THE SEYCHELLES LAW REPORTS

DECISIONS OF THE SUPREME COURT, THE CONSTITUTIONAL COURT AND THE COURT OF APPEAL

2013

(Pp 329 – 666)

Editor

John M R Renaud, LLB (Lond)
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of Lincoln's Inn, Barrister
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THE SEYCHELLES JUDICIARY

THE COURT OF APPEAL

Hon F MacGregor, President
Hon SG Domah
Hon A Fernando
Hon M Twomey
Hon J Msoffe

THE SUPREME COURT
AND THE CONSTITUTIONAL COURT

Hon F Egonda-Ntende, Chief Justice
Hon D Karunakaran
Hon B Renaud
Hon M Burhan
Hon G Dodin
Hon F Robinson
Hon ES De Silva
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30 August 2013 SCA 24/2013

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JUDGMENT Appeal dismissed.

HELD

1 Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made.

2 Judicial review is a means by which the courts necessarily ensure that administrative bodies act within their powers as laid down by law rather than according to a whim or a fancy.

3 The application of the *Wednesbury* and *Council of Civil Service Unions* principles is affirmed.

4 The test of proportionality forms part of the Seychelles jurisprudence.

5 Administrative decision making involving immigration and citizenship requires the consideration of the fundamental human rights of the individual and the courts should subject

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Foreign cases
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Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141
Council of Civil Service Unions v Ministry of the Civil Services [1985] AC 374
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Soering v United Kingdom (1989) 11 EHRR 439

Foreign legislation
European Convention on Human Rights

Counsel C Lucas for the petitioner
J Chinnasamy for the respondent

The judgment of the Court was delivered by
TWOMEY JA

[1] This is an appeal, with leave and stay of execution granted by MacGregor, President of the Court of Appeal, on August 2013 against the dismissal by Karanukarun J in the Supreme Court on 22 July 2013 of the appellant's claim for judicial review. The proceedings were brought to challenge the decision of the Minister for Home Affairs and Transport, Joel Morgan, made on June 2013, to deprive the appellant of his Seychellois citizenship on the ground that the same had been obtained by the making of a false declaration.

The facts

[2] The appellant, Marek Trajter, is a Slovak national by birth. He arrived in Seychelles for the first time on 29 September 2012 and stayed on the island of La Digue where he befriended Ansley Constance, a former Member of the National Assembly. Soon after his arrival, he started making voluntary donations to projects in La Digue. He donated Euro 10,000 to La Digue School and in early 2013 donated R 1,000,000 to the Disaster Relief Fund.

[3] On a date unknown he decided to apply for Seychellois citizenship and in that endeavour received the assistance of Ansley Constance to complete the requisite application procedures: namely, an application to the President of Seychelles for citizenship based on 'special circumstances' and a notice of intention to apply for citizenship of Seychelles which under s 5(2) of the Citizenship Act 1994 has to be published in the *Gazette* and a local newspaper for two consecutive days. The form he submitted states that his date of first entry into Seychelles was 14 February 2007. He subsequently conceded that the date 14 February 2007 was written over the previous crossed entry of 29 September 2012 on the application form.

[4] On 5 April the appellant was granted citizenship. Two weeks later, on 25 April 2013, the Government of Seychelles received a 'red alert notice' from Interpol informing them that the appellant was wanted in Slovakia for criminal investigations into a case of murder. On 2 May 2013, the respondent deprived the appellant of his citizenship on the grounds that he had obtained the same by means of 'false representation and concealment of material fact.' Simultaneously, the Immigration Division pursuant to s 11(1) of the Citizenship Act 1994 issued a 'prohibited immigrant notice' to the appellant on the grounds that his presence was inimical to the public interest.

[5] On the service of this notice the appellant was arrested and detained in police custody for the purpose of being deported. He sought a writ of habeas corpus in the Supreme Court and an order that his detention was unlawful under the provisions of art 18(8) of the Constitution of Seychelles. Both remedies were granted, the Chief Justice rightly finding that the appellant had neither been given

notice in writing informing him of the ground on which it was proposed to revoke his Seychellois citizenship nor information of his right to have the case referred for enquiry as is required by s 11(2) of the Citizenship Act 1994.

[6] On 13 May 2013, the respondent issued a fresh notice to the appellant. He was informed of the Ministry's intention to deprive him of citizenship on the ground that a red alert notice had been issued by Interpol together with a request by Slovakia for his return for investigation in a murder case. He was notified that he had not disclosed the truth and facts about his past and of the said investigation when he applied for Seychellois citizenship.

[7] A further notice was issued to the appellant by the respondent four days later informing him of an additional ground on which it was proposed to deprive him of citizenship, namely that his notice of intention to apply for citizenship contained false declarations. As a result of these notices the appellant requested the respondent to refer the matter to a Commission of Inquiry.

The Commission of Inquiry

[8] Accordingly, a Commission of Inquiry presided over by Justice Anthony Fernando was set up and conducted. The Commissioner reported on 10 June 2013, dismissing the first ground for deprivation of citizenship both on the evidence and the concession by the Attorney-General that the appellant had submitted his application for citizenship prior to the red alert notice and that it could not be proved that he knew he was a 'wanted' person in Slovakia. Hence, there could be no question of concealment of fact on this particular ground.

[9] However, the Commissioner did find that there was 'strict liability' on the part of the appellant in making the entries on the application form (Form IMM 3) correctly and truthfully and that incorrect entries amounted to the concealment of material facts which could lead the Minister to deprive him of citizenship. The Commissioner made no recommendation leaving the ultimate decision to the discretion of the Minister. On 24 June 2013, the Minister issued an order depriving the appellant of his citizenship, on the ground that the same had been obtained 'by making false representation.'

The judicial review

[10] It is this decision which prompted the application by the appellant for an order of certiorari quashing the Minister's decision. He claimed that the Minister's decision was irrational since it did not give due consideration to the report of the Commission of Inquiry. He also submitted that he had not committed any fraud or intentionally concealed any material fact since it was not he but a third party (namely Ansley Constance) who had on his behalf completed the application for citizenship and had inadvertently made a mistake when entering his dates of first and last entry into Seychelles. The appellant also submitted that the Minister had not given reasons for his decision. He further contended that the deprivation of citizenship was unfair and unjust as it would render him stateless. Additionally, the appellant contended, the mistake on the prescribed form was minor and the penalty of deprivation of citizenship was unjustified and excessive and did not satisfy the 'Wednesbury reasonableness' test.

[11] The Judge Karunakaran hearing the review dismissed the application finding that the Minister's decision was not illegal,

irrational, unreasonable or procedurally improper. He agreed with the finding of the Commission of Inquiry that there was 'strict liability' on the part of the appellant in making correct and truthful statements in his application for citizenship and that withholding any material fact could reasonably result in a decision of deprivation of citizenship.

Grounds of appeal

[12] The appellant has now appealed to this Court on a number of grounds. They are, to say the least, inelegantly expressed and at first glance would appear to be grounds of an appeal as opposed to grounds for a judicial review. Further, the appellant appears to be asking this Court not only to examine the merits of the decision of the Minister but also the findings and report of the Commissioner of Inquiry. His grounds are long-winded and repetitive but may be summarised as follows:

1) An examination of the evidence shows that the appellant had not deliberately concealed any material fact but rather that the wrong entries on the immigration form were a mistake on the part of a third party who had undertaken the completion of the form on behalf of the appellant.

2) The Judge was wrong to agree with the Commission of Inquiry's report that the completion of the citizenship forms imposed 'strict liability' on the appellant for any omissions or the entry of wrong information.

3) The Judge was wrong to find that the provisions of the Citizenship Act in relation to the deprivation of citizenship were mandatory in cases where such citizenship had been

obtained by means of false representation and concealment of material fact.

4) The Judge was wrong to find that in cases of judicial review the court should not review the merits of the case but only the manner in which the decision was taken.

5) The Judge was wrong to find that the Minister's letter of 24 June 2013 depriving the appellant of his citizenship disclosed sufficient reasons for his decision.

[13] On the day of hearing of this appeal the appellant moved under rr 31(1) and (2) of the Seychelles Court of Appeal Rules to be allowed to amend his notice of appeal and to produce documentary evidence that had not been available at the hearing of the judicial review. The Court granted leave to produce the documentary evidence *quantum valeat.*

The law on judicial review in Seychelles

[14] The thrust of the appellant's argument is that a judicial review should in this particular case involve a scrutiny of the merits of the Minister's decision to deprive him of his citizenship. As has been oft-repeated judicial review is not an appeal from a decision, but a review of the manner in which the decision was made (*Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141). The jurisdiction conferred by this process determines the legality, as distinct from the substantive merits of the decision of the adjudicating authority, in this case that of the Minister. Judicial review is a means by which the courts necessarily ensure that administrative bodies act within their powers as laid down by law rather than according to a whim or a fancy. The *Wednesbury*

principle – reasonableness in decision making –although initially reluctantly accepted in this jurisdiction, has been firmly adopted by our courts and is now part of our law. As has been pointed out by Mr Lucas for the appellant, the principle imposes on the decision-maker certain duties: he must take into account factors that ought to be taken into account, he must not take into account factors that ought not to be taken into account and the decision he takes must not be so unreasonable that no reasonable authority would ever consider imposing it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

[15] Principles of administrative law were further developed by classifying the grounds for judicial review namely: illegality, irrationality, and procedural impropriety *(Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). That authority has for a number of years also formed part of our law.

[16] But although "the law must be stable it must never stand still" and *Wednesbury* (supra) dates back to 1948. Continental principles of administrative review have crept into the common law and in recent times, influenced by the decisions of the European Court of Human Rights the *proportionality* principle has been adopted in many cases in Europe, the UK and the rest of the world. In *Soering v United Kingdom* (1989) 11 EHRR 439 the Court stated in relation to the European Convention on Human Rights:

> [i]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. [at paragraph 89]

[17] The application of the proportionality test to administrative decisions however is not a simple matter. Wade and Forsyth explain that:

> While the principle of proportionality is easy to state at the abstract level (an administrative measure must not be more drastic than necessary) or to sum up in a phrase (not taking the sledgehammer to crack a nut), applying the principle in concrete situations is less straightforward.
>
> (HWR. Wade and C.F. Forsyth, *Administrative Law* 10th ed, 306).

[18] The proportionality test involves a reasonableness analysis where the merits of a decision may be scrutinised. Common law courts have emulated this approach in judicial review cases in which human rights are involved. The term ‘anxious scrutiny’ in such cases relates to the examination of the merits of a decision and was used for the first time by both Lords Bridge and Templeman in *R v Secretary of State for the Home Dept ex p Bugdaycay* [1987] AC 514, which can be interpreted as taking a 'hard look' approach to cases involving fundamental rights.

[19] In *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 All ER 720*,* the House of Lords in examining the reasonableness of the exercise of the Home Secretary's discretion to issue a notice banning the transmission of speech by representatives of the Irish Republican Army and its political party, Sinn Fein, stressed that in all cases raising a human rights issue, proportionality is the appropriate standard of review. In *R v Ministry of Defence, ex parte Smith* [1996] QB 517*,* the Court held that the more substantial

the interference with human rights, the more the court will require justification before it is satisfied that the decision is reasonable. In *Daly v Secretary of State for the Home Department* [2001] 2 AC 532, Lord Bingham said that:

> The doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

[20] Given the similarity of our Charter of Fundamental Human Rights and Freedoms to the European Convention of Human Rights and the application of art 48 of our Constitution which provides for the consistency of constitutional interpretation with the international obligations of Seychelles, the test of proportionality must logically form part of our jurisprudence.

[21] The question arises as to whether cases involving nationality, citizenship and immigration should involve the use of the proportionality test and the scrutiny of the substance as well as the form of such decisions. Citizenship is a constitutional right as guaranteed by Chapter II of the Constitution of Seychelles. Citizenship and nationality is a:

> legal bond having as its basis a social fact and attachment, a genuine connection of existence, interest and sentiments together with the existence of reciprocal rights and duties.

> *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4

[22] Are such rights and those involving deportation and asylum equivalent or on a par with fundamental rights of life and death, the right to free speech or the right to dignity?

[23] In *D v United Kingdom* (1997) 24 EHRR 423, a case involving the proposed removal of an alien dying of AIDS to his country of origin (St Kitts) where he had no accommodation, family, moral or financial support and no access to adequate medical treatment, the European Court of Human Rights held that the reviewing court in the UK would be required to subject the original decision to 'anxious scrutiny' as the administrative measure infringed art 3 of the Convention (the equivalent of the right to dignity and not to be subjected to inhuman or degrading treatment as contained in art 16 of the Constitution of Seychelles). In *Secretary of State for the Home Department v Nasseri* [2009] UKHL 23, a judicial review case, involving a claim for asylum Lord Hoffman stated:

> It is understandable that a judge hearing an application for judicial review should think that he is undertaking a review of the Secretary of State's decision in accordance with normal principles of administrative law, that is to say, that he is reviewing the decision-making process rather than the merits of the decision. In such a case, the court is concerned with whether the Secretary of State gave proper consideration to relevant matters rather than whether she reached what the court would consider to be the right answer. But that is not the correct approach

> when the challenge is based upon an alleged infringement of a Convention right ....

