Ruling of the Constitutional Court delivered 29 July 2010

Before Egonda-Ntende CJ, Gaswaga, Burhan JJ

This is a ruling in respect of a preliminary objection to the petition raised by counsel for the respondents, Mr Ronny Govinden. It is the contention of the respondents that the petition in this proceeding is `frivolous and vexatious' and that it does not disclose a reasonable cause of action.

Before turning to the submission of the parties we shall provide the factual backdrop to these proceedings. The

petitioner was a proportionate member of the National Assembly. He was recalled and replaced by another person by the party that nominated him to the National Assembly. He disputed the actions of the Speaker of the National Assembly, in relation to those events, in the Constitutional Court. He appealed the decision of the Constitutional Court to the Court of Appeal which rendered judgment on 7 August 2008, allowing the appeal in part, and making certain declarations.

The Speaker of the National Assembly following the decision of the Court of Appeal appeared to be uncertain as to what the decision was requiring him to do. He wrote personally to the President of the Court of Appeal for certain clarifications. The letter states in part -

> I have perused the judgment dated 14th August 2009 given in the above mentioned case. In order to best execute the order given by the Court of Appeal, I need clarifications on what exactly I have to do with regards to Mr. Frank Elizabeth.
>
> Paragraph 15 of the judgment speaks of prospective action, which to my understanding the Court of Appeal was being called upon to decide on the future conduct of all concerned. It is declared in paragraph 45 that, when required by a proportionately elected member, a Certificate of Vacancy should be issued so tha the latter may exercise his Article 82 right of challenge before the Constitutional Court.
>
> My question is, do I have to give Mr. Frank Elizabeth a Certificate of Vacancy folowing this ruling or will it apply in future such occurences only?

Subsequently the President of the Court of Appeal called the parties before him on 29 September 2009. The petitioner appeared in person. The respondents were represented by the Attorney-General at that 'hearing'.

The petitioner stated that he was appearing under protest and that there was no application before the court upon which any hearing can proceed. The Attorney-General on the other hand stated that the Court, or the President, may, *mero motu*, rectify or clarify any issue arising out of a judgment.

The President of the Court of Appeal then made the following statement -

> You've made your position clear on clarification of the particular point likewise you say, I think we agreed that this is the point before us. You have an opinion on that point: he (Appellant) has another view.
>
> We are not rehearing the case. The judgment is already there. It is here for clarification. For me the judgment is clear. I've consulted my brothers. As stated in the judgment in principle you have dropped all the prayers in your appeal and sought only a declaration in principle.
>
> I believe paragraph 15 of the judgment covers the essential of what it is. In principle there is no order from the court. What the court is saying is that it for prospective action. In the event in the future if the principles are not being regarded there will be consequences.
>
> Clarification now there is no order.
>
> There is a declaration in principle for the future,

as stated in paragraph 15 of the judgment.

Court is adjourned.

Following this order the petitioner commenced fresh proceedings in the Constitutional Court for declarations that his right to a fair hearing had been contravened by the President, Court of Appeal, and that the ruling of the President, Court of Appeal, made on 2 September 2009 is null and void. The crux of his application can be gathered from the following paragraphs of his petition -

> 12. The Petitioner avers that there was no application from either party filed properly before the Court of Appeal and served on either of the parties to the case.
>
> 13 The Petitioner avers that the procedure adopted by the 1st Respondent contravened the constitutional right of the Petitioner to have a fair hearing.'

In their addresses to us, both Mr Ronny Govinden and Mr Frank Elizabeth concentrated on whether or not there was merit in this action which was unfortunately not helpful to the points in contention at this stage. Mr Govinden referred us to the case of *Julita D'Offay v F Louise* SCA No 34 of 2007 (unreported) to support the view that a court can clarify ambiguities in its judgment and in that regard would not be *functus officio.* We find this decision useful but on another point to which we shall revert.

In this ruling we are concerned only with two preliminary points that were raised in the answer to the petition. Firstly it was contended that this petition was frivolous and vexatious. Secondly that it did not disclose a reasonable cause of action. The two were lumped together but we take the view that they

are different concepts and shall deal with them separately. This is clear in section 92 of the Seychelles Code of Civil Procedure, which states -

> The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case, or in the case of the action or defence being shown by the pleading to be frivolous and vexatious, the court may order the action to be stayed or dismissed, or may give judgement, on such terms as may be just.

By virtue of rule 2(2) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994, the Seychelles Code of Civil Procedure is applicable, *casus omissus,* to constitutional litigation.

The disjunctive comma after 'and in such case' and use of the word 'or' thereafter clearly establishes the two concepts as separate concepts. We shall take cause of action first. In *Bessin v Attorney-General* [1950] SLR 208 a decision of the Court of Appeal of Mauritius, sitting on appeal from a decision of the Supreme Court of Seychelles, it was held that any such inquiry must be limited to the allegations contained in the pleadings and that no extraneous evidence was admissible. Secondly, that only in plain and obvious cases should the court resort to the summary process of dismissing an action. In that particular case the court held it could not be said to be beyond doubt that no cause of action arose.

In reviewing a number of English decisions which it decided would guide it as the rule was adopted from the English Rules of the Supreme Court, order 25 rule 4, the court stated at page 214 -

> T.L.R. 438, Lord Justice Romer recalled in Hubbuck & Sons v Wilkinson, Heywood and Clark (1899) 1 Q.B. 86, Lord Lindley, after pointing out "that there were two methods of raising points of law, one by raising the question as directed by Order 25 rule 2, and the others applying to strike out the Statement of Claim under Order 25, rule 4, said: "The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any Master or Judge can say at once that the statement of claim as it stands *is insufficient, even if proved, to entitle the plaintiff to what he asks.*

Whether or not a pleading has established a cause of action was discussed in the case of *Auto Garage v Motokov (No 3)* [1971] J EA 514. Spry VP stated at page 519 -

> …the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable. I would summarize the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment. If, on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.

It is to be noted that the above decision was a decision of the East Africa Court of Appeal, on appeal from Tanzania, considering the Civil Procedure Rules in East Africa, whose origin is in the same English rules of procedure, as noted in

Bessen v Attorney-General (supra). Similarly section 92 of the Seychelles Code of Civil Procedure has its origins in English rules of procedures. These remarks are therefore of persuasive value in defining the concept of reasonable cause of action.

In the instant case before us in order for the petition to disclose a cause of action it must show that the petitioner -

(a) enjoyed a constitutional right;
(b) the right had been violated; and
(c) the defendant is liable for the said violation.

A cause of action would not be reasonably disclosed if any of the above mentioned elements are absent or non-existent.

Although the allegation of a right enjoyed by the petitioner is established in the petition, the petitioner has failed to establish in his pleadings that the constitutional right he enjoyed has been violated. The alleged contravention of his constitutional right is asserted in paragraph 14 of the petition which reads as follows -

> that by his action or omission in accepting to hear a case on a letter from the Speaker of the National Assembly, the 1st respondent contravened the constitutional right of the petitioner to have a fair hearing.

Even if one is to accept the petitioner's contention that the first respondent erroneously decided to hear a matter based on a letter from one of the parties, this certainly does not translate into a violation of a constitutional right but would be an error in procedure. In fact the petitioner himself at page 3 of the proceedings before the Court of Appeal dated 2 September 2009 states -

> I have come here to register a protest about the procedure being adopted by the Seychelles Court of Appeal.

It is our view if any party thereto was aggrieved by any such alleged procedural irregularity or decision made in those proceedings, the proper recourse of such a party was to go to the full court to challenge such procedural irregularity or the decision made by a single judge of the Court of Appeal, rather than to allege contravention of a constitutional right to a fair trial.

Further the record clearly indicates the President Court of Appeal summoned all parties to appear and participate in the proceedings before him. The record indicates that an opportunity was specifically provided to the petitioner to be heard and his response specifically called for by the President of the Court of Appeal in respect of the application made by the Speaker of the National Assembly. Therefore by being summoned to appear and participate in the said proceedings and an opportunity being specifically provided for him to be heard, we are of the view that the applicant's right to a fair hearing was clearly observed on the information he has put to us.

For the aforementioned reasons we are satisfied that the petitioner has failed to establish on the pleadings the second element necessary to disclose a cause of action.

Turning to the third element, on the authority of *Julita D'Offay v F Louise* and article 119(3) of the Constitution, it seems clear to us that no action can lie against judicial officers in respect of an act or omission allegedly committed by them in the performance of their official duties. In that case the Court of Appeal had made a decision in an appeal arising from the Constitutional Court. In the Constitutional Court it was challenged, inter alia, that there was a breach of the right to a

fair trial. Three justices of appeal were named as respondents. The Constitutional Court declined the challenge and an appeal was made to the Court of Appeal.

The Court of Appeal held that a decision of the Court of Appeal could not be challenged thereafter in the Constitutional Court on claims that the decision breached constitutional rights. To allow such a challenge would be to undermine the whole structure of the administration of justice and the hierarchy of courts established by the Constitution. The Court of Appeal also further held in relation to naming justices of appeal that rendered the decision as respondents as untenable, improper and an abuse of process.

The Court stated in part –

> (e) [The court quoted article 119(3) of the Constitution] We find that the three Justices of Appeal were clearly in the performance of duties, and far from it any violation of the Constitution which we so distinguish hereby. We consider also joining them and accordingly then in the circumstances of this case an abuse of process.
>
> (f) Counsel for appellants tried to argue that Rule 3(2) of the Constitutional Court Rules provides for joining parties from who relief is sought. In this case it was against the 3 Justices of Appeal as 2nd, 3rd & 4th respondents.
>
> (g) This is clearly a rule of procedure that cannot override a substantive constitutional right and protection in article 119(3) of the Constitution.

The third element for a cause of action of whether or not on

the petition the President of the Court of Appeal can be liable for any act or omission in the performance of his functions is not established on the pleadings. It cannot be established because the President of the Court of Appeal enjoys immunity from legal action in respect of the performance of his functions as a Justice of Appeal and head of the Court of Appeal.

We find that this petition does not disclose a cause of action against the President of the Court of Appeal. As it does not disclose a cause of action against respondent no 1 nor does it disclose a cause of action against respondent no 2.

Turning to the question of whether a matter is 'frivolous or vexatious' we note that the two words are not defined in the Seychelles Code of Civil Procedure. In fact we have not been able to come across a legislative interpretation of the words though the words are used in legislation in many jurisdictions. We shall start by looking at their dictionary definition. According to the Oxford Dictionary and Thesaurus (at page 600) frivolous is defined as 'adj. 1 paltry, trifling, trumpery. 2 lacking seriousness; given to trifling; silly.' We take it that this word in relation to a claim or petition means that the claim or petition has no reasonable chances of success.

Vexatious is defined at page 1750 of the Oxford Dictionary (supra) as 'adj. 1 such as to cause vexation. 2 Law not having sufficient grounds for action and seeking only to annoy the defendant.' Vexatious therefore relates to the effect on a defendant. It is vexatious if an adverse party is made to defend something that would not succeed.

It appears from the wording of section 92 of the Seychelles Code of Civil Procedure that a finding of any one of these, frivolous or vexatious would be sufficient to trigger an order for stay of the action, or dismissal of the same on such terms as may be just.

In light of binding case law as shown above, in this jurisdiction the present petition has no chance of success. It is frivolous. The defence is being made to labour to defend something that has no chance of success. This action is therefore vexatious too.

For the foregoing reasons we are satisfied that the objections to the petition are seized with merit. The petition discloses no reasonable cause of action. The petition is frivolous and vexatious. This petition is untenable, improper and an abuse of the process of this court. It is both surprising and disturbing that it was commenced by a member of the Bar of the Supreme Court. This petition is dismissed with costs.

Before we take leave of this matter we wish to opine that if the petitioner is dissatisfied with a decision of a single judge of the Court of Appeal, including the President of the Court of Appeal, it is within his rights to seek a decision of the full Court of Appeal on that point, especially if there are claims, as here, that one has been prejudiced thereby. It may not be too late for the petitioner to take this course to vindicate his grievances.

Record: Constitutional Case No 2 of 2009

Gabriel v Republic

Hodoul, Domah, Fernando JJ
10 December 2010 Court of Appeal Crim 22 of 2009

Evidence – testing of samples – chain of evidence – procedure to follow

A police officer found substances suspected to be controlled drugs in the accused's vehicle. The substances were taken to the police station for further investigation and placed in the locker of one of the officers. They were later tested by a Government analyst and found to be drugs.

HELD

1. Doubt as to whether the substance analysed was the same as the one collected from the accused is a fatal irregularity, because it created a break in the chain of evidence;

2. In cases where expert opinion is necessary, it is imperative that the investigating agency take care to seal evidence and keep it safe from tampering;

3. The fact that the accused made a deal with the arresting officer is not enough evidence to make a finding of guilt where there is serious doubt as to the chain of evidence.

JUDGMENT: Appeal allowed.

Cases cited
Vital v Republic SCA 3/1997
Rioux v R Crim 11/1997

Foreign cases referred to
78 (1994) CLT 366
Sahu v State 84 (1997) CLT 357
Phal v State of Haryana (1997) 1 SFR 151
Valsala v State of Kerala (1994) AIR SC 117
Naik v State of Orissa (1995) Cr LJ 82
Parida v State of Orissa (1997) Cr LJ 2179

Tony JULIETTE for the appellant
M KUMAR, assistant principal State Counsel for the respondent

Judgment delivered 10 December 2010

Before Hodoul, Domah, Fernando JJ

The appellant had been convicted on two counts of possession of controlled drugs, namely 110 milligrams of heroin and 220 milligrams of cannabis resin.

On 18 January 2004 at about 10.00 pm, PW 2 PC Mousbe, PW 3 PC Sophi and L Cpl Belle had proceeded to the house of one Vincent Samson on information received that a drug transaction was taking place there. Arriving at Vincent's house they had had seen Vincent Samson, Asba, Ventagado and the appellant sitting under the veranda of the house, drinking beer. L Cpl Bell had informed Samson that the police were going to do a search in his presence. They carried out a search inside and outside the house of Samson and found nothing. Thereafter they did a body search of all four persons and in the vehicles of Asba and the appellant. The search of the four persons and the vehicle of Asba did not reveal anything incriminating. Thereafter they searched vehicle S

5768 belonging to the appellant. The windows of the car were open and the doors of it were not locked. In searching vehicle S 5768 in the presence of the appellant, they had seen some substances in the pocket of the door at the driver's side, suspected to be controlled drugs. On questioning the appellant as to what the substances were, he had said that he did not know what they were, that it did not belong to him and someone must have placed it in his car. According to PW 2 the appellant had then told him in the presence of Cpl Belle and PC Sophie that they (meaning the appellant and PW 2) were at NYS together, that he (appellant) has kids and that they should make a deal, to which PW 2 said he does not make deals like that and that he was doing his duty. PW3 said that the appellant had even offered money to PW 2. Thereafter the appellant was brought to the Anse-Aux-Pins Police Station where he was charged.

At the Anse-Aux-Pins Police Station PW 2 had given the exhibit (substances recovered from the appellant's car) to an officer (who was not called as a witness at the trial), for purposes of making the necessary entries and thereafter the exhibit had been kept in the possession of PW 2 till the next day for the purpose of taking it to the Central Police Station to get a 'request letter' to have it examined by Dr Gobine, the Government Analyst and for the purpose of taking it to Dr Gobine to be analysed. The exhibit was placed in the locker of PW 2 at the 'Base' (ADAMS) and the appellant detained at the Central Police Station. PW 2 had stated that only he had access to his locker. PW 2 had in his examination-in-chief stated that the next day (indicating 19 January 2004) he had taken the exhibits to Inspector Hermitte who placed them in an envelope in front of him and issued the letter of request to Dr Gobine. Thereafter the same day he had taken them to Dr Gobine. Later he was compelled to admit that the substances were taken to Dr Gobine on 14 February 2004. After Dr Gobine had analysed the drugs PW 2 had collected a white 'sealed' envelope on which PW 2 had placed his signature.