[24] We are of the view that administrative decisions involving immigration and citizenship require the consideration of the fundamental human rights of an individual and the courts should subject such decisions to 'anxious scrutiny' to determine whether the decisions contravene fundamental human rights. Hence we are asked to consider whether the appellant's loss of Seychellois citizenship will constitute a disproportionate interference with his right to dignity. In performing the test we are conscious that we must also exercise judicial restraint so as not to usurp the role of the executive in exercising its proper discretion.

Applying the principles

[25] These are the principles which guide us when we examine the issues of this case. But, while it is accepted that citizenship and nationality are fundamental human rights as designated by both international conventions and domestic legal instruments and can trigger the operation of the proportionality principle for judicial review, the loss of Seychellois and Slovak citizenship and ultimately the statelessness of the appellant has not been proved. The appellant signed a certificate of concurrent nationality only four months ago and a month before the first notice by the Minister to deprive him of his Seychellois citizenship. The arrest warrant by Slovakia as evidenced by the Red Alert Notice by INTERPOL states that his nationality is Slovak and that interestingly he holds two Slovak passports, one to expire in August 2017 and the other in December 2019. Moreover, the legal opinions of Mgr Dominika Gajarska and Dr Fridrich Bransilav submitted by the appellant are at odds with each other and the 1993 Slovak Act of Nationality. The provisions of

the Act indicate that Slovak nationality can indeed be lost by the acquisition of another nationality but a lengthy process must be initiated. It has not been proven that this process was begun or completed. The 'deed of loss of nationality' which would have been conclusive proof of this fact was not produced before any court in this jurisdiction. The letter from the Ministry of Interior of the Slovak Republic confirms that according to the central register the appellant still holds Slovak nationality. Moreover, Seychelles has neither signed the 1961 Convention on the Reduction of Statelessness nor the 1954 Convention relating to the Status of Stateless Persons. We did allow counsel the opportunity at the hearing of the appeal to submit on this issue and we allowed the production of the legal opinion of Dr Bransilav *quantum valeat* but given the considerations above, the submissions of counsel on the issue of statelessness are at best inconclusive and cannot be accepted by us.

[26] The appellant in his ground 5 has also submitted that the Minister in his letter of 24 June 2013 notifying the appellant of his order depriving him of Seychellois citizenship failed to give sufficient reasons. This is a bold but an altogether inaccurate and unacceptable statement given the fact that the letter clearly states that the decision to deprive the appellant of his Seychellois citizenship is made having complied with legal and procedural requirements after having received a report from the Commission of Inquiry and "having been satisfied ... that [the] citizenship of Seychelles ... was obtained by making false representation." We do not feel the need for further elaboration save to say that ground 5 has absolutely no merit.

[27] The appellant's first, second and third grounds of appeal are inextricably linked and we deal with them together. They arise from the findings of Judge Karunakaran that since the appellant was under an obligation to complete his citizenship application forms truthfully, once it emerged that the statements in the form were incorrect the Minister was under an obligation to deprive him of citizenship. The appellant contends firstly that these errors were a mere mistake, a peccadillo so to speak and that notwithstanding the obligation to complete the official form truthfully, these minor transgressions could be excused by the Minister.

[28] Both the Commission of Inquiry and the Judge hearing the judicial review found that the alleged 'mistakes' by the appellant or his agent in the citizenship application were false representations of material facts reasonably leading to the decision for deprivation of citizenship. We have also scrutinised the application form of the appellant and are of the view that the appellant's contention that the alleged 'mistake' only consisted of the insertion of the wrong dates of entry is at the least an economy of truth.

[29] We note that in the same notice he also stated that he was gainfully employed 'carrying on business as partnership' (sic) since 2007 and that 'the special circumstances which qualifie[d] him to make [the] application [was that] Seychelles as my second home I want to make a contribution economically ...'(sic). He also signed a declaration at the end of Form IMM2 in which he stated:

> i. that the information furnished by me in this application is true and correct; and
>
> ii. I understand that incorrect, misleading or untrue information withheld in any material manner which

may affect the grant of citizenship of Seychelles may result in the deprivation of that citizenship.

[30] In assessing whether the Minister's decision to revoke the appellant's Seychellois citizenship was a disproportionate response to the misrepresentation of facts by the appellant we also have had to look at the object of the Citizenship Act. Ultimately the Act provides for the registration of citizenship of persons other than Seychellois where these persons have done signal honour or rendered distinguished service to Seychelles or where special circumstances exist which, in the opinion of the President, warrant such registration. Special circumstances are not defined and are ultimately determined by the President. Section 16(1) of the Act makes the procuring of citizenship by any false or material particular or reckless statement punishable by a fine of up to R 5000 and by imprisonment for up to 12 months. Both the application for citizenship and the sanctions for its procurement by false representations are grave matters. Given these provisions it can certainly not be the intention of the state to bestow citizenship on persons who even in the initiation of proceedings for such citizenship are either dishonest or unable to give a correct representation of their relationship with Seychelles.

[31] It is our considered opinion that given these considerations the appellant cannot underestimate the seriousness of his actions. Such misrepresentations are not simple mistakes that can be explained away but amount to fraudulent misconduct. It is difficult to accept that citizenship could have been given away merely on the payment of Euro 10,000 for improvements to a school together with another million rupees to the National Disaster Relief Fund. Further, we cannot put ourselves in the position of second guessing the

decision of the President had he been appraised of the true facts. He may well have found that a period of residence of six years in Seychelles together with the operation of a business in Seychelles since 2007 and the contribution to causes in Seychelles demonstrated a genuine tie of affection and closeness with Seychelles meriting the grant of Seychellois citizenship. Whether he would have done the same had he known that the appellant had only been in Seychelles for four months is highly debatable. We therefore find no merit in Ground 1.

[32] Given our finding on the issue of fraudulent misrepresentation on a number of facts we find it unnecessary to consider Ground 2 and whether the word "may" in s 11(1) in the Citizenship Act is permissive or imperative. Equally we do not think it necessary to consider ground 3 of the appeal and to explore the minutiae of the reasons given for the alleged misrepresentations of facts by the appellant in his citizenship form. He is ultimately and absolutely responsible for making his own citizenship application. Alleged confusion by his agent, Ansley Constance, and the blind belief placed in his integrity by his sponsors namely the members of the National Assembly Marc Volcere, Chantal Ghislain and Natasha Esther are both ill-advised and reprehensible as is the omission by the officers of the Immigration Department in not checking the correct dates of entry of the appellant. They do not and cannot excuse or validate the appellant's own actions. The decision of the Minister to revoke the appellant's Seychellois citizenship in the circumstances cannot be faulted for unreasonableness or disproportionality.

[33] For these reasons we dismiss the appeal but make no order as to costs.

Joubert v Suleman

Karunakaran J

20 September 2013 CS 210/1999

Fault – Abuse of rights – Contributory negligence – Flow of rainwater

The plaintiffs sought damages for loss suffered as a result of the defendants failing to control the flow of rainwater from their property to the plaintiff's property.

JUDGMENT For the plaintiffs.

HELD

1 Abuse of rights is a fault.

2 An activity which causes prejudice to a neighbour, if such prejudice goes beyond the measure of the ordinary obligations of neighbourhood is an abuse of right.

3 A person at fault, even if criminal, shall be partially relieved of liability if fault on the part of the victim contributed to the harm.

Legislation
Civil Code arts 1382, 1883, 1384(1)

Cases
A-G v Jumaye (1980) SCA 12
Coopoosamy v Delhomme (1964) SLR 82
De Commarmond v GOS 3 SCAR (Vol 1) 135
Desaubin v UCPS (1977) SLR 164

*Charlot v Gobin*e (1965) SLR 5

Foreign cases
D.1972.Somm 49, 8 Juillet 1971
Trib. Grande Instance de Toulouse 17 May 1971. D 1972 Somm 67
D 1973 Somm 148 Colmar, 1er ch 12 December 1972
Mandin C Foubert – Cour de cassation D 1982 25
Lacouture Inc C Entreprises Caceres Bull civ 1980 III no 206 Cass
Lanworks Inc v Thiara, 2007 CanLll 16449 (Ontario SC)
Ste Mobil Oil Francaise C Entreprise Garrkjue Trib.gr. inst Bayonne, 14 December 1970, JCP 1971 16665

Foreign legislation
Civil Code (France) art 1384(2)

Counsel F Ally for the plaintiffs
PJR Boulle for the first defendant
KB Shah for the second defendant
C Lablache for the third defendant

KARUNAKARAN J

[1] 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, Mahé. 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.

[2] 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 into the plaintiffs' land. It flooded the area, bringing down debris and residual materials, which damaged the plaintiffs' house and properties, ultimately causing loss, 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, 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 onto 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 unto 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.

[3] 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 46,000.00
b) Damage to terraces and land	R 18,500.00
c) Loss of aesthetic value	R 35,500.00
d) Moral damage	R 100,000.00
TOTAL	R 200,000.00

[4] 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 200,000.00 with interest on the sum as from the date of plaint and with costs of this action.

[5] On the other side, all three defendants in their respective statement of defence having completely denied the plaintiffs' claim and aver that they did not commit any fault and are not liable to the plaintiffs for any damages whatsoever. The first defendant although has admitted in his defence that he is the owner and occupier of a parcel of land at North East Point, he 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 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.

[6] The third defendant, a company admits in its defence that it is the occupier of a piece of land at North East Point since 1996 but 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 damage 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.

[7] The essential facts which transpire from the evidence adduced by the parties are these.

[8] It is not in dispute that the first plaintiff, Mrs Marie-Therese Joubert is the owner of the property parcel H3594 at Carana, Mahé and has been living therein 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 plaintiff's property. The second defendant, Mr Franky Adeline also owns and lives in another property adjoining above the first defendant's property, whereas the third defendant, Cable & Wireless (Seychelles) Limited 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.

[9] The plaintiff testified that in December 1997 during the torrential rain that admittedly caused heavy flooding all over Mahé, 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, 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.

[10] During the torrential rain that lashed Mahé in 1997, the rainwater from the defendants' properties that gushed out brought down lots of soil, debris and other materials onto the plaintiff's land and destroyed her house; swept away her bed, furniture and other household objects. The superstructure of the house was extensively damaged. Consequently, 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 properties 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 at R 46,000; the damage to her land and terraces at R 18,500. For the loss of aesthetic value of her land at 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 flow of the rainwater.

[11] 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 properties. 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.

[12] 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.

[13] 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' properties 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. Etc

[14] 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 the Court to give judgment in their favour and jointly and severally against the defendants.

[15] 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 one 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 infrastructures before the defendants started construction of their houses and other structure. 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. One 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 minimize 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' properties.

[16] One Mr Brassel Adeline, who was then working as the Construction and Maintenance Manger 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 from the foundation of the wall. Subsequently, he requested a technician of SHDC one 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 be built by concrete with steel bars. However, since they did not use concrete with steel bars, cracks had appeared from the foundation wall. According to him, the erosion and soil movement caused by the rainwater should have affected the foundation of the house and hence cracks should have appeared. In any event, SHDC pulled down the damaged house and built a new house for the plaintiffs on higher ground. One 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. One 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 of the house.

[17] In view of all 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.

[18] 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 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 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.

[19] The quintessence of the case of the parties, in this matter is this.

[20] 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, levelling of the ground, construction of houses and installation of 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 thereon 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.

[21] 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) 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 art 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) 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 art 1384-1 of the Civil Code of Seychelles.

[22] In the light of the above dichotomy of causes of action, I carefully examined the submissions of counsel touching on several questions of law and facts. 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 art 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 art 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' properties? – 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 art 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 plaintiff's 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?

[23] 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.

[24] In fact, the first limb of the cause of action mentioned supra is based on the principle of "fault" under art 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 therefrom 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 art 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.

[25] Having said that, para 2 of art 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, the abuse of rights acquired the status of an independent tort.

[26] 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 art 1382 or under art 1384-1 or simultaneously under both articles of the Civil Code of Seychelles.

Element No: (i) Damage

[27] 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

[28] 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' properties. In other words, whether the development and construction works carried out by the defendants on their properties alone caused or contributorily caused the overflowing of rainwater that damaged the plaintiffs' properties. This alleged "causal link" is the crucial area in 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-à-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 touching on the subject. 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.

[29] 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 mountain top by the promoters, until it eventually culminated in the abnormal flooding and destruction of her properties. 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 has built any gutter 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 lowlying terrain due to such land developments on a cliff-like mountain top 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.

[30] 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 plaintiff's properties, they obviously, constitute 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 properties.

Element No iii: Fault

[31] The defendants or their predecessor in title or the employees or préposés of the defendants, who carried out the alleged acts including the flattening of their respective land on the steep mountain-top, construction of buildings and retaining walls thereon,

failed to reasonably foresee the said "Flood hazard" or at any rate, failed to make necessary provisions 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 plaintiff's properties. The defendants in that process obviously failed to take necessary precautions 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 constitute 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?