This was on 19 February 2004. After bringing the exhibit from Dr Gobine, he handed over the envelope to the officer in charge at ADAMS, New Port, who had placed it in a safe. In Court PW 2 had identified the envelope as the one he collected from Dr Gobine but stated that he did not know who fixed the piece of paper on the envelope on which was written "CB 13 04 Anse Aux Pins PC Mousbe versus Vincent Gabriel of Anse Royale". PW 1 Dr Gobine had also stated that he did not know where it came from. It is clear from the evidence above that other/s had handled the exhibits, namely the officer who made the entries and the one who fixed the piece of paper on the envelope.

On examination of the substances, Dr Gobine concluded that a sample of the white powder analysed contained 72.3% of heroin and weighed 110 mg. His overall conclusion in respect of the brownish substance was that it was cannabis resin and weighed 220 mg. On 19 February Dr Gobine handed over the exhibits to PW 2 and his report. The results of Dr Gobine's examination as set out in his report (produced as Exhibit P1) had been stated in Court as:

> Item No.1: The creamy white powder wrapped in a piece of golden cigarette paper contains 73.2% heroin. Item No 2: The crushed brownish resinous material having a slight green tint wrapped in a piece of silver cigarette paper is cannabis resin. Weight: 220mg.

The main issue in this case is whether the Government Analyst, Dr Gobine, analysed the very substances that were seized from the appellant's car on 18 January 2004?

This Court takes note of the fact that the substances were taken to Dr Govine only on 14 February 2004, ie nearly 27 days after its seizure. This came to light only after PW 2's attention was drawn by Court to the date, in the 'Request for

Analysis' letter of Inspector Hermitte, which was dated 14 February 2004. In his examination-in-chief, PW 2 said on three specific occasions that he took the exhibits to Dr Gobine the next day, namely on 19 January 2004, after he had seized it from the appellant. In answer to court, at first, he stated that the substances recovered from the appellant on 18 January 2004 were taken to Dr Gobine the next day with the letter from Inspector Hermitte. It was only when the court drew his attention to the fact that Inspector Hermitte's letter is dated 14 February 2004, that PW 2 admitted that he took the exhibits to Dr Gobine after nearly one month.

The prosecution had not questioned PW 2 as to what else was in the locker at the time he placed the substances seized from the appellant in it on the evening of 18 January 2004 and whether or not anything else was put in the locker during the period 18 January to 14 February 2004, for the purpose of excluding a possible mix-up of controlled drugs. This in our view creates a doubt in regard to the chain of evidence.

PW 2 and PW 3 have given different versions as regards to what was seized from the appellant's car and the colour of the substances seized. PW 2 in his examination-in-chief said "There were two packets, one contained some dark powder substance and the other packet contained white powder substance." Under cross-examination PW 2 admitted, as stated in his statement made to the police, that he recovered three substances from the appellant's car, namely, some white powder in a golden Mahe King cigarette paper, some dark substance wrapped in a piece of silver paper and close to it a piece of small dark substance. In answer to court he said the black piece was with the black powder.

In answer to defence counsel, under cross-examination PW 2 answered in the following manner:

Q. Sir, I put to you that the substances produced

> in this court are not those which were allegedly taken from you in the accused car, in that it is different and in that, secondly, it is missing.

PW 2's answer was:

> Yes, the dark substance itself, and there is another piece of dark substance that is missing, and the powder is not the same colour (verbatim from the record).

When called upon in Court to identify the substances seized from the appellant and taken by him to Dr Gobine, PW 2 stated in respect of the white powder seized from the appellant "I can see the colour of the powder has changed, so, I cannot say that it is the same". PW 2 identified the other substance.

PW 3, PC V Sophie testifying before the Court as regards the search of the appellant's car and the seizure of controlled drugs stated:

> It was PC Mousbe who searched the car of Mr. Gabriel; that he searched under the seat and he found a cigarette paper. In the car pocket he removed a piece of silver paper and in this there was some powder and then there was a piece of a black substance which is presumed to be hashish. (verbatim from the record).

Thereafter to the question of the prosecuting counsel which is both leading and misleading (because witness had not made reference to a white substance), "And the white substances where did you found the two substances the powdered substances?" PW 3 said: "It was in the car pocket". Unless there is an error in the recording of the proceedings we would advise prosecuting counsel to desist from misleading

witnesses or asking leading questions. When called upon in court to identify the white substance seized from the appellant's car, PW 3 said: "This is the powder it was white and I saw some sort of colours" and again said "There was only one substance white and brownish colour. There was no black colour. No black colour. There was this hashish this small part of hashish but now I don't see". Under cross-examination PW 3 stated that there was no torch and that he did not bother looking too much at the substances recovered from the appellant's car. In answer to court as to how many items were found in the car, PW 3 said "There was this powder, this white powder with brown colour and then a little piece of dark substance which is hashish, supposedly hashish."

PW 1 Dr Philip T Gobine, testifying before the court stated that on 12 February 2004, PW 2 had brought duplicate copies of Letters of Request, signed by Inspector Hermitte (which were not produced) with an exhibit comprising of two items for examination and analysis. The items consisted of some white powder, wrapped in golden paper, some brownish substance wrapped in silver cigarette paper and a packet of Rizla cigarette paper.

It is clear from the evidence of Dr Gobine that the piece of black or dark substance seized from the appellant's car, as per the testimony of PW 2 and PW 3, was not taken to Dr Gobine for purposes of analysis. The prosecution had failed to produce the Letter of Request for Analysis of the controlled drugs or call Inspector Hermitte as a witness to give an explanation, if one was possible, as to what happened to the piece of black or dark substance recovered from the appellant's car. According to the evidence of PW 2, after seizure of the controlled substances they had gone to the Anse Aux Pins Police Station where he gave the controlled substances to an officer to do the necessary procedures by recording it in the book. There is no evidence on record as to

who this officer was, how long the procedure took or where PW 2 was when the procedures were being done. This too creates doubt on the chain of evidence.

PW 1 Dr Gobine had described the substances sent to him for purposes of examination and analysis as a 'creamy white powder' and a 'crushed brownish resinous material having a slight green tint'. Under cross-examination Dr Gobine specifically stated that he was not given a piece of black substance for examination.

On examination of the items that were produced in court, Dr Gobine said that he was satisfied that they were the same substances which were brought by PW 2 and analysed by him. On examination of item no 1 he said that it "contains heroin. It has gone a little brownish, but, it is storage, because it is damp." Counsel for the appellant argued before us that no evidence was placed before the trial court as to the damp conditions prevailing in the place where the heroin had been stored after its examination by Dr Gobine and prior to it been produced before the court. He said he was not challenging Dr Gobine's evidence pertaining to change of the colour in the heroin but it was incumbent on the prosecution to place some evidence as regards the place where the heroin was stored in view of the apparent change of colour of the heroin and Dr Gobine's explanation.

The trial judge stated in the penultimate paragraph of his judgment:

> Therefore he (meaning PW 2, Mousbe), who was the officer who directly handled the substance did not state that there was a solid mass. In these circumstances the fleeting glance of P.C. Sophie is not reliable.

This was evidently an erroneous statement in view of the

following answers to Court by PW 2:

> Q. You were told in the statement you had mentioned another black piece of something. So, from the car, how many substances that you took? You said white, and the other colour. Did you also get that black piece in the car? In the statement you had mentioned another black piece.
>
> A. Yes, it was in the paper which contains the powder.
>
> Q. So, with the powder there was a black piece, also?
>
> A. Yes, it was, the dark substance was inside the powder.

PW 2 Mousbe had clearly spoken of a solid mass. Had the trial Judge not made this error of judgment he may have come to a different conclusion as regards the chain of evidence.

PW 2 described what happened when he went to Dr Gobine to collect the substances after they had been analyzed by Dr Gobine in the following manner: "The substances were given to me in a sealed envelope". He also stated:

> When Doctor Gobine gave me back the envelope I did not open the envelope, because the procedure is that, when we are given back an exhibit from Dr. Gobine, it should be sealed and we should not tamper with it or even open it .....(verbatim)

PW 1 Dr Gobine's evidence in regard to the handing over of the substances to PW 2 was:

> I first showed him the exhibit, comprising of two items, so that he would be satisfied that it is the exhibit that he brought to me in the first place. When he was satisfied, we proceeded to put the exhibit in an envelope and I proceeded to seal the items in his presence.

There is a clear contradiction in the testimony of PW 1 and PW2 in regard to this matter. This Court is of the view that it is difficult to rely on the evidence of PW2 in regard to compliance with procedures pertaining to maintenance of the chain of evidence regarding exhibits in drug cases. There is much credence in the position put by counsel for the defence to PW 2:

> I put it to you that the substances produced in this Court are not those which were allegedly taken from you in the accused car, in that it is different and in that, secondly, it is missing.

This Court is in serious doubt as to whether the very substances recovered from the appellant were sent for examination and analysis in view paragraphs 6 to 13 above. We are of the view that this was a fatal irregularity. In the case of *Josianne Vital v Republic* Cr Appeal No 3 of 1997 the police woman who seized the drugs had brought them to the police station put them into an envelope, placed a post-it paper with a number on it as an identifying mark on the envelope, and placed it in a locker. As recorded in the judgment:

> However, when the police woman removed the envelope from the locker, she inexplicably peeled off the "post-it" and apparently threw it into a bin. She then took the envelope to the drug analyst who, after examination of the

> substance contained in the envelope, certified it to be cannabis, put it into a khaki envelope which was sealed and handed to the police woman.

The judgment goes on to state:

> The police woman conceded that during the material time, she brought in similar substances secured elsewhere which she placed inside the same locker, and that she visited the analyst many times.

In that case this Court said:

> In these circumstances, it is doubtful that what was analysed by the drug analyst was the same substance that had allegedly been found in the appellant's possession. The whole issue is shrouded in mystery. The onus was upon the respondent to adduce satisfactory evidence to show that the substance that had been brought from the appellant's residence was the same substance that was handed over to the analyst. This they failed to do with the result that there was a break in the chain of evidence to link the drugs analysed by the Drug Analyst to the appellant.

In 78 (1994) CLT 366 it was held that there was unreasonable and unexplained delay in sending the seized articles to the Chemical Examiner and further there was no convincing evidence as to whose custody the seized articles were kept during the intervention period. The vital link evidence being missing the conviction and sentence cannot be sustained. In *Balaji Sahu v State* 84 (1997) CLT 357 it was held that where the prosecution evidence is silent that any effective step was

taken for proper custody of the seized article and same was sent after 43 days, the benefit of doubt must be extended to the accused. In *Ram Phal v State of Haryana* (1997) 1 SFR 151 it was held that the variation in the weight of the sample spoke volumes against the prosecution and that the only inference could be that either the sample was tampered with somewhere or the sample sent to FSL was not the same which was alleged to have been recovered from the appellant. In *Valsala v State of Kerala* (1994) AIR SC 117 it was held that when the link evidence relating to the safe custody is missing, the missing link is fatal for the prosecution. In *Ajajya Kumar Naik v State of Orissa* (1995) Cr LJ 82 and *Jayakrushna Parida v State of Orissa* (1997) Cr LJ 2179 it was held that the incriminating materials recovered from the accused and duly identified during the proceedings go a long way in connecting the accused in the case. In a case where the subject matter of the offence committed is an article for which an expert opinion is necessary to prove the nature of the contraband article, it is all the more necessary and imperative on the part of the investigating agency to seal it in such a manner and keep it in such custody so as to wipe out the slightest doubt in the mind of the Court that there could have been any possibility whatsoever that the article so seized could be tampered with before it could reach the public analyst.

There is nothing in the judgment to indicate that the trial Judge had examined the issue of possession by the appellant before convicting him. All that he said in regard to possession is to be found in the concluding paragraph of his judgment:

> On the totality of evidence, the Court is satisfied that, unlike in the cases of Josianne Vital (supra) and Robert Rioux (supra), there are no doubtful factors to assume the possibility of tampering or there being a mix up of substances taken for analysis to warrant a finding that the element of

> possession had not been proved. Hence the prosecution has proved the elements of possession and knowledge, required to establish both charges under count 1 and count 2 beyond a reasonable doubt.

The establishment of the chain of evidence pertaining to the analysis of the controlled drugs has nothing to do with proof of possession. The trial Judge does not appear to have considered the evidence of PW 2 that the windows of the car of the appellant in which the controlled substances were found were open and the doors of it were not locked. There was no evidence before the Court as to when the appellant came to Vincent Samson's house, from where he came, with whom he came, who had been travelling in his taxi prior to him coming to Vincent Samson's house and how long he had been at Vincent Samson's premises. The trial Judge has failed to comment in his judgment as to the weight he attaches to the appellant's statement to the police when the controlled substances were found, namely that he (appellant) did not know about the presence of controlled drugs, that it did not belong to him, that it must have been placed in his car by somebody and that he was a taxi driver. In the absence of any evidence to the contrary this evidence emanating from the prosecution itself has a bearing on the innocence of the appellant. The principles of fair hearing demand that a trial court must necessarily pronounce on matters like this before coming to a finding against an accused person. Further it was incumbent on the trial Judge to make a pronouncement on these items of evidence as such evidence may be sufficient to rebut the presumption under section 18 of the Misuse of Drugs Act (Cap 133).

The conversation that is alleged to have taken place between the appellant and PW 2, as referred to at paragraph 2 of this judgment, is not sufficient alone to make a finding of guilt against the appellant when there is a serious doubt as to the

chain of evidence pertaining to the exhibits. Many a person tries to wriggle out from a situation by having recourse to 'deals'; which unfortunately have become the norm when dealing with certain officials. This does not mean that this Court condones such actions or is casting aspersions on any particular witness in this case but this court cannot ignore the realities of society. Unfortunately even the innocent find this an easy way to get out of an inconvenient situation which may look incriminatory against them but for which they may not be responsible for. Even if the 'deal story' is to be acted upon, a person cannot be convicted on a sole reliance of such evidence if there is a serious doubt as to the chain of evidence in a drug case.

This case is yet another illustration of a pathetic investigation, a poor prosecution and a desire by the trial court to rope in the accused ignoring the obvious lapses on the part of the prosecution. Maintaining the chain of evidence from the time of seizure of the drugs up to the time it is analysed by the Government Analyst is absolutely vital in dealing with a drug case. Investigators and prosecutors should consider the severe nature of punishment provided by the Act and thus leave no room for doubt in the mind of the court that there could have been any possibility whatsoever that the substance seized could have been tampered with before it reached the Government Analyst. To ensure this, drugs seized should be placed in an envelope or receptacle as soon as possible and sealed. The CB number assigned to the case should be written on the envelope or container. It should then be placed in safe custody and taken to the Government Analyst for examination and report at the earliest possible opportunity. There must always be a balancing of the two interests, namely the public interest of combating drug related crime and the right of an accused person to a fair trial enshrined and entrenched in the Constitution.

In view of the circumstances set out above we are of the view

that it is unsafe to maintain the conviction. We therefore allow the appeal and acquit the appellant.

Record: Court of Appeal (Criminal No 22 of 2009)

Elisa v Government of Seychelles

Hodoul, Domah, Burhan JJ
10 December 2010 Court of Appeal Civ 39 of 2009

Damages – quantum – civil injury

The appellant, along with 12 others, suffered permanent injuries inflicted by the police during a protest. The Court awarded the appellant and three others each R 35,000 in damages. The appellant sought to increase the award to R 370,000.

HELD

The plaintiff suffered serious injuries requiring ongoing treatment. He recovered with only partial movement in his arm and shoulder. As compared to the other three plaintiffs who received similar awards but suffered less serious injuries with temporary effects, the appellant was entitled to a higher award of damages.

JUDGMENT: Appeal allowed. Damages increased to R58,000.

Cases cited
Regar Publications v Lousteau-Lalanne SCA 25/2006, LC 304
Ventigadoo v Government of Seychelles (2007) SLR 242

Antony DERJACQUES for the appellant
Samantha AGLAE for the respondent

Judgment delivered on 10 December 2010

Before Hodoul, Domah, Burhan JJ

This appeal is against an award of damages made to the appellant, a retired officer from the military, by the Judge of the Supreme Court in the sum of R 35,000 for prejudice caused to him as a result of an incident which occurred on 3 October 2004 in which the appellant was injured in a confrontation between the police authorities and certain protesters. The respondent had admitted liability and only quantum was in dispute in a joint claim of which the appellant was the 13th plaintiff in the court below involved in the same incident.