[32] Yes; It is. Indeed, an owner of land commits a fault under art 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 the neighbourhood. Herein, it is relevant to note that in the case of *Desaubin v UCPS* (1977) SLR 164, the Court held thus:

> 1) Under the Seychelles Civil Code, although an attempt had been made in art. 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 art. 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 art. 382.

2) Under the French Civil Code, the principle evolved … that the defendant is liable in tort only if the damage exceeds the measure of the ordinary obligations of neighbourhood.

3) 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.

[33] 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 property, 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 art 1382(3) as

discussed supra. The third defendant is also the co-author of the fault of the second and third defendants in this respect. Therefore, I find that all three defendants are jointly liable in terms of art 1382(1) of the Civil Code, which reads thus:

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

[34] 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.

[35] As I see it, whatever be 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 law in terms of art 1384(1) of the Civil Code, which reads thus:

> 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.

[36] 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: *Receuil Dalloz Sirey* 1972. Somm 49,3 Ch Civ, 8 Juillet 1971.

[37] In the circumstances, I find that the defendants are liable for the fault or negligence of any of its employees, workers, agents or servants, when that caused damage to the plaintiff's property.

[38] Having said that, I hold that a person is liable not only for the damage that he has caused by his own act but also for the damage caused by things in his custody. The owner of land is its custodian and also he is custodian of everything attached thereto or situated or accumulated or stored thereon including soil, debris, residual materials, rainwater etc as he 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* 3 SCAR (Vol 1) at page 155*, (ii) Coopoosamy v Delhomme* (1964) SLR 82 and (iii) Trib Grande Instance de Toulouse 17 Mai 1971. D 1972 Somm 67.

[39] In fact, liability under art 1384-1 above quoted 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 justices of Appeal Sauzier and

Goburdhun in *de Commarmond* (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.

[40] It is pertinent to note herein that the application of art 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 Ia Responsabilité Civile* paragraphes 1205 and 1206 and *(ii) Ste. Mobil Oil Française c Entreprise Garrkjue* Trib.gr. Inst Bayonne 14 décembre 1970 JCP 1971 16665.

[41] 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, preposés, 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.

[42] I gave careful thought to the line of defence raised by the defendants attributing or imputing fault on the part of the 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 art 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.

[43] As stated above, the first limb of the cause of action is based on art 1382-3 and the second rests on the application of art 1384(1) of the Civil Code. The only defence open in this case for the defendants to dispute liability with regard to the both limbs is proof by the defendants that the damage was caused solely either

i) by the act of the plaintiff himself, 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

[44] 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 (iv) the building contractor who constructed the plaintiffs' house on the valley close to the watercourse, all of them hereinafter collectively referred to as 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 plaintiff. In the circumstances, I hold that the defendants are jointly liable but only to the extent of their share of responsibility for 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 *Charlot v Gobine* (1965) SLR 5. 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.

[45] Although English law of tort, recognizes contributory negligence on the part of the plaintiff or any third party as a valid defence against tortious liability, our law of delict under art 1382 or 1384 of the Civil Code does not seem to have expressly recognized the concept of contributory negligence as a defence against liability. Is then, contributory negligence available under art 1384(1)? The French commentators and the jurisprudence have answered that question in a positive way. It does exist under art 1384(1) and by the same token it should also in my considered view exist under arts 1382 (1)–(4).

[46] In support of this proposition, we find for instance, in *Dalloz Encyclopédie de Droit Civil* (2nd ed.) Tome VI, Verbo Responsabilité du Fait des choses inanimées, note 573, which provides that:

> Alors que le fait d'un tiers ne peut normalement entraîner qu'une exonération totale de la responsabilité du gardien, à 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.

[47] This refers to art 1384(1). This is what the commentators have said and again in Mazeaud *Traite Théorique et Pratique de la Responsibilité Civile*, Tome II, note 1527 at page 637:

> Aujourd'hui les arrêts affirment que le gardien doit être exonéré partiellement, dans une mesure qu'il appartient aux juges du fond d'apprécier souverainement, si le fait relèvé 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 art 1384(1) from which our art 1383(2) has been inspired, then that defence may also be pleaded in a claim based on art 1383(2) because, as I have stated supra, that article in our Code Civil has been borrowed from art 1384(1) of the French Civil Code.

[48] At the same time, it is interesting to note that as Laloutte JA observed in *AG v Jumaye* (1980) SCA at p 12 that in art 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, the legislature has removed "contributory negligence"

from being raised as a defence to liability under art 1383(2). Be that as it may, in the case of D. 1982. J. 85 *Mandin c Foubert* Cour de cassation the Court in view of art 1382 of the Code Civil held thus:

> A person, whose fault has caused damage even if the fault constituted criminal offence, is partially relieved of liability, if he proves that fault on the part of the victim contributed to the harm.

[49] Besides, it is a recognized 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 damages, 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).

[50] 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% for 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.

[51] 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 for the said claims 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 Damage		R 50,000
	TOTAL	R 135,000

[52] As found supra, the defendants are liable only to the extent of 80% for 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 so I hold.

[53] 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 art 1382 by abusing their rights of ownership causing damage to the plaintiffs' property having exceeded 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" and (ii) the Planning Authority, which gave approval for constructions on a cliff-like mountain top without necessary conditions or making provision for the flood hazard (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 art 1382 of the Civil Code in the course of developing the estate or constructing the building on 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 "Flood hazard" that was detrimental to the plaintiffs' properties.

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 art 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 in 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.

[54] 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.

Alcindor v R

Burhan J

23 September 2013 Criminal Side 49/2012

Sentencing – Mandatory minimum sentence − Mitigating factors – International treaties

The appellant appealed against a conviction and sentence for possession of a controlled drug. The appellant argued the judge erred in failing to properly consider the appellant's defence and that the sentence was harsh and excessive.

JUDGMENT Appeal dismissed.

HELD

1 The facts that the offender is young, makes an apology to the court and the small quantity of the controlled drug held do not constitute any special circumstances for the sentence to be reduced below the minimum mandatory sentencing.

2 The International Covenant on Civil and Political Rights cannot be applied in Seychelles unless it is made part of the domestic law.

Legislation
Constitution arts 19, 48
Misuse of Drugs Act ss 6, 26, 29

Foreign legislation

ICCPR art 15

Counsel N Gabriel for the appellant
E Gonthier for the respondent

BURHAN J

[1] This is an appeal against conviction and sentence.

[2] The appellant was charged in the Magistrates' Court as follows:

> Statement of offence
>
> Possession of Controlled Drugs Contrary to Section 6 (a) as read with Section 26(1) (a) and Punishable under Section 29 (1) of the Misuse of Drugs Act Cap 133.
>
> The particulars of the offence are that Kelson Alcindor, a beach boy, residing at Beau Vallon, Mahe, on the 15th day of October, 2010, at the junction of Les Mamelles road, Mahe, has in his possession 42 milligrams of heroin (Diamorphine) a controlled drug.

[3] The appellant denied the charge and after trial the Senior Magistrate proceeded to find the appellant guilty as charged and proceeded to sentence him to a term of six years imprisonment.

[4] Counsel seeks to appeal against that conviction and sentence on the following grounds:

> a) the learned Magistrate failed and erred in law in failing to properly consider the Appellant's defence when he stated under oath that the second person standing next to him had thrown the suspected drugs on the ground.
>
> b) the sentence imposed by the learned Magistrate is manifestly harsh and excessive given that the drugs in question weighed 42 milligrams. The

> sentence does not reflect recent patterns of sentencing for similar offences involving similar quantities of heroin before the courts in this jurisdiction.
>
> c) the learned Magistrate before passing sentence should have looked into the special circumstances as provided in law as why the minimum mandatory sentence should not be imposed.

[5] The background facts of the case are that agent Pierre Servina of the NDEA (National Drug Enforcement Agency) whilst on mobile patrol at around 7 pm on 15 October 2010 at the junction at Les Mammelles, had noticed the appellant Kelson Alcindor walking in their direction. He had disembarked from the said vehicle together with agents Malbrook and Hoareau and approached the appellant. They had been in uniform. As they approached the appellant he had thrown a piece of white paper on the ground. Agent Servina had picked up the paper and opened it and found it contained a powder which they suspected to be controlled drugs. They had proceeded to arrest him and have the powder in the white paper analysed. Agent Servina further identified the appellant as the person he had arrested that day and stated he worked as a beach boy at Beau Vallon. The Government Analyst's, Mr Purmanan's, evidence and report confirmed the fact that the said powder was Heroin Diamorphine having a weight of 42 milligrams. Agent Mellissa Malbrook was also called by the prosecution while agent Seeward gave evidence in respect of the exhibit kept in his custody.

[6] I have considered the reasoned judgment of the Senior Magistrate Mrs Samia Govinden. I have noted that she has analysed the evidence of the prosecution and the evidence given by the

appellant in detail, prior to coming to her findings. It is clear when one considers the evidence of the prosecution that the evidence of the principal witness agent Servina stands corroborated by the evidence of agent Mellissa Malbrook. There are no material contradictions in the evidence of the prosecution witnesses that would make one come to a conclusion that their evidence is untruthful and cannot be believed. The chain of evidence in respect of the exhibit from the time of detection, analysis and production in court has been established and not contested. For the aforementioned reasons the Senior Magistrate cannot be faulted for accepting the evidence of the prosecution.

[7] The Senior Magistrate has further analysed the evidence of the appellant in detail. She has come to the conclusion that the defence of the appellant, that he was coming from his mother's place and that he had met another person by the name of Antoine a "rasta" who had been standing near him at the time the NDEA officers arrived on the scene is not acceptable. It appears even though he had not seen it, his defence is that it was this person who had thrown the white paper on the ground. However in the cross-examination of all the prosecution witnesses no such suggestion was made by counsel for the defence. Therefore the Senior Magistrate's conclusion that the defence was a sham and part of a recent story on his part cannot be faulted. It is apparent that the defence is a last minute fabrication and a belated attempt to pass on the guilt to another individual. For the aforementioned reasons it cannot be accepted that the Senior Magistrate failed or erred in law in failing to properly consider the appellant's defence as suggested by counsel for the appellant. Therefore ground (a) of the appeal in respect of the conviction bears no merit.

[8] For the aforementioned reasons the appeal against the conviction of the appellant stands dismissed.

[9] In regard to the appeal against sentence, it is the contention of counsel for the appellant that the sentence imposed is harsh and excessive. His main ground is that the Senior Magistrate had not taken into consideration the special circumstances as required by law and should have done so and not given the minimum mandatory term of imprisonment. When one considers the facts of this case and the plea in mitigation made by counsel namely that the appellant is a first offender, a young man and apologises for his crime and that the court should consider the quantity of controlled drug taken into custody, these facts either on their own or taken together in the view of this Court, do not constitute any special circumstance for the sentence to be reduced below the minimum mandatory considering the fact it was a Class A drug that was found in his possession.

[10] Counsel for the appellant also drew the attention of the Court to art 15 of the International Covenant on Civil and Political Rights (ICCPR).

[11] Article 15(1) and (2) of the said Covenant reads as follows:

> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

> If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
>
> (2) Nothing in this article shall prejudice the trial and punishment of any person for an omission which, at the time when it was committed, was criminal according to the general principle of law, recognised by the community of nations.

[12] What attracts the attention of this Court is the last limb of art 15(1) of the Covenant namely:

> If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

[13] The offence in this instant case was committed on 15 October 2010. According to the law prevailing at that time the maximum penalty prescribed by law was 15 years and included a minimum mandatory term of imprisonment of five years for offences concerning possession of Class A controlled drugs which would be applicable in this instant case.

[14] However at the time of conviction and sentence on 6 November 2012 the law had changed and the Misuse of Drugs (Amendment) Act, Act 4 of 2012, did not impose a minimum mandatory term of imprisonment for the offence with which the appellant has been charged with in this case, therefore it is apparent subsequent to date of the commission of the offence, provision has been made by law for the imposition of a lighter penalty. The question now arises whether in terms of art 15(1) of

the ICCPR the appellant in this case should benefit from it.

[15] When one considers art 19(4) of the Constitution of the Republic of Seychelles it reads as follows:

> 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.

[16] It therefore is apparent that while a part of art 15(1) of the Covenant has been incorporated in the domestic law the last limb namely: "If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." has not been incorporated in any domestic law. Therefore the relief as envisaged by the Covenant cannot be applied to this instant case as it does not form part of the domestic law and for the same reason art 48 of the Constitution of the Republic of Seychelles is not applicable. Counsel for the appellant is however free to challenge this finding in a higher forum.

[17] Counsel for the appellant has brought to the attention of this Court an extract from *Sentencing Theory and Practice* by Nigel Walker at paragraph 1.22 which reads as follows:

> … Or again it may reduce or vary the sentence- even if only slightly- to give weight to a mitigating factor

> which should have, but did not influence the sentencer.

[18] It appears that although being in possession of a quantity of 42 milligrams does attract the minimum mandatory term of imprisonment, even though the charge is of a serious nature as it is in respect of a Class A drug, considering the quantity involved which in the view of this Court is small and the fact that the appellant is a first offender when taken together these facts would have been sufficient grounds in the view of this court, to impose the minimum mandatory term prescribed by law ie five years imprisonment. Therefore this Court will proceed to substitute the sentence of six years imprisonment with a sentence of five years imprisonment. Subject to this variation in sentence the appeal stands dismissed.

Adonis v Ramphal

Egonda-Ntende CJ

30 September 2013 CS 159/2009

Damages – Quantum − Vicarious liability

The plaintiff's daughter was killed in a road accident when hit by a motorcycle ridden by the second defendant but owned by the first defendant. The plaintiff, executor of the estate of the deceased, brought an action on behalf of the deceased contending that both defendants were jointly and severally liable to the plaintiff. The claim was for moral damages for the pain and suffering the deceased went through before she died.

JUDGMENT Partly for the plaintiff.

HELD

1 Ownership is not sufficient to infer vicarious liability.

2 The right to compensation for moral prejudice is not conditional on the victim's ability to profit or benefit from monetary compensation.

3 The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions.

4 It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities and loss of expectation of life. This is sound practice. Although these elements are analytically distinct,

they overlap and merge in theory and in practice.

Legislation
Civil Code arts 1383–1386

Case
Seychelles Breweries v Sabadin SCA 21/2004

Foreign cases
Andrews v Grand & Toy Alberta [1978] 2 SCR 229 (Canada)
Quebec (Public Curator) v Syndicat national des employes de I'hopital St-Ferdinand [1996] 3 SCR 211 (Canada)

Counsel F Elizabeth for plaintiff
C Andre for defendants

EGONDA-NTENDE CJ

[1] The plaintiff is the mother and executor of the estate of the late Lisette Larue who died intestate on 7 May 2011 and brings this action on behalf of the estate of the deceased in respect of a running down case that occurred on 21 November 2008 at Barbarons, Mahe, Seychelles. The first defendant is sued as the owner of the motorcycle registration no S14923 which was being ridden by the late Joseph Ramphal. The second defendant is the estate of the late Joseph Ramphal, son of the first defendant.

[2] It is contended for the plaintiff that on or about 21 November 2008 the deceased Joseph Ramphal was riding a motorcycle no S14923 at Barbarons, Mahe, Seychelles owned by the first defendant when he hit the plaintiff's daughter in a road traffic accident. The road fund licence and insurance for the motorcycle had expired at the time of the accident. It is further contended that this

accident was solely caused by the fault, act or omission of the deceased and that the both defendants are jointly and severally liable to the plaintiff.

[3] The particulars of fault of the first defendant are that the first defendant: (a) allowed the deceased to drive the said motorcycle on the main road when she knew or ought to have known that the said motorcycle was neither insured nor licensed to be driven on the main public road; (b) neglected to ensure that the said motorcycle was licensed and insured at all material times; (c) was reckless and negligent by not stopping and preventing the deceased from driving the motorcycle on the main public road; (d) was reckless and negligent in not stopping the deceased from getting to the keys of the motorcycle for him to operate it on the road; and lastly (f) failed to do everything in her power to prevent the deceased from taking over care, control and possession of the said motorcycle.

[4] The particulars of the fault of the second defendant were that the second defendant: (a) drove the said motorcycle when he knew it was not licensed; (b) failed to heed the presence of the plaintiff on the road; (c) was driving too fast in all the circumstances of the case and was unable to maintain proper control of the said motorcycle; (d) failed to keep any proper lookout; and (e) failed to stop, slow down, swerve or otherwise steer or control the motorcycle in a way so as to avoid colliding with the deceased.

[5] By the reason of the defendants' foregoing actions it is contended that the deceased suffered severe injuries and went into a paraplegic coma in a vegetative state until her death. The plaintiff claims moral damages for pain, suffering, emotional distress, mental anguish and trauma in the sum of R 400,000.00; loss of quality of life R 200,000.00 and loss of amenities in the sum of R 200,000.00;

all totalling R 800,000.00 together with interest and costs.

[6] The defendants, who are really one person sued both in her personal capacity and as a representative of the estate of her late son, the rider of the motorbike, deny liability for the plaintiff's claim and assert a counter claim. On their defence it is admitted that the said accident occurred but not on account of their negligence and thereof she is not liable in law to the plaintiff. The plaintiff was put to strict proof of her claims. It was further contended for the defendant that the late Joseph Ramphal was on the road, riding his motorcycle when the plaintiff/deceased suddenly crossed the road in front of the deceased's motorcycle. Due to the fault of the plaintiff, a total of R 3,000,000.00 is claimed by the defendant from the plaintiff on account of moral damages and for the first defendant's granddaughter who was born fatherless on account of this accident. This counter claim was abandoned at the close of hearing of the case.

The case for the plaintiff

[7] The plaintiff called three witnesses, including herself, Natasha Nourrice and Marcus Evans. The only eyewitness account of the accident is the testimonies of PW2 Natasha Nourrice and PW3 Marcus Evans. It is clear that on the fateful day the deceased, Joseph Ramphal, was riding a motorcycle which was neither insured nor licensed when he collided with a pedestrian, the daughter of the plaintiff, who was crossing the road. This was on 21 November 2008. The accident occurred at Barbarons next to an Indian shop.

[8] The deceased victim, Lisette Larue, was taken to Mont Fleur hospital from the scene of the accident where she was admitted and was under intensive care for 22 days. During this period she could not breathe on her own. She was on life support machine. She was

then moved to the ward after she slightly improved where she stayed until February 2009. She was then moved to North East Point hospital. She was in North East Point hospital until her death on 7 May 2011.

[9] The only medical report that was admitted in evidence as exhibit P5 states that the patient was admitted with a Glasgow coma scale of 3/15. On examination she had laceration left frontal scalp, laceration upper lip; chest – decreased breath sounds; right leg – 3cm laceration, with bleeding and deformity; left elbow—3 cm laceration. X-ray revealed a fracture left femur (shaft), comminuted fracture shaft right tibia of fibula. The CT Brain scan revealed hemorrhagic contusion right frontal lobe; fracture left orbit lateral and medial wall; and intraventricular haemorrhage. The CT Thorax scan revealed Pneumothorax with collapse of lower lobes both lungs. She was diagnosed with Hemorrhagic contusion right frontal lobe; intraventricular haemorrhage; fracture left orbit; le fort 2 fracture; bilateral Pneumothorax; fracture shaft right femur; open fracture shaft right tibia and fibula.

[10] The medical report further states:

> Patient was managed in ICU. It was decided that due to this patient poor condition open reduction of fixation of the femur and tibia fracture was impossible at this time. A POP cast was applied instead and patient was transferred out of ICU on 14.12.08. POP was removed on 21.01.09 and check X-ray showed good callous formation at the femur and tibia fracture. The patient was transferred to North East Point Hospital on 23/01/09 for further Physio and Rehabilitation.

[11] The deceased victim was survived by two children who are both minors. The older child is living with her paternal grandparents while the younger child, about 10 years old, is living with the maternal grandmother, the plaintiff in this case. She receives some assistance from the social welfare agency for this child.

[12] The plaintiff claims moral damages of R 400,000.00 on account of the pain, suffering, emotional distress, mental anguish and trauma suffered by the deceased victim. The plaintiff testified that she saw her daughter in a lot of pain. She was suffering as she could not eat or drink except through a tube and she had suffered a lot of injuries on her body. R 200,000.00 was claimed on account of loss of amenities and R 200,000.00 was claimed for loss of quality of life.

The Case for the Defendant

[13] Mrs May Ramphal testified on her own behalf and she was the only witness for the defence. She did not witness the accident. On the fateful day she left her son, Joseph, at home. She left him money for transport and lunch in case he was coming to town. She returned home at about 6.00 pm and did not find Joseph at home. Neither was the motorcycle. She called her son who told her he was at a friend's place in La Misere. She called him back home.

[14] At about 6.30 pm someone called her and told her that Joseph had been involved in an accident. A neighbour drove her to the hospital and she found her son dead. He was 22 years old at the time of his death.

[15] She admitted that she was the registered owner of the motorcycle that was involved in the accident. The motorcycle was

for use by her son. The motorcycle was under repair and it had neither a licence nor insurance. She was waiting for the repairs to be completed before she would have it licensed again and the insurance paid. She had told her son not to ride the motorbike until it had been repaired. There were some spare parts that they had been waiting for.

Submission of Counsel

[16] Mr Andre, counsel for the defendants submitted that this case had not been proven against the defendants. He submitted that the only two eyewitnesses to the accident had contradicted each other on where the deceased victim was at the time of the accident. They should not be believed. Secondly that the first defendant had not authorised the use of the motorcycle though it was in her names. She had in fact provided to her son, Joseph, money for transport, and food in case he was to come to town on the day that the accident had occurred. He prayed that this action should be dismissed.

[17] Mr Elizabeth, counsel for the plaintiffs, submitted that the first defendant was liable for the accident as she had failed to ensure that the Joseph did not ride the motorcycle and that the estate of Joseph was liable for the accident as Joseph had driven the motorcycle negligently and at high speed. Had Joseph not been negligent this accident would have been avoided. Secondly on this point he submitted that in light of art 1383(2) of the Civil Code of Seychelles there was a presumption of fault on part of a driver of a vehicle which caused injury to another.

Analysis

[18] Article 1383(2) of the Civil Code of Seychelles states:

> The driver of a motor vehicle which, by reason of its operation, causes damage to persons or property shall be presumed to be at fault and shall be accordingly liable unless he can prove that the damage was solely due to the negligence of the injured party or the act of a third party or an act of God external to the operation or functioning of the vehicle. Vehicle defects, or the breaking or failure of its parts, shall not be considered as cases of an act of God.

[19] It is not in dispute that Joseph was riding the motorcycle that was involved in the accident on the material day. It has not been the case for his estate that there was any act of God or of a third party that caused the accident. The claim that the deceased victim had negligently been the sole cause of the accident was unsupported by any evidence. The presumption in this case that arises by virtue of art 1383(2) of the Civil Code of Seychelles has not been rebutted.

[20] I am satisfied that this accident occurred on account of the deceased, Joesph Ramphal's fault, in light of, not only the unrebutted presumption that he was at fault, but the unchallenged evidence by the plaintiff's witnesses. I reject the claim by counsel for the defendants that this evidence was in conflict or contradictory in a material particular. Both witnesses indicated that she was hit while on the road at Barbarons. One specified that the rider of the motorcycle came at high speed and collided into the deceased victim.

[21] As against the first defendant I am satisfied that no case has been made out against her. The deceased Joseph Ramphal was an adult at the time of this accident. He was 22 years old. He was of age. Much as he lived with his mother this cannot be treated as being in the custody of his mother. He was an adult living with his mother.

His mother did not take responsibility for his own conduct.

[22] It is uncontested that the first defendant was the owner of the motorcycle in question which she had bought for her son. The motorcycle was registered in her name. She had expressly told her son not to use it until the repairs were complete and it had been licensed and insured. In choosing to ride the motorcycle that day Joseph violated his mother's instructions. The mother cannot be held liable for the independent conduct of her son, who was of age. In riding the motorcycle Joseph was not doing so on account of the first defendant. Ownership alone is not sufficient to infer vicarious liability. In any case what was alleged against the first defendant was not vicarious liability for the acts of the son but direct liability for her own actions or omissions.

Quantum of damages

[23] The plaintiff has claimed moral damages for pain, suffering, emotional distress, loss of quality of life and loss of amenities of life due to the estate of the Lisette Larue, now deceased, in the total sum of R 800,000.00. Given the fact that the liability has only been established against the estate of a young man, now deceased, who was riding an uninsured vehicle, it is possible that there might be no avenue from which to recover whatever amount may be awarded to the plaintiff. Notwithstanding that it is incumbent upon this Court to evaluate the claim for moral damages and come to its conclusion without regard to the foregoing matter.

[24] The basic head of claim before me is for moral damages or non-pecuniary loss. There is no claim for pecuniary loss of any nature. It is not in question whether or not the deceased victim suffered moral prejudice before her death on this account. Moral

prejudice has been established from the evidence that was adduced on record. The plaintiff saw her daughter in hospital and she was in pain and suffering. It is also implicit by the very nature of injuries the victim suffered which lead to loss of amenities of life and confinement to hospital until her death. The deceased's estate is entitled to recover compensation for the same.

[25] However the quandary is in determining the amount of award. As was noted in a Canadian case, *Andrews v Grand & Toy Alberta* [1978] 2 SCR 229 at page 262 by Dickson, J:

> Andrews used to be a healthy young man, athletically active and socially congenial.
>
> Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this, he is entitled to compensation. But the problem is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide for restitution.
>
> The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms.