The appellant has advanced three grounds of appeal, as follows:

> (i) The Honourable Judge erred in law and principle in that the amount awarded is grossly disproportionate, extremely low and inadequate and does not correctly or adequately reflect the damages and injury suffered by the Appellant;
>
> (ii) The Honourable Judge erred in law in his award of quantum of damages in that the total sum of R 35,000 does not reflect the reasonable ambit within which a proper and reasonable award could have been made, the facts and circumstances, taking into account the age, illness, vulnerability of the Appellant and that the Appellant was an innocent passer-by brutally attacked, assaulted, and injured by the police, with batons, guns and teargas.
>
> (iii) The Honourable Judge erred in law in failing to properly take into account the extreme

> culpability of the Respondent more so the necessity to protect the citizen against abuse of power by the State.

The above may be conveniently summed up in one simple ground: namely, the sum awarded to the appellant fell short of the compensation that was actually due, considering the material and moral prejudice, in his conditions of age, illness and vulnerability, which the appellant suffered as a result of the unlawful acts and doings of the respondent's agents and préposés.

The appellant in an amended plaint has claimed R 370,000 made up as follows: R 170,000 for aggravation of his knee condition for which he needed to go to Singapore for a fresh visit following a prior surgery; R 25,000 for the haematoma and open wound on his right leg; R 20,000 for bruises over knee and small wound superior and medial left shin; R 55,000 for bruises over back and right forearm with permanent pain and loss of mobility; R 100,000 as moral damages which includes humiliation, stress, acute anxiety, fright, psychological pain.

We have had a look at the comparative awards made by the Judge to the twelve other claimants. We agree with counsel for the appellant that the award made in the case of the appellant barely reflects the prejudice he suffered. Counsel for the respondent agreed that she could not support the award made, on the general principles applicable in the law for the award of damages, even if she had made an elaborate submission on the matter vetted by her office. We need to commend her for the objective view she took on reflection of the matter and following remarks from the Court.

The Judge had awarded to the appellant R 35,000 which is the sum he had given to three others: namely, claimants 6, 8 and 10.

Claimant 6 had received injuries from three rubber bullets, one on the right arm and two on the thigh. The bleeding was mild. He complained of pain which lasted for 6 days. He discovered other minor injuries while he was in his shower. The medical report speaks of a circular peeled skin area on the left shoulder appose 1 cm diameter and of left gluteus appose 1.5 cm diameter. His injuries needed cleaning and suturing, daily dressing and he was given paracetamol 1 g. PRN.

Claimant 8 was also injured by rubber bullets. Aside being hit at the chest and legs, he suffered from teargas for which he had to be nebulized for about one hour at the hospital. He spoke of his pain and suffering lasting for 4 to 5 days. The pain to him was of such a nature that he kept talking about it.

Claimant 10 had also received injuries by rubber bullets, two in number: one on the left shoulder and one at the buttock. He stated that, on impact, it felt so hot that he jumped into the river to cool himself down. He spoke of his pain lasting for 11 days. He also spoke of his difficulty to manage the toilet seat for which he sought assistance from his wife. He mentioned that he had to continue dressing till mid-October.

In the case of claimants 6, 8 and 10, one could understand the award of R 35,000. But the case of the present appellant is different. He was first beaten and hit all over and on both his knees repeatedly with truncheons, made to stumble, pushed and assaulted. He spoke of being hit about 15 times, the brunt of the assault raining upon him because he could not run to safety like the others on account of the disability of his knee which had undergone previous surgery and was under treatment, the last being some 5 months before in Singapore. On arrival at hospital, he was stumbling and confused and had to be given oxygen.

He was further shot in both legs. He was picked up from a lying position and taken to hospital, with open wounds, below-knee big haematoma and bruises. On the day in question, he was treated in Casualty under local anaesthesia. His wounds were sutured and dressed. He was given analgesic. Some months later, he had to proceed to Singapore for a reassessment of his medical condition including his knee condition. Considering his age and condition, full recovery of the movement of his left arm and of his shoulder is impaired.

The record reads that he stated that money is not his real problem. This is one of the reasons why, in the written submissions, the respondent argues that appellant does not need an increase in damages. The fact remains, however, that he amended his claim to increase it to R 370,000. We take the view that it was his dignity that was hurt for being hit repeatedly despite his protest to spare him on account of his disability.

In light of the evidence, including the documents which we find on record, we review the damages payable to him on the higher side. The two cases referred by counsel for the appellant: *Charles Ventigadoo v Government of Seychelles* (2007) SLR 242 and *Regar Publications v Maurice Lousteau-Lalanne* SCA 25 of 2006, LC 304 are not strictly relevant to the points under our present consideration.

We take the view that a sum of R 58,000 would adequately repair the prejudice caused to the appellant. We order the respondent to pay to the appellant the sum of R 58,000 with interest and costs.

Record: Court of Appeal (Civil No 39 of 2009)

Mussard v Laurencine

MacGregor P, Hodoul, Domah JJ
10 December 2010 Court of Appeal Civ 39 of 2009

Civil procedure – variation of judgment – amendment of judgment – equity – extension of time – fair trial

The parties divorced. An order was made dividing their land and allowing the respondent the option to purchase the appellant's share of the land within six months. The respondent failed to do so within the allotted period despite the appellant's efforts to make contact. On an application by the respondent, the trial judge varied the six months period to eighteen months. The appellant appealed, arguing that the variation was *ultra petita*, that the trial judge was *functus officio*, that she was not granted a fair trial because the judge had not taken into account her submissions, and that the trial judge failed to take into account equitable principles.

HELD

1. Variations to a judgment may only be made for ancillary matters that are of a continuing and subsisting nature. They are not available for orders of a static and time-bound nature.

2. A judge may not be re-seized of a matter that has already been determined.

3. Failure to consider the appellant's submissions is a breach of the right to a fair trial.

4. The Court does not have an inherent equitable right to extend the time period

allowed for an option under a judicial order.

5. Equity protects the vigilant, not the indolent.

JUDGMENT: Appeal allowed.

Legislation cited
Constitution, art 19
Land Registration Act, s 75

Basil HOAREAU for the appellant
Frank ELIZABETH for the respondent

Judgment delivered on 10 December 2010

Before MacGregor P, Hodoul, Domah JJ

The parties are former spouses whose divorce was pronounced by the Supreme Court. This appeal by Lucie Suzanne Mussard concerns two property settlement orders made by Judge Renaud, then ACJ.

The orders are set out *in extenso* as follows:

a) The immovable property parcel S 1279 valued at R 432,000 be shared on the basis of half share each subject to an adjustment of R 50,000 in favour of the respondent. The applicant (Ms Lucie Suzanne Mussard) shall be entitled to R 166,000 and the respondent shall entitled to R 266,000; and

b) The respondent, being the party who had been occupying the property in issue since the appellant left to live with her concubine

> (sic) elsewhere, shall have the option to remain in possession of the property parcel S1379 and to buy out the half share of the applicant within six month from today, failing which, the applicant shall thereafter have the option to buy out the half share of the respondent and thereupon take vacant possession of the property in issue.

The appellant avers that the respondent failed to exercise the option he had to purchase her share during the delay of six months set by the Court. The respondent disputes this averment and maintains that the law is on his side and that the appellant may still be compelled to sell him her share.

We believe that the position of the parties is best set out by themselves in their respective affidavits.

The affidavit of Lucie Suzanne Mussard dated 12 June 2008 avers the following:

> 1. I am the deponent above-named.
>
> 2. On the 13th of December 2006, the Supreme Court, presided by Renaud J, gave judgment in the case that I had brought against my former husband, Mr. Paul Laurencine, in respect of adjustment of matrimonial property. The said case was case number 133 of 2000.
>
> 3. In the said judgment, a copy of which is attached herewith as A1, Renaud J, inter-alia, made the following orders:
>
> … …

4. Mr. Paul Laurencine was thus given the option, to buy my share in parcel S1379 for a period of 6 months, from the 13th of December 2006. In other words, Mr. Paul Laurencine had until the 13th June 2007, to exercise that option, after which time I had the option to buy his share in the property at the price of R 266,000.

5. By the 13th June 2007, Mr. Paul Laurencine has failed altogether to exercise his option to purchase my share in the property.

6. After the said date, i.e., the 13th June 2007, I attempted to contact Mr. Paul Laurencine on several occasions for him to transfer his half share of the property to me and for me to pay him the sum of R 266,000 in the exercise of my right as per the judgment. However, all attempts to contact Mr. Laurencine were futile.

7. Eventually, I had no option but to deposit the sum of R 266,000, at the Registry of the Supreme court, for the benefit of Mr. Paul Laurencine.

8. The sum of the R 266,000 was deposited with the Registry of the Supreme Court by a cheque dated the 26th of November 2007, from Chetty & Hoareau Chambers, after I had deposited the said sum into the Client's Account of Chetty and Hoareau Chambers.

9. By a letter dated, the 13th of December 2007, from Attorney-at-Law, Basil Hoareau addressed to Mr. Paul Laurencine, he was informed that the sum of R 266,000 had been deposited at the Registry of the Supreme Court by myself, representing the payment in respect of his share in the property and consequently he should transfer his share in the property to me. It is now shown to me, produced and exhibited herewith as A2 a copy of the said letter.

10. Despite this letter, Mr. Paul Laurencine failed to transfer his half share in the property to me.

11. In the end, I had to apply to the Land Registrar, under Section 75 of the Land Registration Act, to register the half share of the property which is registered in Mr. Laurencine's name to me.

12. I have also applied for a writ of execution to be issued by the Registrar of the Supreme Court, to have Mr. Laurencine forcibly removed from the house situated on the property.

13. I have been informed and verily believe that as from the 13th of June 2007, Mr. Laurencine has no right to purchase my half share in the property, as per the judgment of Renaud J, dated the 13th of December 2006.

14. The averments contained in the above paragraphs 1 to 13 are true to the best of my knowledge, information and belief.

The affidavit of Paul Laurencine dated 6 March 2008 avers the following:

1. I am the deponent above-named.

2. That on the 13th December 2006 the Supreme Court ordered me to pay the sum of R 266,000 to the applicant and thereafter for the applicant to transfer her undivided half share in the said title No.S1379 in my sole name.

3. I aver that I have complied with the said order and deposited the said sum with the Registry of the Supreme court for and on behalf of the applicant.

4. I am now desirous that the applicant transfers her half undivided share in the said property to my sole name as ordered by the Court.
5. That in all the circumstances of the case it is just and necessary for the Supreme Court to make an order compelling the applicant to transfer and cause to be registered, her undivided half share in the said property to my sole name.

6. Failing which, it is just and necessary for the court to make an order ordering the Land Registrar to rectify the Land Register by registering myself as the sole owner of the whole title S1379 forthwith.

7. That all the statements contained herein are true and correct to the best of my information, knowledge and belief.

After having gone through the content above, the Judge made the following decision:

> In the circumstances of this case, I believe that it is fair, just and necessary that I vary the time given to Mr Laurencine to satisfy the order of the Court by extending the 6 months period to 18 months thus allowing Mr Laurencine to deposit the money on or before 13 June 2008. The effect of this variation is that Mr Laurencine had made the necessary payment of the half share of Mrs Mussard within time. Mrs Mussard may collect the sum deposited at the Registry of the Supreme Court.
>
> In view of the variation I now make the following orders:
>
> 1. I hereby order Mrs Lucy Suzanne Mussard to transfer her half share in Title No S 1379 to Mr Paul Laurencine within 14 days from today.
>
> 2. Should Mrs Mussard fail to do so, I further order the Land Registrar to rectify the Register by registering Mr Paul Laurencine as sole owner of the said Title No S1379.
>
> Having made the above orders in the disposal of the Notice of Motion of Mr Laurencine I do not see the necessity of adjudicating on the Application of Mrs Mussard. Mrs Mussard may

collect the deposit she made at the Supreme Court Registry.

The appellant was dissatisfied and aggrieved by the judgment of the trial Judge and has now appeal to this Court on the following grounds:

1. The order of variation of the 6 month period to 18 months made by the learned acting Chief Justice, is ultra petita as the respondent did not pray for such an order nor did any of the three prayers prayed by the respondent permit the trial judge to make such an order.

2. The learned trial judge erred in law in that the learned trial judge was functus officio and did not have any power to amend and/or vary the initial judgment of the 13th of December 2006 in the circumstances of the case.

3. The learned trial judge erred in law and/or in contravention of Article 19 of the Constitution, namely the right to a fair hearing, in that the learned trial judge failed to property and adequately consider the affidavit in reply sworn by the appellant and the attached exhibits, in considering the motion filed by the respondent.

4. The learned trial judge erred in law and in equity, namely by not taking into account all the maxims and principles of equity in purporting to exercise the equitable powers of the Supreme Court in varying the judgment of the 13th December 2006.

We have gone through the record of proceedings and the submissions of counsel on either side. We take the view that this appeal should succeed on all four grounds raised above.

Ground 1

The matter which the respondent sought from the Judge was not one for variation as such but for giving to him a second judgment amending his first judgment under the guise of a variation. Variation is with respect to an ancillary matter relating to the parties such as custody of children, continuing and current benefits such as rentals and profits, subsisting maintenance arrangements etc. This was not an ancillary matter. Even then variation relates to matters which are of a continuing, live, dynamic, current and subsisting nature. There cannot be a variation of an order which was of a static and time-bound nature. To pay a certain sum of money within six months, failing which one loses one's option is a right prescribed in time. It could not be amended without the consent and agreement of parties or by the Court on a *de minimus* rule, that is there was only a day or two beyond the time given. The Judge misdirected himself when he considered that the nature of the order being asked was one of variation. In fact that was not the motion of the respondent. There is substance in the argument that the order made was *ultra petita.*

Ground 2

The decision of the Judge is also challenged under this ground on the basis that the Ag Chief Justice was *functus officio.* This ground also succeeds. We note a number of irregularities in the procedure leading to the second judgment. The manner in which the Court was re-seized of a matter already determined and disposed of by a previous judgment which for all intents and purposes had become executory by

effluxion of time, inaction by the respondent and due action by the appellant boggles the mind. The case file of CN 133/00 could not have been picked out from the graveyard and pumped into life. If that precaution had been taken, the mess in the process that followed is unlikely to have occurred.

Indeed, by the time the respondent made his application on 12 March 2008 to which an objection was raised by the appellant, the rights had already accrued to the appellant by the inaction of the respondent to exercise his right of option within the six months allowed to him. His right had effectively lapsed and that of the appellant had begun. CN 133/00 was by that time for the purposes of the Registry a dead file, only due for execution along the term laid down in the order.

As such, the Ag Chief Justice had become *functus officio* and could not have entertained the motion made by the respondent. It could only have allowed the motion of the appellant. In this sense, the Ag Chief Justice misdirected himself when he considered that since the application of the respondent was made on 12 June and the application for execution of appellant was made on 24 June, the respondent's motion should have been considered first. It was not a question of who was first in the queue but whose right had lapsed and whose right was subsisting.

Ground 3

There is substance in the argument raised under Ground 3 that the appellant did not benefit from a fair trial inasmuch as chronology was given precedence over the appellant's rights and objections. The Ag Chief Justice stated that there was no necessity of considering her application since the motion of the respondent had succeeded. Her rights should have been taken into account. When the court ignored her voice, the court failed to afford to her a fair trial.

Ground 4

The Judge, intent upon doing justice not based on law and equity but a personal view of the situation as is evident from the reasons he gives, assumed jurisdiction on the basis that the Court has inherent powers to extend the date upon which a party has to satisfy an order already made where it considers that that is necessary. That is stretching the concept of both law and equity to pernicious limits.

In law, we have to say that this was not a case of extending the date of compliance of an order of an administrative or quasi-administrative order where discretion is in-built. It was the case of a court having adjudged the rights of parties with respect to an option. There had been no appeal on that order. The judgment had become executory. There was no basis in law for reopening it.

In equity, it is a known principle that equity does not come to the rescue of the indolent but the vigilant. This was a case of flagrant indolence by the respondent and judicious vigilance by the appellant. She attempted to contact the respondent to pay him his share in vain and she had no option but to deposit, on 26 November 2008, the sum of R 266,000 at the Registry of the Supreme Court for the benefit of the respondent. It is upon the failure of the respondent to exercise his option and to respond to communication that the appellant applied to the Land Registry under section 75 of the Land Registration Act and has moved for execution. Up until then, there was complete inaction and laches from the part of the respondent which disentitles him to equity considerations. Equity follows the law.

To equity, one comes with clean hands. In his affidavit dated 6 March 2008, the respondent, then applicant stated that he had "complied with the said order and deposited the said sum with the Registry of the Supreme Court for and behalf of the

Applicant." That is, to say the least, misleading the court, the more so in an affidavit with a half-truth overlooking the material part that he was only able to do so long after the critical date had passed.

There are other equitable considerations which militate in favour of the appellant. She gave considerable latitude to the respondent before she proceeded to exercise her right on the judgment. If it was true that the respondent had problems of gathering finances, it was open to him to proceed to court within the six months, which he did not do.

For all the reasons given above, we allow the appeal. The motion of Mr Laurencine was completely out of order in the circumstances and should not have been entertained at all by the Judge.

We accordingly reverse the decision of the Judge and declare that the respondent has lost his right of option for not having exercised it by 12 March 2007 and, accordingly, order that the appellant having done all that is required of her as per the order made on 13 December 2006, is entitled to parcel S 1379 and the house situated thereon.

In light of what we have stated above, the only remedy of the respondent is his entitlement to collect the cheque deposited in the judgment sum at the Registry of the Supreme Court. His advanced age is no barrier to his enjoyment of the proceeds. With costs.

Record: Court of Appeal (Civil No 39 of 2009)

Sidonie v Republic

Hodoul, Domah, Fernando JJ
10 December 2010 Court of Appeal Civ 14 of 2010

Criminal law – manslaughter – self-defence

The deceased, who was the son of the accused, threatened the accused and pinned him to a wall. The accused pressed a small knife into the deceased's stomach. The deceased died. The accused was convicted of manslaughter. The accused appealed, claiming self-defence.

HELD

1. Self-defence may be claimed even if the aggressor is not armed.

2. Fear of being pushed or manhandled by an aggressor who is younger and physically stronger may cause a person to believe that they will suffer grievous harm.

3. The fact that the aggressor is a relative does not prevent a person from claiming self-defence, although a close family relationship between the aggressor and the defender may be relevant to whether the defender reasonably believed the aggressor would inflict grievous harm.

Judgment: Appeal allowed.

Foreign cases noted
Beckford [1988] 1 AC 130
Miller v Minister of Pensions [1947] 2 All ER 372

Palmer v R [1971] AC 814
R v Lobell [1957] 1 QB 547
R v McInnes (1971) 55 Cr App R 551
R v Oatridge [1992] Cr Law R 205 *R v Owino* (1996) 2 Cr App R 128
R v Shannon (1980) 71 Cr App R 192
Re A (conjoined twins: surgical separation) [2001] Fam 147 (UKCA)
Williams (Gladstone) (1984) 78 Cr App R 276

Frank ALLY for the appellant
David ESPARON for the respondent

Judgment delivered on 10 December 2010

Before Hodoul, Domah, Fernando JJ

This is an appeal against a conviction for manslaughter and the sentence of 7 years imposed against the appellant.

The appellant had killed his own son Herve Sidonie and the only evidence as to the circumstances under which the killing took place emanates from the appellant himself.

The main ground of appeal is to the effect that the trial judge erred in his findings that the appellant had not acted in self-defence when there was material evidence adduced by the prosecution and the defence to prove self-defence.

The appellant who is a pensioner and 68 years of age had been living with his 71 year old wife and 30 year old daughter who were both mentally ill. There were two other members of the family living with the appellant. It was the appellant who attended to all the house chores. According to the evidence of the appellant before the trial court, on the day of the incident around 5.30 pm he was getting ready to prepare dinner when he heard the deceased Herve Sidone yelling and

coming towards the house. He had come into the yard where the appellant was, and started swearing at the appellant calling him "cunt of your mother". The deceased who had a pint of Guinness with him had placed it on the wall next to the appellant saying “I will fight with you today. If it is not me it will be you." Prosecution witness (called PW hereafter) S Pool had corroborated the appellant on this matter by stating that he too heard the deceased utter the words "if today is not me it would be you". The deceased had then pressed on the appellant and pushed him against the wall. When counsel for the prosecution questioned the appellant as to whether the deceased said something when he pushed the appellant against the wall the appellant's answer was to the effect: "Yes. He told me if it is not him it would be me." The appellant had suffered an injury to his left wrist as a result of it. PW 1 and 9 confirm seeing the injury on the appellant's left wrist. According to the appellant the deceased -

> was very aggressive. I tried to move but he was pushing me. He was about to jump on me. I was very afraid. I thought he was going to take the bottle of Guinness and hit me with it. I took the knife that I was using to prepare the food and pressed it against his stomach but not strongly.

The deceased had then gone in the direction of the road and fallen. The appellant had then phoned the police. When the police arrived he had handed over the knife telling them "it was the knife I used to injure Herve with." The knife had been on a wall 2 metres away from the appellant before he took it to stab the deceased. The deceased was in the habit of creating trouble at the appellant's house when he got drunk, breaking bottles and louver blades and fighting with their mentally ill daughter. When questioned by counsel for the defence as to how he felt before he stabbed the deceased, the appellant had said "I was in a lot of pressure and I was

very afraid because I could not fight him he is a lot bigger than me." The appellant had also said that he had not seen the deceased in that way before and that the deceased was really violent and aggressive on that day.

The position of the prosecution had been that the appellant was used to the aggressive behaviour of the deceased and the killing therefore was in anger and not in self-defence. Under cross-examination by counsel for the prosecution the appellant had admitted that he was angry when the deceased pressed him against the wall. When questioned whether the incident could have been avoided if he had cooled down the appellant had said "Maybe. But I was under so much pressure and I was afraid and angry." Again when questioned as to why he pointed the knife at the stomach instead of injuring him on the leg or arm the appellant had said "My mind was lost. I did not really know what I was doing. I was angry under pressure and fear." The appellant had said in answer to prosecuting counsel that the deceased would have hit him and punched him if he had a chance because he was so aggressive and could have done anything. The appellant had answered in the affirmative to the two positions put to him by counsel for prosecution, namely "And all that happened very fast" and that "your emotions were mixed." The appellant had said in answer to defence counsel that he thought that the deceased would have harmed him that day, that he had not seen the deceased that way before and it was the first time he saw him like that.

The appellant in his statement made to the police about 4 hours after the incident described the incident which led to the killing of the deceased –

> Herve started swearing at me and there was a time when he pushed me against a wall and I got a scratch on my left hand. At that time my small shining knife which I use to prepare my

> ingredients was there on the wall, I took the knife and stabbed Herve in his chest, I stabbed him once. After that Herve ran on the secondary road and fell further down.

Counsel for the Republic argued before us that the appellant had not mentioned in his statement made to the police that he acted in fear and therefore self-defence is not available to the appellant. We are not swayed by this argument as this was a statement made by a father concerning an incident involving the death of his son at his hands and about 4 hours after such incident.

There has been no evidence from the prosecution to contradict the appellant's testimony in court as to the factual account as to how the incident took place.

The deceased had died as a result of a wound to the right anterior side of the heart in the position of the right ventricle caused by a sharp pointed instrument. The doctor who performed the post-mortem examination on the body of the deceased had testified that the injury could have been caused by the knife the appellant handed over to the police after the incident. She had also stated that that the knife had penetrated through the 6th and 7th ribs and could have "easily gone through the skin into internal parts of organs", thus corroborating the appellant's testimony that the knife was "pressed against the stomach but not strongly". The knife according to PW 13 was small and pointed.

PW 9, a police officer had stated that that he got a call around 5.44 pm from the appellant to the effect that "his son was making trouble with him and that he had stabbed him and he doesn't know if he has died or not". PW 9 had then visited the scene with a police party where he met the appellant who handed over a knife to him. On being questioned by defence counsel PW 9 had said that the appellant when he

approached him had not given him any idea that he was aware by that time that the deceased was dead.

PW 11 had been a neighbour of the appellant for about 36 years and had known the deceased for about 20-25 years and had seen him grow up. According to him the deceased was always drunk and liked disturbing and "when he is drunk he becomes aggressive towards his father, a lot of, people know that." As mentioned earlier he had heard the deceased utter the words "if today is not me it would be you". He had seen the deceased coming out of the appellant's house and falling on the road but not witnessed what happened between the appellant and the deceased prior to that, other than hearing them arguing with each other.

PW 12, another neighbour of the appellant had seen the deceased come out of the appellant's house and falling on the road. He too had not seen what happened between the appellant and the deceased prior to that. After the deceased had fallen he had seen the appellant come towards the deceased and said "next time when you come to my house you will respect me". According to PW 12 the deceased was a very aggressive person when drunk and would react violently by throwing bottles and rocks and said "if you passed in front, you will be hit."

PW 13, a police officer and the wife of the deceased had said that she had come on the scene with a police party once the incident had been reported to the police. When she was beside the body of the deceased she had heard the appellant say *"Monn bez ou liki ou manman, I ava les don mon gren".* PW 13 had admitted that the deceased created problems with his father and she had even had the deceased arrested.

The trial Judge had convicted the appellant for the following reasons:

a)

> The deceased who had been under the influence of alcohol..... uttered abusive words and has admittedly pushed the defendant using his hands in the heat of the moment. In fact the deceased had no weapons on him nor had any lethal object or instruments in his possession to cause any physical harm – let alone grievous harm – to the deceased at the relevant time. Hence, as I see it, there was no attack by the deceased to the degree of putting the defendant in imminent peril..... at the material time so as to necessitate the defendant use such lethal force as he did, to defend himself. There was no justification for the defendant to use such a lethal force, in the name of self defence alleging a farfetched fear arising from an outstretched imagination of the defendant over the presence of a bottle of Guinnesss, which remained intact on a wall in the vicinity and so I find.

The trial judge had also stated:

> No reasonable person in good sense would overreact and use such a lethal force against another, who simply embarks on an aggressive argument, pushes especially, with bare hands and that too, whilst under the influence of alcohol. Hence, as a man of the world, not necessarily as a judge, I find that the defendant had acted unreasonably and unnecessarily .....

It is clear that the trial judge had used a purely objective test in making this determination and placed himself in the position of the reasonable man.

The fact that the deceased was under the influence of alcohol,

had acted in the heat of the moment and had no weapons appear to be, in the mind of the judge, factors that denied the right of self-defence to the appellant. Intoxication, insanity or young age of the aggressor or that the aggressor was acting in the heat of the moment or that he is a member of the family of the defendant are not factors that will take away from a person who honestly believes he is in imminent peril, his right to defend himself. The law does not state that it is only when the aggressor is armed with a weapon or lethal object that the one put in peril becomes entitled to the right of self-defence. This may have a bearing on one's apprehension of grievous harm to himself and in regard to the question whether the force used was reasonably necessary. A fear of being pushed or manhandled by a person younger and physically stronger than oneself may result in apprehension of grievous harm. Taking a small knife that is lying close to you, and not that one goes looking for, and pressing it against a person who is manhandling him cannot be said to be use of “such lethal force” as the trial Judge had termed it. The trial Court ought to have taken into consideration the doctor’s evidence that the knife had penetrated through the 6th and 7th ribs and could have “easily gone through the skin into internal parts of organs.”

The trial Judge appears to have ignored the following uncontradicted items of evidence in arriving at a determination of this matter:

(i) The utterance of the deceased "I will fight with you today. If it is not me it will be you";

(ii) The appellant's evidence that the deceased had been very aggressive and violent that day, that he had not seen the deceased in that way before and that the appellant was very afraid because he

could not fight him as he is a lot bigger than the accused;

(iii) The appellant's evidence that he thought that the deceased was going to take the bottle of Guinness and hit him with it.

b) The trial Judge had gone on to state:

> I conclude that what the defendant did in the circumstances was not by way of self defence. He has committed the act in question undoubtedly, out of uncontrolled anger which had accumulated over the years against his son, the deceased. As an angry man he has turned his back on reason due to a kind of pain and inner convulsion. This is evident from what he stated to his daughter-in law Jamila (PW 13) at the scene of crime.

In coming to this conclusion the trial Judge gives the impression that the appellant's conduct on the day of the killing was without cause, thus ignoring the deceased's aggressive and violent behaviour towards the appellant. His statement that the appellant "has committed the act in question undoubtedly, out of uncontrolled anger which had accumulated over the years against his son" is only an assumption and not based on evidence before him. The issue in this case is not whether the appellant was angry but whether he was also afraid of being in imminent peril? Anger, jealousy, love and fear are emotions that can be so mixed up in certain circumstances that it is difficult to separate one from another. As long as the evidence suggests that the appellant had also acted out of apprehension of grievous harm to himself, the appellant's conduct can be justified on the basis of self-defence. The prosecuting counsel had understood this very well when he suggested to the appellant in cross-

examination that "And all that happened very fast and that his emotions were mixed." The appellant had answered in the affirmative to these two suggestions made to him by the prosecuting counsel.

The trial Judge appears to have been weighed down by the fact the appellant had killed his own son. Even in his order on sentence the trial Judge makes reference to the fact "a father has killed his own son". In the law relating to self-defence no exceptions are made to the relationship between the aggressor and defender, although it may have a bearing on the issue of whether the accused had reason to apprehend grievous harm from a close family member and should have reacted in the way he or she did. Just as much as the prosecution can argue that the appellant should not have acted in the way he did because the deceased was his son and the appellant was accustomed to his behaviour, the appellant is entitled to argue and as he has done in this case, that he would not have done what he did on the day of the incident unless the deceased had behaved in a more violent and aggressive manner than on earlier occasions, putting him in immediate peril. In the case of *Re A (conjoined twins: surgical separation)* [2001] Fam 147 (Court of Appeal, Civil Division) 'Jodie' and 'Mary' were conjoined twins. Leaving them joined would result in the death of both of them within six months. A separation operation would certainly result in the death of Mary who was not capable of separate survival but would give Jodie a good prospect of normal life. The issue was whether such an operation would be lawful despite the fact that it would result in the death of Mary under circumstances making the surgeons prima facie liable for murder. Ward LJ said:

> The reality here as it is to state it, and unnatural as it is that it should be happening- is that Mary is killing Jodie *How can it be that Jodie should be required to tolerate that state of affairs?* One

> does not need to label Mary with the American terminology which would paint her to be 'an unjust aggressor', which I feel is wholly inappropriate language for the sad and helpless position in which Mary finds herself. I have no difficulty in agreeing that this cannot be said to be unlawful. But it does not have to be unlawful. The six year old boy indiscriminately shooting all and sundry in the school playground is not acting unlawfully for he is too young for his acts to be so classified. …….What I am, however, competent to say is that in law killing that six year old boy in self-defence of others would be fully justified and the killing would not be unlawful.

This case illustrates that in situations like the one the appellant was placed in, the court must focus attention on the appellant's normative position and whether he had sufficient reasons for his defensive actions, bearing in mind that he was not required to tolerate the deceased's behaviour towards him because he was his son.

The classic pronouncement upon the law relating to self-defence is that of the Privy Council in *Palmer v R* [1971] AC 814, approved and followed by the Court of Appeal in *R v McInnes* (1971) 55 Cr App R 551:

> It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances ….. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If

> there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. Of all these matters the good sense of the jury will be the arbiter ……. If there has been an attack so that defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the Jury thought that in a moment of unexpected anguish a person attacked had only done what he had honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken .....

This approach in Palmer was described in *Shannon* (1980) 71 Cr App R 192 as:

> a bridge between what is sometimes referred to as 'the objective test' that is what is reasonable from the viewpoint of an outsider looking at a situation quite dispassionately, and the 'subjective test' that is the viewpoint of the accused himself with the intellectual capabilities of which he may in fact be possessed and with

> all the emotional strains and stresses to which at the moment he may be subjected.

The Court of Appeal in *Shannon* quashed the conviction because the judge had ignored the subjective aspect of the question and put the question to the jury as: "Did the appellant use more force than was necessary in the circumstances?" Whereas the real question, according to Ormrod LJ was:

> Was this stabbing within the conception of necessary self-defence judged by the standards of common sense, bearing in mind the position of the Appellant at the moment of the stabbing, or was it a case of angry retaliation or pure aggression on his part?