[26] This question was grappled with by the Supreme Court of

Canada in *Quebec (Public Curator) v Syndicat national des employes de l'hopital St-Ferdinand* [1996] 3 SCR 211 in it was held:

> Quebec civil law supports the conception that the right to compensation for moral prejudice is not conditional on the victim's ability to profit or benefit from monetary compensation. This objective characterization of moral prejudice is more consistent with the fundamental principles of civil liability than the subjective conception. In Quebec, the primary function of the rules of civil liability is to compensate for prejudice. This objective requires that there be compensation for the loss suffered because of the wrongful conduct, regardless of whether the victim is capable of enjoying the substitute pleasures. In order to characterize the nature of the moral prejudice for purposes of compensation, the purely subjective conception thus has no place in the civil law, since the reason that damages may be recovered is not because the victim may benefit from them, but rather because of the very fact that there is moral prejudice. The victim's condition or capacity to perceive are irrelevant in relation to the right to compensation for the moral prejudice.

[27] With respect to the evaluation of moral prejudice, although the functional approach does not apply in Quebec civil law to the determination of the right to moral damages, it is nonetheless relevant, together with the conceptual and personal approaches, when it comes to the calculation of such damage. In Quebec civil law, these three approaches, when it comes to calculating the amount

necessary to compensate for moral prejudice apply jointly and thereby encourage a personalised evaluation of the moral prejudice.

[28] The foregoing remarks are equally applicable in this jurisdiction where compensation is compensatory in nature. See arts 1382–1386 of the Civil Code of Seychelles. The obligation on the tortfeasor is to 'repair' the damage he has caused.

[29] In determining the quantum of damages a court needs to have regard to comparable cases. See *Seychelles Breweries v Sabadin* SCA 21/2004. No previous cases of a similar nature as the case at bar in relation to award of moral damages in this jurisdiction have been drawn to my attention by counsel. Nor have I been able to come across any local cases to provide a comparative guide.

[30] The deceased victim was 46 years of age at the time she died. There has been very little information provided in evidence about her life. We do not know if she was working or not. She lived with her mother and had two children. To that extent we know that she led an 'ordinary' life and had responsibilities in this world. She had a family too. After the accident she never left hospital. The plaint described her condition in hospital at the time of filing this action in paragraph 8 thereof as, "currently paraplegic in a coma at North East Point hospital in a permanent vegetative state." The written statement of defence did not specifically deny this paragraph of the plaint but only stated that the plaintiff is put to strict proof of paragraphs 7, 8 and 9.

[31] PW1, the plaintiff, in her testimony stated that she was told, on transfer of her daughter to North East Point hospital that her daughter was going to die, and was being taken there to rest. The medical report stated that she was admitted in hospital while in coma

but does not state whether she improved from her comatose state at all.

[32] I note with regret that the evidence with regard to the condition of the deceased victim is rather incomplete in rendering a true understanding of her condition both before and after the accident. Nevertheless it is clear that she suffered life-threatening injuries that left her in a comatose state from which she apparently did not recover, eventually succumbing to her death. The question of suffering moral prejudice is established. This is so regardless of whether she could feel the pain or not given her comatose state. Literally the accident destroyed her happiness and her life.

[33] In this case the claim was split into three parts; one for pain, suffering, emotional distress, mental anguish and trauma; another for loss of quality of life and the last for loss of amenities. There is no evidence to support emotional distress and mental anguish of the deceased victim. Loss of quality of life and loss of amenities are so intertwined that it is difficult to separate them. As was noted by Dickson, J, in *Andrews v Grand & Toy Alberta* (supra) at page 264:

> It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that the losses have the common

> trait of irreplaceability, favour a composite award for all non-pecuniary losses.

[34] I am inclined to adopt the same approach and provide a composite award for moral prejudice for the same reasons. Though in this particular case it must be acknowledged that if the deceased victim was in a comatose state right from admission to hospital to her subsequent death three years later, one cannot assert emotional distress and mental anguish for that period. Perhaps it could have been the mother of the deceased to claim for emotional distress and mental anguish that she suffered on seeing her daughter in such a state but that was not the claim before me. No doubt there must have been suffering and trauma inflicted on the victim. I shall take into account that this claim is limited by its nature from the date of the accident up to the death of the deceased victim; that is from 21 November 2008 to 7 May 2011.

[35] I note that the claim for moral damages or damages of any sort did not extend to the damages for loss of expectation of life, especially in relation to the two young children of the deceased, who were robbed of their mother, and now have to plod through this world without their mother. I know that the claim was filed before the death of the deceased but after her death the claim could have been amended accordingly to include a claim for loss of expectation of life or any pecuniary loss the estate and heirs of the deceased suffered since the deceased never recovered from her injuries, was never discharged and died in hospital, presumably from her injuries, unless counsel were aware that the cause of death was not related to the injuries she received from the accident. I must admit that in this case no evidence was ever adduced related to the cause of death.

Decision

[36] Doing the best I can in the circumstance of this case I award the estate of the deceased victim the sum of R 250,000.00 as moral damages for suffering trauma, loss of quality of life and loss of amenities against the estate of the late Joseph Ramphal together with costs of this action and interest at legal rate from today till payment in full. For avoidance of doubt I wish to state that this action has succeeded, not against the first defendant, but against the estate of the deceased Joseph Ramphal, the second defendant. The action against the first defendant is dismissed.

Mill Hill v Revenue Commissioner

Karunakaran J

3 October 2013 Civil App 01/2009

Tax − Assessment − Non-disclosure − Business Tax Act

This appeal was made against the respondent's decision to amend the assessment of business tax. The appellant argued the decision to make the assessment was made after the expiration of the three year limit. The respondent contended that the amendment was not subject to the statutory limitation since the appellant did not make a full and true disclosure.

JUDGMENT Appeal partly allowed.

HELD

1 If a taxpayer has not made a full and true disclosure and avoided tax payment fraudulently or evasively, there is no time limit preventing the Commissioner from reopening and making amendment to previous assessments.

2 If non-disclosure is not due to fraud or evasion by the taxpayer, the Commissioner has the power to amend an assessment only within six years from the date when notice of the original assessment was issued.

3 Any material fact or information that affects or is likely to affect tax liability may be revealed directly and openly by the taxpayer to the Commissioner by making a full and true disclosure.

4 A Nil Tax Liability Assessment constitutes an assessment under s 93 of the Business Tax Act

5 Assessment is the act or process of ascertainment, not the quantum of the amount ascertained.

Legislation
Business Tax Act ss 2, 6, 40, 50, 88, 93, 97, 104 – 106, 110, 143, 3rd Sch

Foreign cases
Austin Distributors v FC of T (1964) 13 ATD 429
In re Woking Urban District Council (Basingstoke Canal) Act 1911 [1914] 1 Ch 300

Foreign legislation
Australian Income Tax Assessment Act (1936)

Counsel Alton for the appellant
D Esparon for the respondent

KARUNAKARAN J

[1] This is an appeal preferred under s 106 of the Business Tax Act - hereinafter referred to as the "Act" - against the decision of the Revenue Commissioner - hereinafter referred to as the "respondent" - on the amended assessment of business tax payable by the appellant, namely, Mill Hill Pty Ltd for the tax years 2000, 2001, 2002, 2003, 2004, 2005 and 2006 hereinafter collectively referred to as the "relevant years".

[2] The appellant, Mill Hill Pty Ltd - hereinafter referred to as the "MHPL" - is a company. This was incorporated in Seychelles on 26 July 1998. According to its Memorandum of Association, it was established to acquire immovable property by way of purchase or lease, acquiring shares in other companies that deal in immovable property, carrying out the business of leasing immovable property and carrying out the business of property development and

management. On 28 July 1998 the company acquired a plot of land parcel V5242 (hereinafter called the "property") from La Moutia (Pty) Ltd for the sum of R 1,193,031.91, situated at La Louise, Mahé. The property included land and a building, which comprised a restaurant, kitchens, storage area, an office and living quarters. In fact, the property previously was owned by one "Vera Doreen Georges". On 9 April 1993, the La Moutia (Pty) Ltd represented by its directors Mr Melton Pierre Ernesta and Mrs Georgette Suzanne Ernesta purchased the property from the previous owners for R 500,000.

[3] Subsequent to the sale of the property, Mrs and Mr Ernesta leased out the property to the appellant. This was done initially through the entity "La Moutia (Pty) Ltd" and later by Mrs Ernesta in her own right registered with tax office as a sole trader restaurateur.

[4] With this background, I will now turn to the material facts that gave rise to the business tax assessments and subsequent amendments made thereto by the Revenue Commissioner in respect of the annual returns lodged by the appellant for the relevant years.

[5] On 16 October 2001 the appellant registered with Tax Office and declared on its application that it commenced business on 27 July 1998 with its main activity being real estate. Subsequently, the appellant lodged its annual returns pursuant to s 88 of the Act. Within these returns it valued the property at R 2,300,000 (land R 680,000 and building R 1,700,000) and claimed depreciation on the building on a cost basis as follows:

Year	Depreciation Claimed	Resulting Tax Shortfall
2001	340,000	100,844.00
2002	170,000	90,839.20
2003	170,000	69,999.40
2004	170,000	64,698.00
2005	170,000	17,770.20
2006	170,000	2,167,75

[6] Based on the information provided in the annual returns and other information at his disposal, the Commissioner assessed the returns pursuant to s 93 of the Act and informed the appellant of the assessments. In fact, after presumably securitizing and having accepted the annual returns furnished by the appellant for the relevant years, the Commissioner issued a Notice of Nil Tax Liability assessment to the appellant pursuant to s 93 of the Act, which reads thus:

> 93. (1) From the returns, and from any other information in his possession, or from any one or more of those sources, the Commissioner shall make an assessment of the amount of the taxable income of any business, and of the tax payable thereon by the owner of the business.

> (2) Where the Commissioner has made any adjustment to the return submitted by a business, he shall notify the business of any adjustments made.

[7] On 1 April 2007, the Commissioner initiated an audit (case number l392) investigating the taxable income of Mill Hill over the relevant years. During the audit, facts surrounding the depreciation treatment of the property were discovered and subsequently the Commissioner proceeded to amend the assessments of Mill Hill for all the relevant years by (among other things) increased tax liability by disallowing the depreciation of the property pursuant to s 50(1) of the Act.

[8] On 19 August 2008, the appellant lodged objections to the 2001 to 2006 amended assessments pursuant to s 104 of the Act. However, the Commissioner in his considered decision - in terms of s 105 of the Act - disallowed those objections. The appellant therefore, in terms of s 106 of the Act, requested the Commissioner to treat those objections as an appeal against his decision and refer the matter to the Supreme Court for determination. The Commissioner accordingly, referred the matter to the Supreme Court with the relevant records in terms of s 106(1) of the Act and hence is the instant appeal before this Court. The grounds of objections and the contention of the respondent in reply thereto were in essence, fall under three grounds as follows.

First ground of objection

[9] The first ground of objection of the appellant was based on the application of s 97(3) of the Act (which is about the "Amendment of assessments"). This section reads thus:

> Where a business has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the owner of the business in any particular shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the end of the tax year in which the assessment was made.

[10] According to the appellant, it made a full and true disclosure in all its annual returns to the respondent, of all the material facts necessary for its assessments with respect to relevant years. The respondent also made his assessments after those disclosures and accordingly issued the Notice of Nil Tax Liability Assessment to the appellant. By virtue of s 97(3) of the Act, no subsequent amendment of the assessment increasing the liability shall be made after the expiration of three years from the end of the tax year in which the assessment was made. Therefore, the appellant contends that in the instant case the amendment of assessment made after three years, that was in 2008 by the respondent, for the tax years 2001, 2002, 2003, 2004 and 2005 is time-barred and hence not tenable in law.

[11] However, the respondent contends that the appellant did not make full and true disclosure in their annual returns of the material facts pertaining to depreciation on property. Hence the amendments made were not subject to the statutory period of three year limitation. The respondent accordingly amended the assessment disallowing the depreciation claimed by the appellant and imposed an Additional Tax or Omitted Income Penalty pursuant to s 143(2) of the Act for the relevant years; the details of which are as follows:

Annual Return Year	Omitted Income Penalty
2000	97,750.00
2001	88,052.00
2002	56,460.00
2003	52,183.00
2004	11,918.00
2005	1,182.00
2006	4,011.00
Total	**311,556.00**

Second ground of objection

[12] The second ground of objection was based on the application of s 50(1) of the Act (which is about the "Acquisition of depreciated property"), which section reads thus:

> Where either before or after the commencement of this Act a business has acquired any property in respect of which depreciation has been allowed or is allowable under this Act or the previous Act, the business shall not be entitled to any greater deduction for depreciation than that which would have been

> allowed to the person from whom the property was acquired if that person had retained it;
>
> Provided that, where under section 48 an amount is included in the assessable income of the business selling the property, the business acquiring the property shall be allowed depreciation calculated on the sum of that amount and the depreciated value of the property under this Act immediately prior to the time of the sale.

[13] According to the appellant, it correctly claimed depreciation at the rate specified under paragraph 9 of the Third Schedule, which permits such deduction.