Archbold 2009 at 19-42 states:

> The old rule of law that a man attacked must retreat as far as he can has disappeared. Whether the accused did retreat is only one element for the jury to consider on the question of whether the force was reasonably necessary.

It further states:

> There is no rule of law that a man must wait until he is struck before striking in self defence. If another strikes at him he is entitled to get his blow in first if it is reasonably necessary so to do in self defence.

The trial Judge in this case has not taken into consideration the subjective element essentially interwoven into the objective test in determining whether the appellant had acted in self-defence, namely whether in the circumstances the appellant was placed in, the appellant had done what he

honestly and instinctively thought what was necessary. The issue of possible retreat does not arise as the evidence indicates that the appellant had been pushed against the wall and the appellant was unable to move. It is to be noted that the evidence in this case does not indicate that the appellant had attacked the deceased with the intention of killing him. The words uttered by the appellant in the hearing of PW 13, referred to at paragraph 12 above and quoted by the trial Judge in support of his findings does not necessarily indicate this. This has to be understood in the light of the evidence of PW 12 referred at paragraph 11 above. Evidence of PW 9, the police officer, referred to at paragraph 16 above, of the appellant's lack of knowledge of the death of the deceased at around 5.44 pm when the appellant called him and when the police visited the scene, indicates that the attack was merely an instant reaction to avert the imminent danger the appellant was placed in.

In *R v Owino* (1996) 2 Cr App R 128 (Court of Appeal Criminal Division) the defendant was charged with assault occasioning actual bodily harm upon his wife, a case somewhat similar to the case before us so far as the close relationship between the parties are concerned. He claimed that the injuries had been caused when he had acted defensively to stop her assaulting him. He was convicted and appealed on the ground (inter alia) that the jury had not been properly directed on the issue of self-defence. Collins J said:

> The essential elements of self defence are clear enough. The jury have to decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or threatened attack. In this respect a defendant must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide

> whether the force used was reasonable in the circumstances he believed them to be.

Pressing on a small knife with which the appellant was cooking in the region of the chest of the deceased, when the deceased cornered the appellant on a wall certainly cannot be termed as the use of "lethal force" as the trial Judge had termed it.

Even if the appellant had genuinely believed, although mistaken, that he was about to be attacked he does not lose his right to self-defence if such mistake was a reasonable one. In *Williams (Gladstone)* (1984) 78 Cr App R 276 however it was held by the Court of Appeal that the defendant's mistake need not be reasonable. Instead he has to be judged according to his view of the facts. This was confirmed in *Beckford* [1988] 1 AC 130. In *R v Oatridge* (1992) Crim LR 205 the Court of Appeal concluded that the defendant, who had been abused by her partner on previous occasions, was entitled to have her mistaken view of the incident, which led to her fatally stabbing him, considered by the jury:

> the possibility of the appellant honestly believing that on this occasion the victim really was going to do what he had previously threatened — even if this was not in fact what he was going to do — was not so fanciful as to require its exclusion.

The facts of this case before us are similar to that of *R v Oatridge* on the issue of the appellant's belief.

As to what amount of force is 'reasonable in the circumstances' in the exercise of the right of self-defence is, in our view, always a question of fact and never a 'point of law.' A court has to necessarily consider the circumstances in which the appellant had to make the decision whether or not

to use the knife and the shortness of the time available for reflection. The hypothesized balancing of risk against risk, harm against harm, by a person in immediate peril of danger is not undertaken in the calm analytical atmosphere of the courtroom after counsel with the benefit of retrospection have expounded at length the reasons for and against the kind of degree of force that was used by the appellant, but in the brief second or two which the appellant had to decide whether to use the knife or not under all the stresses to which he was exposed. This was a case where a 68 year old man had to act on the spur of the moment with his emotions of anger and fear all mixed up and when his son who was much younger and stronger than him was aggressively and violently cornering him on to a wall with the threat of: "I will fight with you today. If it is not me it will be you."

In *R v Lobell* [1957] 1 QB 547 it was held that if on a consideration of the whole of the evidence, the jury are either convinced of the innocence of the prisoner or are left in doubt whether he was acting in necessary self-defence, they should acquit. The burden of negativing self-defence rests on the prosecution. The trial Judge has referred to the authority of *Miller v Minister of Pensions* [1947] 2 All ER 372 in regard to the standard of proof necessary in a criminal case. The case before us in our view does not carry a high degree of probability as regards the guilt of the appellant. We are unable to state that the evidence in this case is so strong against the appellant as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible but not in the least probable". We certainly are in doubt as regards the guilt of the appellant.

We therefore allow the appeal and acquit the appellant forthwith.

Record: Court of Appeal (Civil No 14 of 2010)

Vital v Chetty

MacGregor P, Domah, Fernando JJ
10 December 2010 Court of Appeal Civ 9 of 2010

Civil procedure – consent judgment - professional practice – alternative dispute resolution

The parties settled by consent after being prompted by the Court.

HELD

1. It is best professional practice for counsel to minimise litigation rather than generate it;

2. The Court system should be reserved for matters that genuinely cannot be resolved, or that require a finding on the facts or judicial interpretation of the law;

3. Alternative dispute resolution methods should be the preferred system of resolution of disputes.

JUDGMENT in accordance with the settlement reached by the parties.

Legislation cited
Code of Civil Procedure, s 131

Cases cited
Cecile v Rose SCA 8/2009, LC 338
Dhanjee v Dhanjee SCA 13/2000, LC 208
Estico v Songoir SCA 37/2007
Pardiwalla v Pardiwalla SCA 15/1996, LC 48

William HERMINIE for the appellant
Antony JULIETTE for the respondent

Judgment delivered on 10 December 2010

Before MacGregor P, Domah, Fernando JJ

In this case, prompted by the Court which took the view on examination of the brief, the grounds of appeal and the respective Heads of Arguments, that this was a fit and proper case for a settlement by consent. Both counsel expressed their willingness to proceed to the negotiating table and use their professional skills to settle the differences between the parties. Goodwill from both counsel bore fruits.

Enhanced professional practice demands that, through their specialized knowledge of the law and life, counsel should attempt to minimize litigation rather than generate it. The trend nowadays is to keep the courts at bay from matters which may best be resolved by conciliation, mediation and arbitration and reserve our courts for matters which genuinely could not be resolved between the parties with the assistance of counsel and which may require a finding of material as opposed to collateral facts in dispute and the determination of respective rights of parties based on an interpretation of the law where counsel differ.

Use of alternative dispute resolution systems under the able guidance of professionals trained in the law is a preferred system of resolution of disputes between citizens in a society becoming more and more complex with untold variables and solutions which only the parties are best able to bring forth in confidence to their counsel.

In many jurisdictions intent upon ringing in the new era of judicial development, there is a formal requirement that parties to a civil suit should first try to proceed to mediation

and a party which unreasonably refuses to do so may be mulcted with costs. In Seychelles, there is no such formal requirement but that does not stop parties from adopting this principle based on common sense. In a majority of situations, “un mauvais arrangement est mieux qu’un bon jugement.”

The conventional court system is based strictly on the conflict theory of dispute resolution in society. It is also one where the winner takes all. The new system imports a consensus theory of resolution of disputes between subjects. The virtues of a consensus theory which complements the conflict theory are many. It engages the parties themselves to reach a win-win solution under the skilled guidance in law of counsel and the magic of the court. It does not help to go to the battleground and shed blood all the time, in all matters, for all things.

The world over, legal practice is developing along new approaches from which our jurisdiction could derive immense benefits. However, many would say that these new approaches always existed in society but had been abandoned when too much emphasis was given to the text of the law rather than the outcome of the dispute.

We encourage parties to make greater use of section 131 of the Code of Civil Procedure. It provides:

> The parties may at any stage of the suit before judgment, appear in court and file a judgment by consent signed by both parties, stating the terms and conditions agreed upon between them in settlement of the suit and the amount, if any, to be paid by either party to the other and the court, unless it see cause not to do so, shall give judgment in accordance with such settlement.

We have intervened in many cases with positive results: see for example, *Jamshed Pardiwalla v Naheed Pardiwalla* SCA

15/1993, LC 48; *Viral Dhanjee v Suzan Margaret Dhanjee* SCA 13 of 2000, LC 208; *Samuel Butler Estico v Doris Songoir* SCA 37 of 2007; *Jessley Cecile v Rose* SCA 8 of 2009, LC 338.

Coming back to this case, having perused the agreement reached to ensure that it is in compliance with section 131 and, finding no cause for not doing so, we give judgment in accordance with the settlement as reached between the parties.

Counsel are commended for their efforts.

Judgment by consent

The parties to the above suit have agreed to a sum of nine thousand Seychelles Rupees (R 9000) for loss of earnings in favour of the appellant.

Each party to bear his own cost.

Record: Court of Appeal (Civil No 9 of 2010)

In the matter of the winding-up of Ailee Development Corporation (in liquidation) and in the matter of the Companies Act

MacGregor P, Hodoul, Domah JJ
10 December 2010 Court of Appeal Civ 17 of 2008

Company law – liquidation – Companies Act – Land Registration Act – removing charges

On an application to wind-up a company, the court granted an order to remove charges registered against title to the company's main asset to enable its sale. The property was sold to a third party buyer. The court also ordered that the title be registered free from various encumbrances, including the appellant's charges. The appellant creditor claimed that the encumbrances should remain against the title till the debts had been discharged.

HELD

1. There is no conflict between section 278(5)(d) of the Companies Act 1972, relating to realisation of assets, and section 45(1) of the Land Registration Act 1965, relating to security registered against land. The two regimes operate in different areas without one overriding the other.

2. The court has the power under the Companies Act to remove charges registered against a title for the limited purpose of allowing a sale to realise the encumbered asset. All rights reserved by the registered charges against the asset remain intact and attach to the proceeds

> of sale. The holders of encumbrances then may pursue their rights to the proceeds against the liquidator.

JUDGMENT: Appeal allowed in part.

Legislation cited
Companies Act, ss 223, 232, 278(5)(d)
Land Registration Act 1965, ss 20(e), 41(3), 45(1)

Cases cited
Charlie v Francoise SCA 12/1994, LC 72

Foreign cases cites
Re Greenhavens Motors Ltd Mayers v BG Funding Ltd [1999] EWCA Civ 3046

Kieran SHAH for the appellant
Francis CHAN SAM for the respondent
Bernard GEORGES amicus curiae for the creditors and contributories

Judgment delivered on 10 December 2010

Before MacGregor P, Hodoul, Domah JJ

This is an appeal against one of the orders made by the then Ag Chief Justice Perera in a winding-up up application in which he made a number of orders among which one in the following terms:

> the Registrar of Lands shall register the transfer of property Title T 147 together with the buildings and appurtenances …. free of all encumbrances, save the right of way …. Consequently, all restrictions, inhibitions and charges entered in the Register of Lands are hereby removed …

Some counsel make simple issues complex and some complex simple issues. We had the benefit of counsel of standing in this matter intent upon the latter preoccupation. They reduced the controversies to one central issue. What finally this Court is now being called upon to decide, as per document dated 30 November 2010 filed before us on the day of hearing, is:

> whether the Supreme Court was the right to order the removal of the charges registered against Title T147.

The following may be stated to be the common ground among the parties as at 29 November 2010 (vide documents filed by liquidator and counsel pending hearing). Following the order made by the Ag Chief Justice, the liquidator has already sold Title 147 to European Hotels & Resorts Limited for the sum of R 480,000,000. That happened on 4 September 2008. The buyer has taken possession of the property and builders have already moved on and taken over the site. Demolition works have started. So have rebuilding works. As for the proceeds, they are still lying with the liquidator awaiting a ruling from the Supreme Court for the purpose of disbursement. It would appear that this process is being stalled because the creditors and the contributories have not been too happy as to the manner in which the liquidator proceeded with the application leading to the sale ordered by the Court.

The Attorney-General, Mr Govinden, appearing for the State, indicated his stand on the overall dispute. His position is that the distribution as per the law is getting stalled on account of the fact that the creditors and contributories are recalcitrant in using the avenue and the opportunity afforded to them under the law including the Companies Act, more particularly section 223. He added that the procedure adopted has been in accordance with the law and the wide powers given by the liquidator and the Court in a winding-up.

Mr F Chan Sam for the liquidator submitted that it is important to consider that with which we are involved: it is a winding-up order. Since that is the case, the powers of the court are wide. The court may make any order it may deem fit. However, he emphasized the point that the rights of the creditors and the contributories are, thereafter, vested in the assets realized and they should now, more profitably, be engaged in that direction.

Admittedly, in the light of the events which have supervened since the orders made on 28 September 2008 and the reality on the ground, a number of issues raised in the procedure for sale may be relevant for another forum.

As far as this appeal is concerned, counsel for the appellant, Mr K Shah SC, argued that we may with benefit resolve the issue of law where the court may be said to have clearly erred when it decided that: "the special law contained in the Companies Act would override the general law in the Land Registration Act."

That, in our considered view, is a far-reaching pronouncement. If that remains in our jurisprudence, the consequences may be chaotic**.** The Ag Chief Justice so stated when he was interpreting section 278(5)(d) of the Companies Act 1972 and section 45(1) of the Land Registration Act 1965 in the context of a winding-up application. He saw himself in a situation where he had to overcome the hurdle of removing the encumbrances and charges which had been registered under the Land Registration Act on the property Title 147 before he could exercise his power under the Companies Act to effect the sale in that application of a special nature under our law. He took the view that the two sections were conflicting and the only way he could have proceeded was to state that section 278(5)(d) of the Companies Act 1972 overrides section 45(1) of the Land Registration Act 1965. However, our reading is, as rightly submitted by counsel for

applicant, different.

Section 278(5)(d) of the Companies Act 1972 provides:

> a security shall be deemed to be realized if any of the assets subject to it are sold or are ordered by a court to be sold, or if a receiver is appointed in respect of any of those assets, or if the person entitled to the security takes possession of any of those assets.

Section 45(1) of the Land Registration Act 1965 provides:

> a charge shall be discharged by an order of the Court or by an instrument in the prescribed form, or, in the case of a legal charge by an order of the Court, or upon the application in writing of the Officer or person referred to in section 43.

Another section to which the Ag Chief Justice referred to was section 20(e) of the Land Registration Act 1965 which provides:

> The registration of a person as the proprietor of a charge shall vest in that person all the rights, powers and remedies of a mortgagee or of a person entitled to a privilege, as the case may be, under the law of mortgages and privileges; and it is hereby provided that, notwithstanding anything to the contrary contained in any other written law, the land or lease comprised in the registered charge shall be security for all sums recoverable under such charge in priority to all claims under the mortgage or privilege which is not registered under this Act.

Mr Shah's argument is that the Supreme Court was never

called upon, in the first place, to decide which law gained priority over which so that the pronouncement of the Supreme Court on the matter was *ultra petita.* He cited *Tex Charlie v Marguerite Francoise* SCA 12 of 1994, LC 72. He further argued that, in any event, the interpretation was incorrect, inasmuch as there is no conflict between the two regimes envisaged by the two laws under consideration.

He referred to section 278 of the Companies Act which deals with matters of priority with regard to income tax, wages, workmen's compensation etc whereas the provisions of the Land Registration Act deal with, inter alia, security on immovable property. Each has its own field of operation.

Mr B Georges, holding a watching brief for the other creditors and contributories, argued that the Court had no power to wipe the slate of encumbrances clean. The stroke of one judicial pen had swept all the rights of the parties concerned. He cited *Halsbury* paragraph 1042 which repeats the rule obtaining in section 232 of the Companies Act:

> An order for winding up operates in favour of all the creditors and contributories as if made on the joint petition of a creditor and of a contributory.

He referred to the case of *Re Greenhavens Motors Ltd Mayers v BG Funding Ltd* [1999] EWCA Civ 3046. His argument was that the order as made violated the principle that dealings in the assets of a company may only be possible with the agreement and consent of the creditors and the contributories.

We have given due consideration to the submissions of all four counsel. We have to say that while a number of arguments presented to us are important for our present consideration, a number of them are valuable for other fora. Our analysis has shown that the devil in the order made by

the Ag Chief Justice lay not in the order as made but in the laws as interpreted. The Judge simply overstated it when he decided that the above-stated provisions of the Companies Act overrode the above-stated provisions of the Land Registration Act. To that extent we agree with the submission of counsel for the applicant. That cannot be, inasmuch as the two laws under scrutiny deal with two different concepts in law: one with security and one with realization.