[14] Hence, the appellant contends that the property on which depreciation was claimed falls within the ambit of law and correctly constitutes an allowable deduction.

[15] However, the respondent contends that s 50 should be interpreted using a purposive approach to accord with the "Fiscal Policy" of the Government; that is to encourage the investment in new assets within Seychelles such as construction of hotels or commercial premises. Hence, generous capital allowances such as depreciation on capital assets were given on such investments. The appellant did not construct the building in question. Hence, he cannot be given the benefit of allowable deduction based depreciation on capital assets. Besides, it is the contention of respondent that the actual wording of s 50(1) to wit: "property in respect of which depreciation has been allowed or allowable" implies that since deduction of the depreciation was allowable under the Act, the appellant is not entitled to any greater deduction for depreciation than which would have been allowed to the previous

owner La Moutia (Pty) Ltd had it retained the property. Therefore, the respondent contends that appellant's claims for depreciation were not allowed.

Third ground of objection

[16] The third ground of objection relates to the payment of tax for late lodgments and penalties. In a letter dated 20 October 2008, the Commissioner allowed the objection in part pursuant to s 105 of the Act. The objection to the calculation error was allowed whereas all other objections were disallowed. The appellant does not dispute that the respondent's power and rights to impose penalties under the Act for late lodgments or other lawful reasons. However, the appellant objects to a taxpayer being penalized after being misled by actions of the Commissioner.

[17] On the other side, the respondent contends that the Late Lodgment Penalties (LLP) totaling R 15,285.00 were imposed on the appellant as it lodged the annual returns late for the tax-year 2002 and 2003, which were in fact, lodged after a delay of 295 days and 112 days from their respective due dates. Therefore, the respondent applied both ss 143(1) and 143(2) of the Act to late lodgments of annual returns and imposed the LLP accordingly.

[18] In view of all the above, the appellant urged the Court to allow this appeal upholding its objections to the respondent's amended assessments for the relevant tax years.

[19] I meticulously perused the appellant's grounds of objections to the assessments in dispute, as well as the submission of the respondent setting out his reasons for those assessments. I also perused the written submission of the appellant filed in the appeal

proper. I gave diligent thought to the arguments advanced by both counsel on points of law as well as on the facts in issue.

[20] First of all, I wish to observe that the Act prevents the appellant from raising new grounds in the appeal, which were not raised in the first instance before the Commissioner. Section 110 of the Act reads thus:

> On any appeal to the Supreme Court under section 106 -
>
> (a) the owner of a business shall be limited to the grounds stated in his objection served under section 104, and
> (b) the burden of proving that the assessment is excessive shall lie upon the owner of a business.

[21] I will now proceed to examine the fundamental issues raised by the parties on points of substantive law and on the facts restricting only to the grounds stated in the appellant's objection served under s 104 of the Act.

[22] On ground no 1, it is important to peruse s 97 of the Act in its entirety so that one can understand the myriad of factual circumstances in which the Commissioner may make amendments to previous tax assessments. This section reads thus:

> 97. (1) Subject to this section, the Commissioner may at any time amend an assessment by making such alterations therein or additions thereto as he thinks necessary, notwithstanding that tax may have been paid in respect of the assessment.

(2) Where a business has not made to the Commissioner a full and true disclosure of all material facts necessary for his assessment, and there had been an avoidance of tax, the Commissioner may

(a) where he is of the opinion that the avoidance of tax is due to fraud or evasion, at any time; or
(b) in any other case, within six years from the date when the notice of assessment is issued in accordance with section 101,

amend the assessment by making such alterations therein or additions thereto as he thinks necessary to correct an error in calculation or a mistake of fact or to prevent avoidance of tax, as the case may be.

(3) Where a business has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the owner of the business in any particular shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the end of the tax year in which the assessment was made.

(4) No amendment effecting a reduction in the liability of the owner of a business under an assessment shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the end of the tax year in which the assessment was made.

(5) Where an assessment has, under this section, been amended in any particular, the Commissioner may, within three years from the end of the tax year in which the amended assessment was made, make in or in respect of that particular, such further amendment in the assessment as, in his opinion, is necessary to effect such reduction in the liability of the owner of a business under the assessment as is just.

(6) Where an application for an amendment in his assessment is made by the owner of a business within three years from the end of the tax year in which the assessment was made, and the owner of the business has supplied to the Commissioner within that period all information needed by the Commissioner for the purpose of deciding the application, the Commissioner may amend the assessment when he decides that application notwithstanding that that period has elapsed.

(7) Nothing contained in this section shall prevent the amendment of any assessment in order to give effect to the decision upon any appeal, or its amendment by way of reduction in any particular in pursuance of an objection made by the owner of a business or pending any appeal.

(8) Where -

(a) any provision of this Act is expressly made to depend in any particular upon a determination, opinion or judgments of the Commissioner; and
(b) any assessment is affected in any particular by that determination, opinion or judgment,

then if, after the making of the assessment it appears to the Commissioner that the determination, opinion or judgment was erroneous, he may correct it and amend the assessment accordingly in the same circumstances as he could under this section amend any assessment by reason of a mistake of fact.

(9) Notwithstanding anything contained in this section, when the assessment of the taxable income of any year includes an estimated amount of income derived by a business in that year from an operation or series of operations the profit or loss on which was not ascertainable at the end of that year owing to the fact that the operation or series of operations extended over more than one or parts of more than one year, the Commissioner may at any time within three years after ascertaining the total profit or loss actually derived or arising from the operation or series of operations, amend the assessment so as to ensure its completeness and accuracy on the basis of the profit or loss so ascertained.

(10) Nothing in this section prevents the amendment, at any time, of an assessment for the purpose of giving effect to the provisions of section 39(3) or section 48(5).

(11) Nothing in this section prevents the amendment of an assessment for the purpose of giving effect to section 2 (6) if the amendment is made within three years after the end of the tax year in which the assessment was made.

(12) Notwithstanding anything in this Act, the Commissioner may amend an assessment for the purpose of giving effect to section 66 if the

> amendment is made within six years after the end of the tax year in which the assessment was made.
>
> (13) Except as otherwise provided, every amended assessment shall be an assessment for the purpose of this Act.

[23] From a plain reading of ss 97(1)(2)(a) and (b) supra, it is evident that in cases where the Commissioner is of the opinion that a taxpayer had not made a full and true disclosure of all material facts for the assessment in respect of any assessment year and had thus avoided payment of tax fraudulently or evasively, the Commissioner has the power to amend that particular assessment subsequently at any time. In other words, there is no time limit in those cases preventing the Commissioner from reopening and making such amendments to the previous assessments. However, in other cases where such non-disclosure was presumably, not due to fraud or evasion by the taxpayer, the Commissioner has the power to amend that assessment only within six years from the date when the notice of the original assessment was issued. In other words, there is a statutory limitation of six years in such cases preventing the Commissioner from reopening and making such amendments beyond that limitation period.

[24] On the other hand, s 97(3) stipulates that in cases where if a taxpayer had made a full and true disclosure to the Commissioner of all material facts necessary for the assessment, and if an assessment had already been made after that disclosure, then no amendment of the assessment increasing the liability of the taxpayer shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the end of the tax year in which the assessment was made.

[25] Now, coming back to the case on hand, in relation to the amended assessments for the relevant years, the Commissioner claims that he was of the opinion that the appellant had not made a full and true disclosure of all material facts necessary for that assessment and had thus avoided tax payment; he has therefore, reopened and amended that assessment. A case of such non-disclosure obviously, falls under s 97(1)(2)(b) supra. Hence, the Commissioner in such cases has the power to reopen and amend that assessment within six years from the date when the notice of the original assessment was issued.

[26] On the other hand, s 97(3) supra obviously refers to cases of disclosure, where the taxpayer had made a full and true disclosure to the Commissioner of all material facts necessary for the assessment. In such cases, the Commissioner has no power in law to reopen and amend that assessment after the expiration three years subject to the exceptions stated supra. Hence, it follows that if and only if the appellant had failed to make a full and true disclosure, the Commissioner is entitled to amend the previous tax assessment on 24 July 2008, since that date falls well within the said six-year limitation period.

[27] Now, the crucial question arises as to whether the appellant had made a full and true disclosure to the Commissioner as required under s 97(3) above, in order to prevent the Commissioner from making amendment after the expiration three years. According to the Commissioner, the tax return and attached documents did not disclose sufficient information to allow a determination by him on the issue of allowable deduction based on depreciation.

[28] It is pertinent to note that s 97(3) of the Act is identical to a corresponding former provision in the Australian Income Tax

Assessment Act 1936, which has been considered by Australian courts on many occasions. While not binding our courts in Seychelles, such cases however, provide significant guidance in interpreting our tax laws.

[29] In the case of *Austin Distributors v FC of T* (1964) 13 ATD 429 the Australian Court has in fact, propounded a test for full and true disclosure in cases of this nature. This runs thus:

> If advice were to have been sought by the taxpayer whether or not the sum in question was … taxable … would the person from whom advice was sought have required more information than this return disclosed to the Commissioner?

[30] In my considered view, any material fact or information that affects or likely to affect the tax liability, may be revealed directly and openly by the taxpayer to the Commissioner by making a full and true disclosure of them explicitly - in unambiguous terms - in his annual returns. This, I would call a "voluntary disclosure". On the contrary, when there is no such "voluntary disclosure" made, either through inadvertence or unintentional omission on the part of the taxpayer or an ambiguity or lack of information exists in the annual returns, then the Commissioner is under an obligation first to request the taxpayer to furnish those facts and information, which he deems necessary for the purpose of making his assessments or adjustments. If the taxpayer is not cooperative, he may obtain them through investigation carried out under the provisions of the Act. This, I would call a "constructive disclosure".

[31] Obviously, in the instant case, after receiving the annual returns from the appellant, the Commissioner did not require more information than the appellant's return disclosed to him. Presumably,

he was satisfied and accepted the information sufficient as disclosed in the returns. Therefore, he proceeded to issue the Notice of Nil Tax Liability Assessment to the appellant. Even if one assumes for a moment that if advice had been sought by the taxpayer from the Commissioner himself, whether or not the depreciation he claimed in the annual return constitutes an allowable deductions, most probably he would not have sought and in fact, he did not seek more information from the appellant than the appellant's return disclosed to him. In the circumstances, I find that the appellant had made a full and true disclosure to the Commissioner as required under s 97(3) above. This certainly, prevents the Commissioner from making amended assessments after the expiration three years from the end of the relevant tax years namely, 2000, 2001, 2002, 2003, 2004 and 2005. Accordingly, I allow the appellant's objections in this respect based on ground no 1 above and uphold the contention of the appellant that in the instant case the amendment of assessment made after three years, that was in 2008 by the respondent, for the tax years 2001, 2002, 2003, 2004 and 2005 are time-barred and hence not tenable in law save 2006. Besides, I hold that issuing of a Nil Tax Liability Assessment constitutes an assessment pursuant to s 93 of the Act for the simple reason that in law, "assessment" means "the ascertainment of the amount of taxable income if any, and of tax payable thereon" vide s 2 of the Act. In a particular case, if the amount of taxable income is ascertained to be nil or zero and consequently, the tax payable thereon would also be nil or zero. This does not mean there was no assessment. What constitutes "assessment" for all legal intents and purposes is the act or process of ascertainment, not the quantum of the amount ascertained, which could range from zero to any other positive integer that is being

ascertained. With due respect, I beg to differ with the respondent's interpretation in this respect.

[32] Now, I will move on to ground no 2 pertaining to the application of s 50(1) of the Act (which is about the "Acquisition of depreciated property"). It is evident from s 40 of the Act, that in calculating the taxable income of a business, the total assessable income derived by the business during the tax year shall be taken as a base, and from it there shall be deducted all allowable deductions of the business and such other sums as may be prescribed.

[33] In passing, I should mention that in interpreting the provision of law under s 50, both parties bring in the "marginal note" (Acquisition of depreciated property) as an aid to interpret it. As a word of caution it is not permitted and does not accord with the principles of statutory interpretation. In fact, the marginal notes often found printed at the side of sections in an Act, which purport to summarize the effect of the sections, have sometimes been used as an aid. However, the weight of the authorities show that they are not part of the statute and so should not be considered for they are not inserted by the legislators nor under the authority of Legislature but by irresponsible persons vide *In re Woking Urban District Council (Basingstoke Canal) Act 1911* [1914] 1 Ch 300 per Phillimore LJ at p 322.

[34] In fact, s 50(1) states that if the taxpayer has acquired any property in respect of which depreciation had already been allowed or is allowable under this Act or the previous Act, he shall not be entitled to any "greater deduction for depreciation than that which would have been allowed to the person from whom the property was acquired if that person had retained it".

[35] Obviously, this section does not deny the taxpayer his depreciation claims altogether on the depreciated properties he acquired from anyone, but it only restricts the quantum of deduction so that such deduction does not exceed what had been allowed before to the previous owner or would have been allowable to the person from whom the property was acquired.