Section 41(3) of the Land Registration Act (Cap 107) reads:

> A charge shall not operate as a transfer but shall have effect as a security only.

We agree with what Mr B Georges submitted that the Judge could not wipe the slate clean with respect to the accrued rights of the creditors and contributories in the assets recovered.

Mr Chan Sam has put it equally correctly. The parties have never lost their rights which may be traced in the assets. What the order did was simply to break the deadlock, enable the sale, recover whatever proceeds could in the circumstances be obtained and enter the parties on to the next logical stage.

In fact, the judgment is quite clear on this aspect of the order made:

> the Registrar of Lands shall register the transfer of property Title T 147 together with the buildings and appurtenances …. free of all encumbrances, save the right of way ….Consequently, all restrictions, inhibitions and charges entered in the Registrar of Lands are hereby removed … *subject to the rights of the chargees and other creditors who have registered inhibitions and restrictions being repaid when distributing proceeds in accordance with the*

> *provisions of the Companies Act for proof and ranking of claims.* [emphasis ours]

Our interpretation of the order made by the court is that the property in question was sold unencumbered only for the purposes of effecting the sale. However, all the rights reserved by the encumbrances have remained intact and have been transferred and have as a matter of course vested in the proceeds. Accordingly, parties are to pursue their rights in the proceeds in the hands of the liquidator. The creditors and the contributories are to use the avenue given to them under the Companies Act to claim from the realized assets in accordance with the encumbrances and the law.

If anything needs to be added for the purposes of clearing any doubt on the interpretation that the impugned provision in the Companies Act cannot override the impugned provisions of the Land Registration Act, we need not go to any canon of interpretation.

The answer is found in section 20(e) itself when it states:

> The registration of a person as the proprietor of a charge shall vest in that person all the rights, powers and remedies of a mortgagee or of a person entitled to a privilege, as the case may be, under the law of mortgages and privileges; and it is hereby provided that, *notwithstanding anything to the contrary contained in any other written law,* the land or lease comprised in the registered charge shall be security for all sums recoverable under such charge in priority to all claims under the mortgage or privilege which is not registered under this Act.

The answer, therefore, to the question asked of us is found in the emphasised part above. In other words, notwithstanding

anything to the contrary contained in any other written law, the land or lease comprised in the registered charge continue to be security for all sums recoverable under such charge in priority to all claims under the mortgage or privilege which is not registered under this Act.

In the light of the above, our answer to whether the Supreme Court was empowered to order the removal of the charges registered against Title T147, is in the positive inasmuch as it was for the limited purpose of effecting the sale to realize the assets; but, we hasten to add that such removal did not have the effect of abrogating the rights of those who had registered their charges. The rights thereunder have been transferred to the assets that have been realized in the process.

Since the applicants have succeeded partly in this appeal, we make no order as to costs.

Record: Court of Appeal (Civil No 17 of 2008)

Barbe v Republic

MacGregor P, Hodoul, Fernando JJ
10 December 2010 Court of Appeal Crim 24 of 2009

Evidence – circumstantial evidence - Constitution – fair trial – right to silence – inference of guilt

The appellant was convicted of importation of heroin. At trial circumstantial evidence was brought that was not challenged by counsel for the appellant, who was of the opinion that the inconsistencies in the circumstantial evidence was sufficient to weaken or destroy the inference of guilt.

HELD

1. An accused's failure to take the opportunity to rebut circumstantial evidence brought against him or her can be taken as an admission that the evidence is uncontested;

2. (Fernando JA dissenting) To draw an inference of guilt from an accused's decision not to challenge a piece of evidence is in breach of the right to be presumed innocent;

3. An accused is accorded the right to remain silent, which is a privilege against self-incrimination. The right is a constitutional right and an international norm.

JUDGMENT: Appeal dismissed.

Legislation cited
Constitution, arts 18(3), 19(2)(a), (g), (h), 19(10) (b)
Court of Appeal Rules, r 24(1)(a)-(k)
Misuse of Drugs Act

Cases referred to:
Onezime v Republic (1978) SLR 140
Republic v Rose (1977) SLR 39

Foreign cases noted:
Benmax v Austin Motor Co Ltd [1955] 1 All ER 326

Nichol GABRIEL for the appellant
N Hemanth KUMAR for the respondent

Judgment delivered on 10 December 2010

Before MacGregor P, Hodoul, Fernando JJ

This is an appeal against conviction for importation into Seychelles of a controlled drug, namely, 402.4 grams of heroin (diamorphine) on 7 April 2008. According to the particulars of the offence, Kevin Barbe on 7 April 2008 imported into Seychelles a controlled drug, namely, 402.4 grams of heroin (diamorphine). A sentence of 11 years' imprisonment, which the appellant is currently serving, was imposed by the trial Judge.

In the original indictment filed before the Supreme Court the appellant was, in addition to a charge of importation, charged together with Jean-Paul Bacco for conspiracy to import into Seychelles a controlled drug, 402.4 grams of heroin (diamorphine). Jean-Paul Bacco was also charged as co-accused under a separate count for aiding and abetting the appellant to import the said drug into Seychelles. We learn at pages 4 and 7 of the appeal brief that the charges against Jean-Paul Bacco had been withdrawn leaving only one

charge against a sole accused, the appellant, that of importation. We have not found any formal application for leave to withdraw the charges against Jean-Paul Bacco. More about this later.

This appeal essentially concerns circumstantial evidence, ie the circumstances and conditions required for such evidence to uphold a verdict of guilt. The courts have always been very strict to ensure that no injustice is done to the accused; however, in cases where it is the accused, himself/herself who "wastes" his/her chances, he/she has no one but himself/herself to blame.

We have a number of judgments of our Supreme Court which clarify the issues in hand. For instance, in his judgment in *Onezime v Republic* (1978) SLR 140, Sauzier J rehearses salient aspects of the law, with which we fully concur.

In that case:

> The appellant was convicted in the Magistrates' Court on three counts charging dangerous driving and relating to three distinct offences, alleged to have been committed at three different times on the same night. The evidence in respect of counts I and 2 was merely circumstantial.
>
> HELD
>
> (1) Before a conviction can be based on circumstantial evidence, the trial Court must direct itself that the inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. Before drawing the inference of guilt from the

circumstantial evidence, the trial Court should also ensure that there are no other circumstances "weakening or destroying" the inference of guilt.

(2) The statement given by the appellant to the Police and produced at his trial was a self-serving statement in which he alleged that the car was not being driven by him at the first two incidents. Such statement was not evidence that the accused was not the driver, but was a circumstance capable of "weakening or destroying" the inference of his guilt.

(3) The Magistrate had failed to direct himself properly on these issues, and the convictions on the first two counts were quashed, the conviction on the third count being upheld.

The case against the appellant was heard by the Supreme Court (Burhan J) and several witnesses testified on behalf of the prosecution, namely, Dr Abdul Jakaria, Government Analyst, Inspector Wesley Frangois, Principal Trades Tax Officer, Mr Patrick Didon, Trades Tax Officer, Damien Frangoise and Police Constable, Malvina. The trial Judge ruled that the accused had a case to answer but the latter chose to remain silent, exercising his constitutional right in article 18(3) of the Constitution. The Judge warned himself, as required, that no adverse inference should be drawn from the exercise of his right to silence. He found the accused guilty as charged and explained his decision as follows:

> Having considered the entirety of the circumstantial evidence by the prosecution this court is satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other

> reasonable hypothesis than that of guilt of the accused.
>
> This court is also satisfied ... ... that there are no other co-existing circumstances which weaken or destroy the inference of guilt.
>
> However, the court in coming to its final conclusion must determine how far the prosecution case has been weakened by cross examination. It appears in this case as mentioned above that several vital pieces of circumstantial evidence led by the prosecution have gone uncontested and it appears that the defence set up implied by cross examination is a mere suggestion by the defence counsel that the parcel was never sent to Bacco by Kevin Barbe (vide page 12 of the proceedings of 13 March 2009, 1.45 PM). Considering the circumstantial evidence led by the prosecution in the context of self preservation, specially when he chose to remain silent, the evidence led by the prosecution should have been challenged in an attempt to weaken the case for the prosecution rather than to allow these pieces of evidence to slip in uncontested. (Judgment at page 118)

Although the evidence of the prosecution witnesses was subject to cross-examination, no material inconsistencies were forthcoming in respect thereof. Surprisingly, such pieces of prosecution evidence which, if contested, would have "damaged or destroyed" the relevant circumstantial evidence, were not contested by the advocate for the appellant at the time the witnesses testified or during cross-examination. The advocate for the appellant intimated that this was part of the defence strategy ... We will leave it at that.

We are satisfied that the trial Judge did direct himself as required by law and set out in paragraph [4] (1) above. He did ascertain that there were no other circumstances "weakening or destroying" the inference of guilt. At page 7 of his judgment, he records that he did scrutinize the evidence of all prosecution witnesses, including the evidence of Dr A Jakaria and his report marked P2:

> Having thus carefully analysed the evidence, it is clear that the prosecution has based its case on circumstantial evidence. The evidence that a carton box arrived from Thailand to Seychelles given by witness Kevin Didon is corroborated by the evidence of three prosecution witnesses, namely, Inspector Francoise, Aaron Zialor and Maurice Gonthier. ... ... As such this Court is satisfied that these pieces of evidence could be safely accepted by the Court.

We have no valid and cogent reason to differ.

In the *Onezime* case, Judge Sauzier found that the statement to the police did "destroy" the inference for the reason that "The Magistrate had failed to direct himself properly on these issues, and the conviction on the first two counts was quashed, the conviction on the third count was upheld".

But Kevin Barbe was dissatisfied with and aggrieved by the judgment. He submitted this, his present appeal, against conviction on four grounds:

1. The decision of the trial judge to convict the appellant for importation of a controlled drug is unsafe and one which cannot be supported by the evidence.

2. The learned judge erred in holding that

the Government analyst Dr Dackaria did display the contents of the two packets in open court as he should have normally done during the course of the trial.

3. The learned judge erred in inferring the mens rea of the appellant based on insufficient pieces of circumstantial evidence that had been challenged by the appellant especially conflicting evidence given by the prosecution witnesses.

4. The learned judge failed to take into account the fact that a key witness in the case, who was the consignor of the parcel seized by Customs at the Airport, failed to give evidence in the trial.

As regards the skeletal heads of argument, hereinafter the arguments, they are regulated in rule 24(1) (a) to (k), Seychelles Court of Appeal Rules 2005, ie fourteen sub-rules. The notice of appeal and the arguments from the two parties were lodged within the times fixed in the Court of Appeal Rules. The arguments of the appellant are dated 26 July 2010 and those of the respondent dated 2 August 2010.

The appellant's argument

The appellant considers Ground 1 together with Ground 4. We believe that it would be more appropriate to consider Ground 1 together with Ground 3. Be that as it may, Ground 1, as formulated, is of a general nature and cannot stand on its own. It has to be substantiated by at least one specific and material point, pertaining to law or fact, recorded in the proceedings and alleged to be erroneous. In any event, the arguments for the appellant appear to create even more confusion...

As regards Ground 4, the appellant complains that he has been denied the opportunity to benefit from the evidence of the key witness who failed to give evidence in the trial. The attorney should bear in mind that the prosecution conducts its cases independently and has no obligation to consult the accused or his advocate. However, in cases where the prosecution has provided the defence with a "docket" containing, inter alia, a list of its witnesses to be called, and it subsequently decides that the testimony of that particular witness will not be required, there arises an obligation to make that witness available to defence for questioning. This does not arise in the instant case and we find no merit in Grounds 1 and 4, jointly or individually.

In Ground 2, the appellant alleges that Dr Jackaria failed to produce the two packets of the controlled substance according to the correct procedure. We have read carefully the account relevant to the production of two white envelopes containing the control substance. We consider that in the circumstances of this case in the procedure whereby the said exhibits were produced in a manner which has not adversely affected the appellant's case, no injustice was done to the appellant.

At page 7 of his judgment, the trial Judge states:

> Having thus carefully analysed the evidence it is clear that the prosecution has based its case on circumstantial evidence. The evidence that a carton box arrived from Thailand to Seychelles given by witness Kevin Didon is corroborated by the evidence of three prosecution witnesses namely Inspector Françoise, Aaron Zialor and Maurice Gonthier. ... ... this court is satisfied that these pieces of evidence could be safely accepted by court.

In any event, the advocate for the appellant has not identified the alleged resulting prejudice suffered. We find no merit in Ground 2.

In Ground 3, the appellant complains that inconsistencies in the prosecution witnesses' evidence were sufficient to "weaken or destroy" the inference of guilt. The trial Judge did consider the alleged inconsistencies and found that none were material enough to be fatal. We quote from the judgment:

> Although the evidence of these witnesses were subject to cross-examination by the accused counsel no inconsistencies were forthcoming in respect of these vital pieces of evidence. This court is satisfied beyond reasonable doubt that the prosecution has established the chain of evidence from the time the heroin was detected, analysed and subsequently produced and identified in open court. (Judgment, page 8)

The appellant has not substantiated his allegations and the trial Judge found accordingly. We find no merit in Ground 3.

The respondent's argument

Indeed, at the hearing, the respondent's advocate, H Kumar, submitted arguments on behalf of the Attorney-General's Office. They do not help to clear the confusion. Whereas there are four grounds of appeal, he refers to only three. Moreover, he totally ignores guidelines to the effect that the "heads of argument shall not contain lengthy quotations from the record or authorities" and "reference to authorities and the record shall not be general but to specific pages and paragraphs". Please see our reference, rule 24 Seychelles Court of Appeal Rules 2005 in paragraph [10] *ulto.* Ground 1 is spread over

one and half pages of platitudes amounting to what appears to be an attempt to rehash the facts of the case. We do not comprehend the arguments pertaining to Grounds 2 and 3. They consist of one and a half identical lines *(mutatis mutandis),* namely: "The Issue raised by the appellant herein clearly addressed by the leaned Trial Judge by (sic) his judgment page on (sic) 119 & 120." For these reasons, we find no merit whatsoever in the arguments submitted by the respondent.

We must be very cautious before disturbing a finding of the trial Judge who has had the opportunity to observe the comportment and hear the evidence of witnesses. We prefer to follow the wisdom of "angels who fear to tread where devils dare without hesitation!" In this regard, we are comforted by the judgment of the House of Lords in *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326. We quote excerpts from pronouncements and findings of two eminent Law Lords:

(i) Viscount Cave:

> The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made ... This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as

it has sometimes been aid, between the perception and evaluation of facts ... ... A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what is evaluation . ... For I have found on the one hand universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge. ...

(ii) Lord Somervell of Harrow:

... The advantages enjoyed by the trial judge have often been stated and are, I am sure, familiar to all appellate courts. The difficult cases are those where there are circumstances on which appellant and respondent can each rely. The judge has based his decision on the way in which witnesses give their evidence. Unless there is no dispute at all he always does this. On the other hand, there are sentences in his judgment which indicate very probably, but not certainly, that he did not have present to his mind an answer or document which plainly affects the accuracy of a witness he has relied on, or his general conclusion. I only refer to this in order to emphasise the impossibility, in my

> opinion, of laying down anything in the nature of a code as to the circumstances in which an appellate court should interfere either by reversing the trial judge or ordering a new trial. I agree that the appeal should be dismissed.

By reason of the matters aforesaid, we are satisfied that the appellant has had a fair trial and the finding of guilt against him based on circumstantial evidence is justified and should not be disturbed. We therefore dismiss the appeal and confirm the sentence of 11 years imposed by the trial Judge. We make no order as to costs.

One issue which we have raised in paragraph [2] *ulto*, concerns the procedure and circumstances whereby two counts inculpating Jean-Paul Bacco as co-accused were simply dropped. We need not repeat the particulars of the charges set out with sufficient clarity in paragraph [2].