[36] In the instant case, in the absence of any evidence before the Commissioner - especially when he was in doubt as to whether the previous owner had claimed depreciation on the property or not, and more so without ascertaining whether depreciation was in fact, allowed before or allowable for the benefit of the previous owner - in my considered view, it is not lawful for the Commissioner to deny the appellant's claim for depreciation under s 50(1) of the Act based on guesswork or speculation.

[37] The appellant has claimed depreciation on his property at the rate specified under paragraph 9 of the Third Schedule, which reads thus:

> In relation to all building, plant, and articles owned by a business, other than a hotel or building referred to in paragraph 5 and 6, acquired or installed ready for use or the construction of which commenced on or after January 1, 1995 the following rates of depreciation shall apply.

[38] Obviously, it is evident from the above paragraph 9 of the Third Schedule depreciation at rates specified thereunder, shall apply to any building that had been acquired by the taxpayer after 1 January 1995. It is interesting to note that no distinction is made herein between the properties which were previously subjected to depreciation deductions by the previous owners and the ones which

were not. Hence, in my considered view, it is lawful for the appellant or any other taxpayer for that matter, to claim depreciation, if he had acquired that immovable property after 1 January 1995 as part of his initial investment cost on capital assets. Therefore, I hold that the appellant is entitled to claim depreciation on the building on a cost basis as he did in his annual returns for the relevant years.

[39] I will now move on to ground no 3, which relates to the payment of tax for late lodgments and penalties. The appellant does not dispute that the respondent's power and rights to impose penalties under the Act for late lodgments or other lawful reasons. However, the appellant objects to a taxpayer being penalized after being misled by actions of the Commissioner.

[40] On a careful examination of the records, it is evident that the appellant has lodged the annual returns late for the tax years 2002 and 2003, which were in fact, lodged after a delay of 295 days and 112 days from their respective due dates. Therefore, the respondent applied both ss 143(1) and 143(2) of the Act to late lodgments of annual returns and imposed the LLP accordingly. Hence, the decision of the Commissioner cannot be faulted for imposing the Late Lodgment Penalties (LLP) totaling R 15,285.000 on the appellant. Therefore, I see no merit in the appellant's objection on ground 3 above, which objection is liable to be dismissed.

[41] Obviously, the determination on all three grounds have substantially and effectively, disposed of this appeal. In summing up, for the reasons given hereinbefore, I make the following declarations and orders:

1) the amendments of assessment made after three years, that was in 2008 by the Commissioner, for the tax years 2001,

2002, 2003, 2004 and 2005 are time-barred. They are not tenable in law. Accordingly, all those amendments of assessment are hereby set aside. For the avoidance of doubt, I hold that the Nil Tax Liability Assessment notices issued by the Commissioner for the said tax years constitute valid assessments, which are final and still binding the parties;

2) the deduction claims made by the appellant in its annual returns for the tax years 2000 to 2006 for depreciation on the building are allowable deductions. The Commissioner's orders to the contrary disallowing those claims are hereby set aside; and

3) the Late Lodgment Penalties (LLP) imposed by the Commissioner on the appellant, in the total sum of R 15,285.000 for the tax years 2002 and 2003 are valid in law. The appellant is liable to pay the said sum to the respondent.

[42] In view of all the above, the appeal is therefore partly allowed and I make no orders as to costs.

Brioche v Attorney-General

Egonda-Ntende CJ, De Silva J

22 October 2013 CP 6/2013

Plea bargain – Nolle prosequi – Right to equal protection of law

The eight petitioners including the skipper of a fishing vessel "Charitha" were charged with the offences of trafficking in a controlled drug, and possessing firearms and turtle meat. The petitioners argued that the seventh and the eighth petitioners were not on board at all material times. Further their constitutional right to equal protection of the law was violated when the Attorney-General entered a *nolle prosequi* in favour of the skipper.

JUDGMENT Petition dismissed.

HELD

1 A court cannot compel the Attorney-General to initiate, continue or drop charges in criminal proceedings.

2 Recourse to the Constitutional Court should not be used to deter the progress of a criminal trial, with matters that arise time and again in the conduct of criminal proceedings, under the guise of "enforcement of constitutional rights".

3 The Constitutional Court does not have the jurisdiction to review the merits of the decisions of the Attorney-General.

4 The mere fact of issuing a *nolle prosequi* and proposing to call the exempted person as a state witness is not enough to establish discrimination.

5 An erroneous decision by the State does not amount to intentional and purposeful hostile discrimination by the State.

6 The Attorney-General's decision to enter a *nolle prosequi* is amenable to judicial relief only in very exceptional circumstances.

Legislation
Constitution arts 19(1), 46, 74 (a)–(c), 27(1), 76 (4) (10), 125(c),129, 130,
Code of Criminal Procedure ss 60, 61,61A
Constitutional Court (Application, Contravention, Enforcement or Interpretation) Rules r 9
Misuse of Drugs Act ss 17, 18

Cases
R v Marengo (2004) SLR 116
R v Murangira (1993) SLR 90
R v Priyashantha Hettiarachi CrimS 5/2012
R v Nabi Bux CrimS 5/2010
R v Chabir CrimS 6/2010

Foreign cases
Edath-Tally v Glover [1994] MR 200
Gouriet v Union of Post Office Workers [1978] AC 435
Lagesse v Director of Public Prosecutions [1990] MR 194
Marshall v The Director of Public Prosecutions (Jamaica) [2007] UKPC 4
Matalulu v DPP [2003] 4 LRC 712
Maxwell v R [1996] 1 LRC 744
Mohit v The Director of Public Prosecutions of Mauritius [2006] UKPC 20
R v Comptroller- General of Patents [1899] 1 QB 909
R v Panel on Take-overs and Mergers, Ex parte Datafin PLC [1987] QB 815
S v Kurotwi [2011] ZWHHC 56
Sharma v Brown –Antoine [2006] UKPC 57; [2007] 1 WLR 780

Siddappa v The State of Mysore AIR 1967 Kan 67; AIR 1967 Mys 67; (1966) 1 Mys LJ
Snowden v Hughes 321 US 1 (1944)
The State v Ilori SC 42/1982

Foreign legislation
Constitution of Mauritius ss 72, 119
Nigerian Constitution 1961/1963
1979 Nigerian Constitution art 191(3)

Counsel J Camille for first petitioner
A Amesbury for second, third, fifth and sixth petitioners
K Domingue for fourth petitioner
A Juliette for seventh petitioner
N Gabriel for eighth petitioner
R Govinden, Attorney-General, and Robert for respondent

EGONDA-NTENDA CJ

[1] I have had the advantage of reading in draft the ruling of my brother, De Silva J, in this matter. That ruling sets out fully the facts of the case. I agree with him this petition must fail for the reasons that he has elaborated in his ruling. However there are a few remarks that I must make in my own words in addition.

[2] The petitioners were charged jointly with one Michael Joseph Hoareau in Criminal Case No 11 of 2013 before the Supreme Court with various offences including trafficking in a controlled drug; unlawful possession of firearms and ammunition without a licence; possession of turtle meat; conspiracy to commit the offence of drug trafficking in a controlled drug; aiding and abetting the commission of the offence of unlawful possession of firearms and ammunition and several other offences. The petitioners contend that

some time prior to 24 July 2013 the first respondent, acting pursuant to art 76 of the Constitution and s 61A of the Penal Code Act, entered into a plea bargain agreement with the Mr Hoareau. Following that agreement the first respondent entered a nolle prosequi in favour of Mr Hoareau on all charges, leaving the petitioners as the only accused persons.

[3] The petitioners contend that the first respondent has contravened their right to a fair trial/ hearing and right to equal protection of the law when he exercised his powers under art 76 of the Constitution and in pursuance of s 61 of the Penal Code Act entered into a plea bargain agreement with the one Michael Joseph Hoareau to give evidence against the respondents in Criminal Case No 11 of 2013 leading to the withdrawal of charges against Michael Joseph Hoareau. In taking the decision that the first respondent took it is alleged that he failed to have 'regard to public interests, the interests of justice and the need to prevent abuse of the legal process.' It is contended that the nolle prosecui is the prize to Mr Hoareau for agreeing to testify against the petitioners and is an abuse of the legal process.

[4] The petitioners, pursuant to art 46(1) of the Constitution, are seeking a multiplicity of relief in this petition. Firstly a declaration that the first respondent has contravened their right to a fair trial/hearing and their right to equal protection of the law. Secondly that the petitioners be remanded to bail forthwith and criminal proceedings in CR No 2/2013 be stayed; Thirdly that this Court issue a writ of certiorari quashing the first respondent's decision to enter nolle prosequi in favour of Joseph Hoareau, or in the alternative to issue a writ of mandamus compelling the first respondent to enter a nolle prosequi against all petitioners and lastly award any damages

to compensate the petitioners for any damages they may have suffered.

[5] This petition is supported by an affidavit sworn jointly by the petitioners.

[6] The respondents have filed a preliminary objection to these proceedings contending that the petition is frivolous and vexatious in light of the provisions arts 76(4) and 76(10) of the Constitution which vest the first respondent with the power he exercised which is not subject to the direction and control of any other person or authority. The respondents reserved their defence on the merits. This ruling is on the preliminary point of law raised.

[7] What the petition in this case seeks to do in the words of Mrs Amesbury is to challenge the exercise of discretion by the first respondent whether it has been a valid exercise of discretion. The respondents in their preliminary objection contend that the petitioners or any other persons, are precluded from doing so in light of the art 76(4) and (10) of the Constitution. I shall set out art 76(4) and (10).

> Article 76(4)
>
> The Attorney-General shall be the principal legal adviser to the Government and, subject to clause (11), shall have power, any case in which the Attorney-General considers it desirable so to do-
>
> (c) to discontinue any stage before judgment is delivered at any criminal proceedings instituted or undertaken under subclause (a) or by any other person or authority.

> Article 76(10)
>
> 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 other person or authority.

[8] It is not contended for the petitioners that s 61A of the Criminal Procedure Code is unconstitutional in anyway. What is sought to be challenged is that the Attorney- General in exercise of powers he can validly exercise both under the Constitution and the law the Attorney-General has not correctly exercised the same. And in doing so has contravened the petitioners' rights to a fair trial/hearing and equal protection of the law.

[9] In providing under art 76(10) of the Constitution that in exercising the power vested in the Attorney-General in art 76(4) the Attorney-General is not subject to the direction or control of any person or authority does not, in my view, imply that the Attorney-General's exercise of power cannot be subject to challenge in the Court. It goes to the independence of the Attorney-General in exercising that power. He is independent in exercising the power reposed in him by art 76(4) of the Constitution. He should not take any instructions in this matter from any person or authority, including the Executive, which is the organ of state within which his office falls. Clause (10) should not be read to mean that the exercise of the power can not be subject to litigation or be questioned in a court of law.

[10] This view is consistent with the holding of the Privy Council in the case of of *Mohit v the Director of Public Prosecutions of Mauritius* [2006] UKPC 20 in which it was concluded that the decisions of the Director of Public Prosecutions may be subject to

judicial review by the courts on the traditional grounds of illegality, impropriety and or irrationality much as the courts will not seek to substitute their own judgment for that of the DPP in matters for which the DPP alone is entrusted with the power to make a decision by the Constitution or a statute.

[11] The Privy Council in the *Mohit* case cited with approval the following remarks of the Supreme Court of Fiji in *Matululu v DPP* [2003] 4 LRC 712 which I believe express the position as it is under the law of Seychelles.

> It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.

[12] The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997

Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1) In excess of the DPP's constitutional or statutory grants of power - such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)).

2) When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion - if the DPP were to act upon a political instruction the decision could be amenable to review.

3) In bad faith, for example, dishonestly. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.

4) In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.

5) Where the DPP has fettered his or her discretion by a rigid policy - eg one that precludes prosecution of a specific class of offences.

[13] There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant

considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.

[14] I reject the contention by the Attorney-General that the decisions made under art 67(4) of the Constitution are not amenable to judicial review. The wording of art 76(10) imports no such meaning, other than, to buttress the independence of the Attorney-General from all manner of influence, in exercising the powers given solely to the Attorney-General under art 76(4) of the Constitution. It would be permissible for a person who claims to have been adversely affected by such a decision to invoke the supervisory jurisdiction of the Supreme Court under art 125(1)(c) of the Constitution for judicial review of such a decision.

[15] The following words expressed in *Mohit v DPP* in relation to the powers of the DPP in Mauritius are equally applicable to the Attorney-General of Seychelles:

> ….the DPP is a public officer. He has powers conferred on him by the Constitution and enjoys no powers derived from the royal prerogative. Like any other public officer he must exercise his powers in accordance with the Constitution and other relevant laws, doing so independently of any other person or authority. Again like any public officer, he must exercise his powers lawfully, properly, and rationally, and an exercise of power that does not meet those criteria is open to challenge and review in the courts. The grounds of challenge certainly include those listed in Matalulu, but need not necessarily be limited

> to those listed. But the establishment in the Constitution of the office of DPP and the assignment to him and him alone of the powers listed in section 72(3) of the Constitution - the wide range of factors relating to available evidence, the public interest and perhaps other matters which he may properly take into account; and, in some cases, the difficulty or undesirability of explaining his decisions - these factors necessarily mean that the threshold of a successful challenge is a high one. It is, however, one thing to conclude that the courts must be very sparing in their grant of relief to those seeking to challenge the DPP's decisions not to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any review at all.