At page 7 of the record of proceedings, there is an exchange between the advocates for the parties and the Judge:

> Mr Labonte (for the Republic): My Lord, the matter is for hearing and we are ready to proceed. But we move to make amendment. Previously there were two accused, one was discharged, so count 1 and 2 fall. Only count 3 stands now.
>
> Mr Gabriel (for the accused): No objection.
>
> Court: Motion granted. Amendment effected accordingly.
>
> Mr Labonte: May the amended charge be put to the accused.
> (Charge put to the accused)

Thus, following a *viva voce* request for an amendment and not for a "withdrawal", worded as follows: "But we move to make amendment", the two charges inculpating Jean-Paul Bacco as co-accused were withdrawn and the appellant left as the sole accused charged, with importation. This is a most unorthodox procedure.

In fact, the correct procedure required that an application for leave to "withdraw" and not to "amend" be submitted by way of motion, supported by an affidavit of the facts and reasons for withdrawal. The trial Judge would then have to hear the parties and give his ruling. Such a procedure is not unknown to both advocates. In this very instant case, the advocate for the appellant did in fact submit two notices of motion in respect of applications for bail. They are dated 1 September 2008 and 24 September 2008. The appellant also filed papers in respect of two applications for leave to appeal out of time, but why two? All the papers have been admitted and marked as exhibits.

In the case of *Republic v Rose* (1977) SLR 39,

> The accused was prosecuted by the Police for an offence committed against the complainant who was however advised by the Magistrate that she should elect whether to proceed civilly of criminally because, whether the accused were convicted or acquitted of criminal office charged, she would forfeit her right to claim damages from them. The complainant thereupon agreed to withdraw the case and the accused were discharged. On revision at the instance of the State. ... The leave to withdraw the charge and the discharge of the accused were set side, and the case was remitted for trial by the Magistrates' Court.

In the judgment, it is further stated that:

> ...a complainant has no right to withdraw from the prosecution. If the public prosecutor wishes to withdraw he must seek the leave of the Court under section 65 of Cap. 45 except where he is instructed by the Attorney General so to do. This procedure does not affect the right of the Attorney General to enter a "Nolle Prosequi', under the provisions of section 61 of Cap. 45.

Our attention has been drawn to the decision in *Wise v R* (1974). That decision must be distinguished from that in *Republic v Rose*. The facts are different and in the latter case, it was decided that the convictions should not stand as "...there were matters where the appellants might have benefitted from professional assistance..." It could be argued that the accused had somewhat been led astray... Further, the court was being particularly vigilant to protect the appellant's interests and a re-trial was ordered before a different magistrate.

The appeal has been dismissed and the appellant is serving his sentence of 11 years. This notwithstanding, we are not satisfied that justice has been done and the case shelved for good. The leaders of this country have solemnly proclaimed that we have declared "war on drugs". To ensure that the police have the means to win that war, a police task force, the NDEA, under the command of a foreign expert has been set up at great cost to society.

Sadly, this case illustrates an appallingly poor investigation and prosecution. We fail to see why the case against Jean-Paul Bacco was not further investigated. A simple investigation at Airtel would have revealed who was the owner of telephone bearing number 765664 at the material time and would have clarified whether calls were made to that number

on 9 April 2008, as claimed by PW5.

Again, a comparison of the handwriting in P13, P15 and P16 would have given indications as to who made the invoice. The court cannot draw its own conclusions from a comparison of handwriting without the assistance of an expert.

Having dismissed the appeal (paragraph [18]), and bearing in mind our remarks at paragraphs 26 and 27 herein, we also consider it appropriate to invite the Attorney-General to consider:

- that the investigation in case CR SCA No 24 of 2009 be resumed principally for the purpose of determining the role of Jean-Paul Bacco and/or any person, other than the appellant, in the importation of the controlled drug; that role may have been as an accomplice, aider, abettor, conspirator, etc., ... in respect of which the appellant has been found guilty;

- that any person(s), other than the appellant, whom the investigation reveals should be brought to justice, shall be inculpated and prosecuted in the Supreme Court, according to law;

- that the resumed investigation be entrusted to an investigator who was not directly involved in the initial investigation, prior to the inculpation and trial of the appellant.

Record: Court of Appeal (Criminal No 24 of 2009)

Beeharry v Republic

MacGregor P, Hodoul, Domah, JJ
10 December 2010 Court of Appeal Civ 28 of 2009

Criminal procedure – defective charges – amendment of charge - rule of law

The appellant was accused of drug trafficking under section 14(d) of the Misuse of Drugs Act 1994. At the conclusion of the hearing it was discovered that the charge had been wrongly laid under section 14(c) of the Act. The prosecution applied to amend the charge. The defence objected on the grounds that the trial had been entirely conducted based on the defective charge. The trial judge convicted the accused under section 14(d) notwithstanding the defective charge.

HELD

1. In considering whether to amend a defective charge, it is important to consider the prejudice caused to the accused. If the accused objects to the amendment by claiming prejudice then the accused must be given an opportunity to be heard. It is not enough for the prosecution to simply state that the accused will not suffer any prejudice;

2. Where the prosecution seeks a motion for an amendment of charge or the defence objects to the grant of an amendment, the court is entitled to hear proper submissions;

3. The rule of law demands that a court of law properly trace the actual source of

law as well as identify the scope and limit of its powers under that law. In exercising judicial powers, the Court must hear from the parties concerned – particularly from the party who may be adversely affected by the exercise of the court's powers.

JUDGMENT: remitted to Supreme Court for ruling on amendment of charge.

Legislation cited
Criminal Procedure Code, s 187 (1)
Misuse of Drugs Act 1994, ss 14(c), (d), 26(1)(a), 29

Pesi PADIWALLA for appellant
J CHINNASAMY for respondent

Judgment delivered on 10 December 2010

Before MacGregor P, Hodoul, Domah, JJ

The appellant, accused in the court below, was convicted by the Supreme Court on a charge for trafficking in a controlled drug contrary to section 5 coupled with section 14(d) and 26(1)(a) of the Misuse of Drugs Act 1994 as amended by Act 14 of 1994 and punishable under section 29 and the Second Schedule of the 1994 Act. The particulars of the charge were that he had in his possession 201.6 grams of cannabis resin which gives rise to a rebuttable presumption that he was in possession of same for the purpose of trafficking.

The appellant put up 15 grounds of appeal. However, on anxious consideration, we took the view that the points raised under grounds 10, 11 and 12 should be resolved as a threshold exercise before we could proceed, if at all, to determine the rest of the grounds, should that become necessary in the light of the determination under grounds 10,

11 and 12. The controversy arises from the fact that even if the charge under which the appellant was convicted was section 14(d), paragraph (d) was not that under which he had been arraigned and along which the hearing had been conducted up until the close of the case for the prosecution and the defence. The charge read section 14(c) which refers to heroin and not section 14(d) which refers to cannabis resin.

Grounds 10, 11 and 12 are:

1. The learned Judge erred in law in amending the charge at the stage of address by the appellant and arbitrarily concluding that no harm was done to either side.

2. The learned Judge erred in law in not inviting the appellant to consider whether he wished to call further witnesses or recall witnesses in view of his arbitrary amendment.

3. The learned Judge's findings that "the amendment was therefore neither fatal to the proceedings nor prejudicial to the accused but rather in the interest of justice" is flawed in law and speculative.

The record shows that it was at the stage of the final submission that counsel for the appellant raised a point of law of defective charge: namely, that the prosecution case should there and then abort on account of the fact that the charge was laid under section 14(c) when it should have been section 14(d).

At page 438 of the brief we read:

> My Lord, more interestingly, the case should be stopped before Judgment is given. ... And on that issue alone I say, my Lord, the case must be stopped here and now.

It is in the course of his submission that the Attorney-General responded and attempted to salvage the situation. He moved for an amendment in the following terms with the ensuing objection. At page 441, we read:

> My Lord in respect of the charge not standing up ... if 14(c) appears to relate to another class of drugs and not the one in issue then we move that section be amended. -
>
> Mr Padiwalla: No this is not an address this is a motion now
>
> Mr Govinden: My Lord is entitled to do that.
>
> Mr Padiwalla: No, my Lordship, I am objecting to that, my Lord. The time for amendments is gone and finished. I mean one cannot stand up now and make an amendment now at this point in time.

What then followed is an exchange between the court and counsel on the multiple issues that arose thereby: inter alia (i) the precise text of the law applicable to the point of law raised; (ii) the power of amendment of the court; (iii) whether amendments may be made at all stages of the proceedings before judgment; (iv) if the answer was in the positive, on which terms so as not to cause prejudice to the defence. On each of those points of law, everybody seemed to have been caught unawares, including the Court. Finally, the Attorney-General commented that section 7(1) (sic) is applicable and no injustice was caused. Nothing was further heard on the

matter. The matter rested there and the Attorney-General then resumed his submissions on other aspects of the case. In fact, he must have meant section 187(1) of the Criminal Procedure Code.

Everyone seems to have forgotten about both the motion which had been made and the objection which had been raised. In the normal course of things, there must have been full arguments on the points of law and facts raised, culminating in a formal ruling. However, there was neither any invitation to make submissions nor any ruling for that matter. The assumption of the Attorney-General was regarded as the final word. No opportunity was given to counsel for the appellant who had raised the objection of defective charge to obtain a ruling on the point.

Prejudice to the defendant is an important element to consider on the grant or denial of an amendment to a defective charge. The Attorney-General who was appearing for the prosecution stated that there was no prejudice caused to the appellant. Even if he may have been expressing an obvious view, the fact remained that the prejudice which the law speaks about is the prejudice to the appellant and the latter should have been heard on the subject.

The next we hear about the issue of amendment to the defective charge and section 187(1) of the Criminal Procedure Code is when the Judge states in his judgment:

> It should be observed from the outset that a wrong section of the law was cited in the charge sheet and leave to amend at the last minute under section 187(1) of the Criminal Procedure Code, Cap 54, sought and granted ...

As may be seen, the record does not show any granting of the amendment. Following the motion for amendment and the

objection, there never was any proper submission by either party. Nor was there any ruling delivered.

That to us is not procedurally in order. True it is that the powers of amendment of a court are wide. But they are not absolute. Counsel for the appellant has argued before us that the exercise was arbitrary. There has been a procedural lapse. There is also an error on the face of the record when the Judge states that the amendment was granted.

On Grounds 10, 11 and 12, which we consider as the threshold grounds for the determination of the appeal, we remit the matter to the Supreme Court to give a ruling on the motion for amendment which was formally made and formally objected to. This may only be done after hearing both parties in law and on the facts.

True it is that the Judge commented that –

> That amendment was therefore neither fatal to the proceedings nor prejudicial to the accused but rather in the interest of justice.

However, he could not have so stated without a proper submission from both sides, more especially without having heard counsel for the appellant on a matter raised by him. The rule of law demands not only that we should properly trace as a court of law the actual source of our law but also demarcate the scope and limit of our power under that law; and having demarcated it we should undertake a judicious exercise of the power conferred upon us. That may only be done after hearing the parties concerned, more particularly, the party due to be adversely affected in the exercise of that power.

For the reasons given above, we remit the matter to the Judge who heard the case to hear the parties in law and on the facts

and give his ruling on the motion for amendment in light of the objection raised. The outcome of this appeal will depend upon the outcome of that ruling.

Record: Court of Appeal (Civil No 28 of 2009)

Talma v Michel

Egonda-Ntende CJ, Karunakaran, Renaud JJ
28 September 2010 Constitutional Court 2 of 2010

Constitutional Court – procedure – standing – limitation - Constitution – right to property

The first petitioner sold land to the second petitioner. In 2005, the petitioners applied to the Seychelles Investment Bureau (SIB) to approve a project to build a hotel on the land. The SIB provided approval subject to a number of conditions. The conditions were not satisfied and the project did not go ahead. In November 2006, the petitioners made a second application to the SIB for a development project on the same land. This application and a further application were not approved because the land was categorised as a No Development Zone in December 2006. The petitioners petitioned the Constitutional Court to declare that the Government's declaration of the No Development Zone was unconstitutional and breached their right to property.

HELD

1. To have standing in the Constitutional Court, the person who alleges that there has been a breach of the Constitution needs to show that the actual or likely contravention is in relation to that person;

2. If an act continues to inhibit a petitioner's right to property then the contravention of the Constitution will be continuing for the purposes of calculating the limitation period;

3. If an Act states that a regulation must be gazetted to come into force, then the failure to gazette the regulation will mean that it has not taken effect;

4. If a regulation has not taken effect it cannot be a limitation on a provision of the Constitution;

5. The right to enjoyment of property includes the right to develop the property;

6. *Quaere* whether the Constitutional Court (Application, Contravention, Enforcement and Interpretation of the Constitution) Rules may in some circumstances run counter to article 45 of the Constitution.

JUDGMENT Declaration granted.

Legislation cited
Constitution, arts 26, 27, 45
Code of Civil Procedure, s 29
Constitutional Court (Application, Contravention, Enforcement and Interpretation of the Constitution) Rules, rule 4
Environment Protection (Impact Assessment) Regulations 1996
Town and Country Planning Act, ss 3, 6

Foreign cases
De Boucherville Roger France Pardayan v Director of Public Prosecutions (2002) MR 139
Talbot Fishing Co Ltd v Ministry of Fisheries & Cooperatives (unreported) (2002) SCJ 131

Antony DERJACQUES for the petitioners
CHINNASAMY for the respondents

Judgment delivered on 28 September 2010

Before Egonda-Ntende CJ, Karunakaran, Renaud JJ

EGONDA-NTENDE, CJ: Petitioner no 1 is a Seychellois businessman and investor of Anse Lazio, Praslin. Petitioner no 2 is a landowner, businesswoman and investor of Glacis, Mahe. They bring this constitutional petition against the respondents alleging infringement of their fundamental rights under articles 26(1) and 27 of the Constitution in relation to the development of their property PR 2552, a moiety of land, situated at or near Anse Lazio, Praslin and measuring 64.4 acres of land.

Respondent no 1 is the President of the Republic of Seychelles and is being sued in his official capacity. Respondent no 2 was the Vice President of Seychelles at the time this petition was filed, and was sued in his official capacity as Minister responsible for Tourism. Respondent no 3 is the Government of Seychelles that establishes and administers policies and laws. Respondent no 4 is the Attorney-General and is added as a party in accordance with rule 3(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994.

The petitioners contend that together with a foreign investor they established a joint project to develop a 5 Star hotel development complex, promoted by the petitioners' company, Leisure Investment Pty Ltd. They presented their project proposal to petitioners 1, 2 and 3 and it was approved on 7 September 2005, vide CO5/M24. The petitioners appear to have had problems that prevented them from proceeding with the project but they continued to be committed to the project.

The petitioners contend that on a date unknown in the year 2006 the respondents 1, 2 and 3 determined, unilaterally and

without consultation, that the area of land at Anse Lazio including the petitioners' land was an area of outstanding beauty and was therefore declared as a No Development Zone. The respondents have pursued a zero development zone policy with regard to the petitioners' land. The petitioners made appeals to respondent no 1 on 16 April 2007 and on 20 September 2007 to the first three respondents seeking that they relent from prohibiting the petitioners' development.

Respondent no 2, it is further contended for the petitioners, on behalf of the first 3 respondents, on 27 October 2009 answered the petitioners' appeal in the negative, stating in the National Assembly that hotel development for Anse Lazio was cancelled by the Government. The petitioners therefore contend that their constitutional right to protection of the right to property and equal protection of the law without discrimination have been contravened.

The particulars of violation are stated to be 8 in number and I shall set them out below.

i) The respondents' acts prevent the petitioners from peacefully enjoying their property.

(ii) The respondents' acts prevent the petitioners' right of motorable access.

(iii) The respondents' acts prevent the petitioners from developing the property and pursuing the said project.

(iv) The respondents' acts prevent any development whether proximate to Anse Lazio beach or not whatsoever.

(v) The respondents' acts and decisions are discriminating in that other owners and developers have been granted permission to construct two restaurants at Anse Lazio beach.

(vi) Other areas in Seychelles, unique in beauty, on beaches and mountains, have not been declared 'No Development Zones' including, Lemuria Resorts at Anse Kerlan, Praslin, a wetland and Turtles Nesting Site and Residence at Petit Zil, Anse Takamaka, at a Marine Park Boundary, whereas La Reserve at Anse Petite Cour, Raffles Resort, L'Archipel Hotel, Beach Comber Resorts at Anse Volbert, Paradise Resorts at Anse Volbert, Acajou Hotel, at Anse Volbert and Vacanze at Anse Volbert, all bordering the Curieuse Marine Park.

(vii) Numerous and innumerable sites on the outlying islands, of greater beauty have been developed by owners and investors, with the respondents' active management and backing.

(viii) The said decisions of the respondents have no basis in law, are arbitrary, irrational and harmful to the petitioners, rendering their property of nil value and nullifying all past investments, and costs incurred.

The petitioners seek declarations that:

1. The decision of the first three respondents that Parcel PR 2552 is in a No Development

Zone contravenes articles 26(1) and 27of the Constitution in relation to the petitioners.

2. The decision of the first three respondents that the petitioners' project stands cancelled contravenes articles 26(1) and 27 of the Constitution.

3. The aforesaid decisions of the first three respondents are void.

The petitioners further seek an order compelling the first three respondents to consider, consent and allow the petitioners to develop the said project or a similar tourism project or any tourism project; an award of damages of R 400,000 and costs of this action.

The petition of the petitioners is supported by the affidavits of petitioner no 1 and petitioner no 2.

The respondents, in their answer, raise two preliminary objections. Firstly they contend that petitioner no 1 has no cause of action against the respondents given that at the time of presentation of this petition he was not the registered proprietor of the property in question. The property in question is registered in the names of petitioner no 2. Secondly the respondents contend that this petition is time barred in terms of rule 4(1)(a) of the Constitutional Court (Application, Contravention, Enforcement and Interpretation of the Constitution) Rules.

The respondents contend on the merits that the approval granted for the project in September 2005 was subject to conditions precedent that never materialised and that approval lapsed. Anse Lazio is listed as an area of outstanding natural beauty by the Environment Protection (Impact Assessment) Regulations 1996. The prohibition of

further development at Anse Lazio is in the public interest and is consistent with the Development Plan for Anse Lazio as approved in 1995, reviewed in 2005 and 2009. In accordance with that Development Plan the petitioners may develop a residential house on their land on its existing footprint, communicated to the petitioners in a letter dated 22 April 2009 (ref LAU/M/35/04).

The respondents further contend that the petitioners' right to property as protected by article 26(1) of the Constitution has not been contravened. The enjoyment thereof has been limited by Anse Lazio Development Plan which is permitted in so far as it was made under the Town and Country Planning Act, a law that is necessary in a democratic society in the public interest.

The respondents further contend that the petitioners' right to equal protection of the law from discrimination under article 27 of the Constitution has not been contravened as the petitioners have not been treated any differently from the owners of land at Anse Lazio in similar circumstances.

It is further contended for the respondents that other areas of natural beauty in Seychelles have not been declared 'No Development Zones' for relative considerations based on the public interest. The respondents' answer was supported by of affidavits of Sherin Renaud, Chief Executive Officer of Seychelles Investments Bureau (hereinafter called SIB); Flavien Joubert, Director General of Wildlife, Enforcement and Permit of Division of Department of Environment; Jones Belmont, Chairman of the Planning Authority; and Christian Lionnet, Principal Secretary for National Development in the Ministry of National Development.

The facts from which the issues for decision in this matter arise are not substantially in dispute in light of the affidavit evidence given by both sides. I shall set them out. Petitioner

no 2 is the registered proprietor of the land PR 2552. A project proposal to be partly implemented on the land in question of a 5 star hotel development consisting of 30 villas was approved in principle by SIBA by a letter dated 23 September 2005. The project was a joint venture proposal between Southern Sun Hotels, represented by Mr Joseph Albert and Leisure Investments Pty Ltd. The approval was subject to an Environment Impact Assessment Class 1 to determine the full scope of the project, submission of an outline planning application to the Planning Authority for consideration, and negotiation with the Ministry of Land Use and Habitat for additional land required for the implementation of the project.

On 26 March 2006 the Ministry of Land Use and Habitat informed petitioner no 1 and Mr Joseph Albert, in writing, that the Government was unable to offer them any land as requested for the proposed 5 star hotel development. The Environment Impact Assessment was not done and presented to the appropriate authority. The project did not receive Environment Impact Assessment Authorisation. The joint venture project ran into other problems and could not go ahead to implement the other conditions precedent outlined above.

Petitioner no 1 submitted another project to SIB on 21 November 2006 under the name 'Le Privilege Hotel'. In December 2006 the Government decided to declare the Anse Lazio area, including the land known as PR 2552, now belonging to petitioner no 1, a No Development Zone.

On 13 March 2007, Le Privilege Hotel Development Co (Pty) Ltd with petitioner no 1 as lead shareholder presented yet another project proposal to SIB for a proposed luxury resort consisting of 62 freehold villas on the land in question. This project was not approved given the Government's No Development Zone at Anse Lazio.

The essential question that has to be answered is whether the Government's declaration of a No Development Zone at Anse Lazio in December 2006 was in accordance with the law in force at the time such decision was made. And if the answer is in the affirmative a secondary question may arise as to whether the law in question is constitutional or not.

Before those issues are tackled it will be necessary to deal with the preliminary objections raised by the respondents. Petitioner no 1 transferred the land, PR 2552, to petitioner no 2 and such transfer was effected on 10 November 2005. It is clear therefore that at the time this petition was filed in this court and up to now petitioner no 1 was not the owner of PR 2552. He has no legal interest in PR 2552 having transferred for value this land to petitioner no 2.

Petitioner no 1 cannot therefore seek relief under article 46(1) of the Constitution on the ground that a provision of the charter is likely to be contravened or has been contravened 'in relation' to himself. In the result he has no *locus standi* to bring this action. The first preliminary objection has merit.

With regard to whether this action is time barred it is convenient to start by setting out the relevant provisions of the law. Rule 4(1) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules states,

> (1) Where the petition under rule 3 alleges a contravention or a likely contravention of a provision of the Constitution, the petition shall be filed in the Registry of the Supreme Court:
>
> (a) in a case of an alleged contravention, within 3 months of the contravention;
>
> (b) in case where the likely contravention is

> the result of an act or omission, within 3 months of the act or omission; …

It is clear that the matters complained of initially occurred in December 2006 or somewhat soon after the rejection of the Le Privilege Hotel Development Co (Pty) Ltd proposal of 13 March 2007. This petition was filed early this year, approximately 3 years later, which exceeds the 3 month time limit provided by the rules.

Nevertheless the nature of contravention in this matter, being in relation to land continues to inhibit petitioner no 1's right to enjoy her land, and in that sense can be viewed as a continuing cause of action. For as long as the policy in question is in place and the policy continuously inhibits a person from enjoyment of her property the contravention would continue to arise and in that sense give rise to a continuing cause of action. In such a case it is possible to found a cause of action in the last three months from the filing of the petition.

This is different from a contravention that is a completed transaction, for instance, holding a person in custody beyond the permitted period of 24 hours without being produced before a court of law. If he is held for 3 days and then released, the contravention is complete and is not continuing. He would have regained his liberty. On the other hand in the instant case if the contravention continues to inhibit the person entitled to enjoy a right in relation to land, for as long as it inhibits that person from the enjoyment of one's land as one would wish to do, the contravention is continuing.

Talbot Fishing Co Ltd v Ministry of Fisheries & Cooperatives (2002) SCJ 131 (unreported) and *De Boucherville Roger France Pardayan v Director of Public Prosecutions* (2002) MR 139, decisions of the Supreme Court of Mauritius, cited to us by the respondents are distinguishable from the case before

us and are not helpful on this point. Both were concerned with causes of action that were not continuing causes of action.

Secondly it is troubling that in an ordinary cause of action based on contract or other right of action not specifically provided for, limitation is 5 years but in a matter of such public law significance a limitation of 3 months was imposed by rules of procedure to subscribe enforcement of a constitutional right. Maybe the time is ripe for reconsideration of what would be the appropriate time limitation in initiating actions of this kind in relation to the application, enforcement and or interpretation of the Constitution.

I can understand the need to commence constitutional actions as soon as possible given that the Constitution is the foundation of the State of Seychelles from whence everything else springs. Hence the need for a speedy resolution of all issues related to its application, enforcement and or interpretation.

I am far from sure whether in the application of rule 4(2) of the Constitutional (Application, Contravention, Enforcement, or Interpretation of the Constitution) Rules, in some circumstances as in this case, may not run contrary article 45 of the Constitution as it may allow a person or group of persons to continue with contravention of the rights and freedoms protected by the Seychellois charter of fundamental rights and freedoms on the ground that an action challenging such contravention was not instituted within 3 months of commencement of such contravention.

Article 45 states,

> This Chapter shall not be interpreted so as to confer on any person or group the right to engage in any activity aimed at the suppression of a right or freedom contained in this chapter.

I now turn to the main question before us: Whether the Government decision or policy of a No Development Zone at Anse Lazio is constitutional or not. The respondents put forth two contentions in support of the Government's position of a No Development Zone. Firstly it refers to the Town and Country Planning Act and submits that this Act empowers the Planning Authority to prepare development plans for the whole of Seychelles and review the same every 5 years. The Anse Lazio Development Plan decreed that that it would be a No Development Zone. Secondly that it was an area of outstanding natural beauty specifically mentioned in the Environment Protection (Impact Assessment) Regulations 1996.

The Town and Country Planning Act (hereinafter referred to as the TCPA), established vide section 3 a Planning Authority with extensive powers to plan for the development of all land in Seychelles that would be published in a development plan. Development plans would be revisable every 5 years or possibly at other intervals.

Section 6(2) of the TCPA obliges the Planning Authority to publish notice of drafts of such plan or proposals for amendment of such plan, including the place or places that the public may be able to inspect such draft plans and or proposals. Provision is made for objections to be made. The plan or proposals for amendment so submitted to the Minister may be approved by him and that approval shall be published in the *Gazette* and at least one newspaper. Under section 6(6) of the TCPA the development plan or such amended development plan becomes effective on the date it is published in the *Gazette* or such later date as the Minister shall determine.

The Chairman of the Planning Authority in his affidavit states in part,

> ...that the Anse Lazio (Baie Chevalier) development plan was approved in 1995, reviewed in 2005 and edited and revisited in 2009. That I state that the Anse Lazio (Baie Chevalier)
> Development Plan as approved in 1995 maintained the moratorium on all tourism development, particularly accommodative tourism development, with the exception of the two approved restaurants, at Anse Lazio, Praslin. The Anse Lazio (Baie Chevalier) Development Plan as reviewed in 2005 reaffirmed the moratorium on further facilities at Anse Lazio, Praslin. The Anse Lazio (Baie Chevalier) Development Plan which was edited and re-visited in 2009 also re-affirmed the moratorium on tourism accommodative development as well as further developments. However, Anse Lazio property owners are allowed to build a residential house on their land on its existing footprint, which ground plus one story (G + 1), ground only or ground plus attic depending on the location of the existing footprint.

The respondents have not put in evidence the Anse Lazio (Baie Chevalier) Development Plan as amended or reviewed. The respondents have not provided any evidence that in the making of this plan the Planning Authority complied with the TCPA. The respondents have not shown that notice of the draft plan, or the amended or revised plans were ever published in the *Gazette* and one newspaper. The respondents have not shown that the Minister approved that plan, and its various amendments or revisions. The respondents have not shown that the notice of the approval by the Minister of the plan, amended plan and or revised plan,

were ever published in the *Gazette*, a necessary prerequisite for such plans to take effect.

I have searched the statutory instruments issued under the Town and Country Planning Act from 1971 to date and have not seen any that relate to the Anse Lazio (Baie Chevalier) Development Plan.

If it is true that a moratorium on tourist accommodative development was in place from the 1995 Plan, it is puzzling that the petitioners received provisional approval of their 5 star hotel development project that was partly to take place on PR 2552. If the moratorium was in place in 2005 it is inconceivable that SIB would have granted approval to the 5 star hotel development project.

A letter dated 17 March 2009 addressed to the Ombudsman by Mrs Sherin Renaud giving a history of the matters related to PR 2552 and now attached to petitioner no 2's affidavit states in part,

> In December 2006, a decision was taken by the Government to declare the Anse Lazio area, an area of outstanding beauty and therefore decreed as a No Development Zone. This area encompasses parcel PR 2252 belonging to Mr. Talma.

The letter continues later on to state,

> The No Development Zone policy has recently been finalised by the Ministry of National Development providing clear guidelines on the extent of no development and demarcating the boundaries. The Cabinet has also approved the updated policy and the Ministry of National Development has agreed to meet all promoters

> who submitted projects in that area to explain the extent of the policy. These meeting are yet to be scheduled and SIB is in the process of informing the promoters of same. On the same token, SIB has kept pending project proposals for that area submitted by all promoters until after the above meetings.

Who are we to believe? Is it the Chairman of the Planning Authority who asserts on oath that there was a moratorium on tourist accommodative development from 1995 to date? Or is it the Chief Executive Officer of SIB? On the one hand she claims that the No Development Zone policy started in December 2006 but then continues to claim that the policy has only recently been finalised and is yet to be presented to the affected people.

Petitioner no 2 established that she is the owner of PR 2552 and she planned by the last project proposal they submitted to develop a luxury resort with 62 villas. This is the way she wishes to enjoy her property. She has established that she was denied approval to develop her property on the grounds that the land was in a No Development Zone.

Of course development of such property is rightly and according to law subject to restrictions in the public interest. This is contemplated and permitted by the Constitution. The obligation on the officers of the Government is to manage the development process or enjoyment by the people of their rights in accordance with the different laws in place for such a purpose. In this case the TCPA and regulations issued thereunder provide a route for management of development of land.

It appears to me that the officers of the Government have failed to proceed in accordance with the law with regard to the Anse Lazio (Baie Chevalier) Development Plan. The No

Development Zone policy for Anse Lazio whether it was formulated in 1995, 2000, 2005, as a moratorium on tourist accommodative development, or December 2006 or recently in 2009, has not been shown to have been formulated in accordance with the relevant laws. That plan cannot therefore provide the basis for a refusal to consider the development plans for parcel PR 2552.

Reference was made to the Environment Protection (Impact Assessment) Rules 1996 as laying the basis for the declaration of Anse Lazio as an area of outstanding natural beauty. It is true that it is named in Schedule 2, A.4 as a site of outstanding natural and physical beauty. However those regulations do not bar development much less impose a No Development Zone. Those regulations are dealing with Environment Authorisation of development in certain areas or for certain projects.

All in all it is clear that there is no legal justification for the refusal to consider the project proposal of the applicant. The refusal by the officers of Government to consider the petitioner's project, in accordance with the existing law, is unconstitutional. The officers of Government have made decisions that would have been constitutionally permissible had they complied with the law in the first place. Not having acted within the relevant law those decisions have no force of law. Those decisions are, so to speak, unlawful and unconstitutional.

I would therefore grant the declaration that the decisions of respondent no 3 in refusing to consider the petitioners' application for development of her property contravene article 26(1) of the Constitution. The No Development Zone policy has no basis in law and presently cannot be the basis for a refusal to consider petitioner no 2's project proposal by the relevant authorities. An award of moral damages in the sum of R 50,000 is made in favour of petitioner no 2 against

respondents nos 3 and 4.

I do not find that the applicant has suffered any discrimination contrary to article 27 of the Constitution on the facts before this court. No declaration would issue with regard to article 27 of the Constitution.

With regard to the order for costs I note that this action was commenced against 4 respondents. Under section 29(2) of the Seychelles Code of Civil Procedure, hereinafter referred to as SCCP, all actions against the Government of Seychelles may be preferred against the Attorney-General as defendant. This petition is basically against the Government of Seychelles, and not respondents 1 and 2 in their individual capacities. It was entirely unnecessary to name respondents no 1 and 2 as parties to the proceedings. Doing so just led to unnecessary multiplication of cost and time spent on this matter. I would allow petitioner no 2 as the only proper defendant in the matter. I would dismiss the petition by petitioner no 1 with costs.

As Karunakaran and Renaud JJ agree, the petition by petitioner no 1 is dismissed with costs and the petition by petitioner no 2 succeeds in part as set out above against respondent no 4.

KARUNAKARAN J: I have had the benefit of reading in draft the judgment of the Chief Justice. I agree with the reasons, the findings and the conclusion reached by the Chief Justice. I concur.

RENAUD J: I had the benefit of reading the draft of the judgment drawn up by his Lordship the Chief Justice. I concur with the judgment.

Record: Constitutional Case No 2 of 2010