[16] Nevertheless I agree with the Attorney-General that the petition now before this Court is frivolous and vexatious.

Abuse of process and right to a fair trial / hearing

[17] The petitioners contend that from the time of their arrest and detention they exercised their right to remain silent or gave truthful statements that did not implicate the seventh petitioner and the entering of the *nolle prosequi* against the skipper was his prize for co-operating with the respondents, and this is they aver an abuse of the legal process and also contravened their right to a fair trial.

[18] It is not shown exactly how the legal process has been abused on the petition. Nor is it shown how the first respondent's actions have contravened the petitioner's right to a fair trial. It is just regurgitated without providing what constituent element or elements of the right to a fair trial or fair hearing has or have been contravened or is or are likely to be contravened. The petition does not state the

prejudice that the petitioners have been put to by virtue of the *nolle prosequi* entered in favour Mr Hoareau and plea bargain agreement, perhaps other than that Mr Hoareau is now a Crown witness, and will presumably testify in support of the case for the prosecution.

[19] There has been no contravention of the right to a fair trial for the petitioners in the actions of the Attorney- General complained of which cannot be taken care of by the trial Court at the appropriate stage in that trial. If the objection is to Mr Hoareau testifying against the petitioners during the course of the trial the petitioners will have a right to object to his testimony on whatever grounds they may have and can muster at law; and the court will rule on such objections. For as long as the petitioners have not challenged the constitutionality of s 61A of the Criminal Procedure Code I do not see how they can challenge at this stage of the proceedings in Criminal Case No 11 of 2013 the exercise of the power granted to the Attorney General under the Constitution and law of Seychelles. Discretion is left to the Attorney-General to exercise and he alone is obliged to exercise it, not concurrently or under supervision by a court of law.

[20] The petitioners will have a right to appeal the decisions of the trial court if they are not satisfied. The Court cannot compel the Attorney-General to initiate, or continue as the petitioners now demand criminal proceedings against Mr Hoareau. Neither is there a justifiable reason to order the Attorney-General to drop charges against petitioners. The Attorney-General is within his powers to initiate and continue a prosecution against the petitioners to its logical conclusion. The petitioners are entitled to a fair trial before an impartial and independent court established by law.

[21] It is important to point out to the petitioners, if only to avoid multiplicity of proceedings, that the Constitutional Court, is not an

appellate court in respect of decisions of the Supreme Court that aggrieve them. The appellate court is the Court of Appeal. A criminal trial of course involves the observance of the Seychellois Bill of Rights including the right to a fair trial/hearing and the right to equal protection of the law. Recourse to the Constitutional Court should not be used to deter the progress of a criminal trial with matters that arise time and again in the conduct of criminal proceedings under the guise of 'enforcement of constitutional rights.'

[22] In my view what the petitioners are seeking, in substance, in this petition is for this Court to sit on appeal over the decision of the Attorney-General that is complained against rather than challenging its constitutionality or otherwise. The petitioners have no such right available to them under any law. Neither is the Constitutional Court endowed with the authority to sit on appeal or review the merits of the decision of the Attorney-General in this regard. The power to exercise such authority is the sole province of the Attorney-General subject of course to the supervisory jurisdiction of the Supreme Court. That jurisdiction has not been invoked. The petitioners have instead chosen to petition the Constitutional Court to review the merits of the decision of the Attorney-General. That jurisdiction is not available to the Constitutional Court.

[23] From the bar it was made clear that the petitioners before the Supreme Court had raised the issue of abuse of process after the charges were dropped against the Mr Hoareau and the Court pronounced itself on that matter at the stage it was raised. The proper course of conduct is to take up this matter on appeal at the appropriate time rather than regurgitating the same in another parallel forum. Or if the issue was raised prematurely in the trial

court it can be raised again at the appropriate stage of the proceedings or trial.

Equal protection of the law

[24] The petitioners contend that their right to equal protection of the law has been contravened contrary to art 27 of the Constitution. The petitioners 'aver that the charges as laid, are unfair in that they are duplicitous, malicious and inconsistent with other charges laid in other similar cases and in that regard they aver that they have been denied the right to equal protection of the Law.'

[25] Article 27 provides:

> (a) 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 necessary in a democratic society.
>
> (b) 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.

[26] Equal protection is often invoked in respect of a person or groups of people who are denied certain rights and freedoms in preference to other persons on some clear ground as the basis for different treatment. The ordinary grounds of discrimination being race, gender, sex, religion, colour, age, disability, or any other ground. Contravention of art 27 would have to be linked not only to a denial of a right or freedom under the charter to the petitioners which another similarly situated person or persons are allowed to enjoy on account of a ground such as race, gender, sex, religion,

colour, age, political or other opinion or persuasion, language, ethnicity, national or social group or any other recognisable ground.

[27] The petition does not allege any discrimination of the petitioners on any grounds whatsoever other than that 'the charges are duplicitous, malicious and inconsistent with some other charges laid in other similar cases.' In my view no cause of action is established by the petitioners in relation to the claim that art 27 has been contravened or is likely to be contravened. The claim is simply frivolous and vexatious.

Decision

[28] In the result I would uphold the preliminary objection of the Attorney-General. I find that this petition is frivolous and vexatious. I would dismiss it. As my brother De Silva J, agrees, this petition is dismissed accordingly. Each party shall bear its costs.

DE SILVA J

[29] The eight petitioners in this application allege violations of their 'constitutional rights' by the first respondent (who is the Attorney-General of the Republic of Seychelles) and seek redress for such violations in terms of art 130 of the Constitution of the Republic of Seychelles and for relief by way of the supervisory jurisdiction of this Court in terms of art 125(c) of the Constitution of the Republic of Seychelles.

Petitioner's case in brief

[30] The petitioners aver that the first six petitioners along with one Micheal Joseph Hoareau who was the skipper of the fishing vessel "Charitha" (the skipper) were charged before the Magistrate

on 7 January 2013 with the offences of trafficking in a controlled drug, namely cannabis herbal material, trafficking in cannabis resin, possessing firearms and ammunition (two counts) and for possession of turtle meat, by the Republic in case CR No 2/2013.

[31] It is averred in the second paragraph of the petition that on 29 February the charges were amended and the suspects were further remanded at the insistence of the first respondent who is the Attorney-General. The amendment of the charges was made by bringing in two other accused persons ie the seventh and the eight respondents, who, allegedly were not on board of "Charitha" and by adding charges of conspiracy to traffic in a controlled drug, aiding and abetting others to possess firearms without a licence and counselling other persons to commit an offence of possessing turtle meat.

[32] The petitioners submit that the first respondent being the Attorney-General is the person vested with powers under arts 76(4)(a)–(c) of the Constitution of the Republic of Seychelles (the Constitution) to institute and undertake criminal proceedings and to takeover, continue or discontinue such proceedings "at any stage before the judgment is delivered" and the Attorney-General exercising such powers on a date unknown to them entered into a "plea bargaining agreement" pursuant to the constitutional powers and the powers vested in him under s 61A of the Penal Code of Seychelles (the section cited should be corrected as s 61A of the Criminal Procedure Code and not of the Penal Code which hereinafter will be referred to as s 61A of the CPC) with the skipper of the vessel "Charitha" on the understanding that he will give evidence against the eight petitioners, thereby dropping all charges against the skipper.

[33] The petitioners submit therefore:

i) That the first to the sixth petitioners were the fishermen/crew on board "Charitha" who were at all times acting under the exclusive instructions and command of the skipper when "Charitha" left Port Victoria on the 21 November 2012 on a fishing trip and the 7th and 8th petitioners were not on board "Charitha" at all material times.

ii) That the 7th and 8th petitioners were not on board "Charitha" at all material times.

iii) That the first respondent acting under s 61A of the CPC and by virtue of powers vested in him under art 76 of the Constitution entered a *nolle prosequi* in favour of the skipper and by doing so, has failed to have regard to,

a) public interest,

b) interests of justice and

c) the need to prevent the abuse of legal process,

and, thereby contravened the petitioners fundamental right to a fair hearing enshrined in art 19(1) of the Constitution. It is the petitioners' position that the right to a fair hearing postulates a "fair charge or indictment" and the first respondent by his failure to indict the skipper, by entering a *nolle prosequi* in his favor and making him a state witness, has violated the petitioners' Constitutional right for a fair hearing.

The charges laid are unfair in that they are duplicitous, malicious and inconsistent with the other charges laid in similar cases and thereby the petitioners' right to equal protection of the law enshrined in art 27(1) of the Constitution is violated.

[34] In the prayer of the application to this court [ie prayers (i) and (iii)] the petitioners pray that this Court interalia make the following orders:

> Prayer (i)
>
> Declare that the first respondent has contravened the petitioners' right to a fair trial/hearing and their right to equal protection of the law.
>
> Prayer (iii)
>
> To issue a writ of certiorari quashing the first respondent's decision to enter a *nolle prosequi* in favor of the skipper of the vessel 'Charitha' and, in the alternative, to this issue a writ of mandamus compelling the respondent to enter a *nolle prosequi* against all petitioners.

The preliminary objection by the first respondent

[35] The first respondent raised a preliminary objection to the petitioner's application in terms of r 9 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994.

[36] The objection raised by the first respondent is that the petition is frivolous and vexatious and should be dismissed in law in that in pursuance to art 76(4) read with art 76(10) of the Constitution the first respondent (the Attorney-General) has the

power in any case which the first respondent considers it desirable so to do, to discontinue any criminal proceedings at any stage before judgment is delivered and in the exercise of such power the first respondent is not subject to the directions or control of any other person or authority.

[37] Whilst taking up the above preliminary objection, the first respondent reserved his defence on the merits.

The first respondent's arguments and the law

[38] In support of his contention (the first respondent's) that: "where he considers desirable to do so under the Constitution" he has the power to undertake criminal proceedings against any person for any offence alleged to have been committed by said person and to discontinue the same before the judgment is delivered, to issue a *nolle prosequi* in terms of arts 76(4)(a) and (c) read with s 61(1) of the CPC and in doing so the first respondent is not subject to the direction or control of any person or authority in terms of art 76(10) of the Constitution; the first respondent relied on the Privy Council judgment in *Mohit v The Director of Public Prosecutions of Mauritius* [2006] UKPC 20 [*Mohit's case*], the judgment of the Supreme Court of Nigeria in *The State v Ilori* SC 42/1982 [*Ilori's case*] and the judgment in *S v Kurotwi* [2011] ZWHHC 56. I do not wish to refer to the *Kurotwi* judgment as it has no significance to the matter under discussion.

Nolle prosequi

[39] In terms of art 76(4) of the Constitution, the Attorney-General has power to institute, undertake and discontinue legal proceedings. I shall refer to that article.

> Article 76(4)
>
> The Attorney-General shall be the principal legal adviser to the Government and, subject to clause (11), shall have powers, in any case in which the Attorney-General considers it desirable so to do.
>
> (a) to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person; to take over
>
> (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
>
> (c) to discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken under sub-clause (a) or by any other person or authority.

[40] Article 76 cl (11) provides that an Act may make provision for any person or authority other than the Attorney-General to institute proceedings before a military court or tribunal and further provides that the Attorney-General, unless otherwise provided, shall not exercise his powers under art 76(4) of the Constitution in relation to such proceedings.

> Article 76(6)
>
> Subject to clause (7), the power conferred on the Attorney-General by clause (4) (b) to take over any proceedings or by clause (4) (c) to discontinue any

> proceedings shall be vested in the Attorney-General to the exclusion of any other person or authority.
>
> Article 76(10)
>
> 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.

[41] The only limitation, as seen, under the constitutional provisions to the Attorney-General's powers under the art 76(4) is the limitation under art 76(11) of the Constitution which provides that unless an Act otherwise provides in regard to the proceedings instituted by a person or authority other than the Attorney-General before a military court or tribunal established for the trial of military offences by persons subjected to military law, the Attorney-General's powers under art 76(4) are not exercisable.

> Section 60 of the Criminal Procedure Code
>
> The Attorney-General is vested with the right of prosecuting all crimes and offences of which the courts of Seychelles have jurisdiction.
>
> Section 61(1) of the Criminal Procedure Code
>
> In any criminal case at any stage thereof before verdict or judgment, as the case may be, the Attorney-General may enter a nolle prosequi, either by stating in court or informing the court in writing that the Republic intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered …, but such discharge of an

> accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.
>
> Section 61A of the Criminal Procedure Code
>
> The Attorney-General may, at any time with the view of obtaining the evidence of any person believed to have directly or indirectly concerned in or privy to an offence, notify an offer to the effect that the person:
>
> (a) Would be tried for any other offence of which the person appears to have been guilty; or
>
> (b) Would not be tried in connection with the same matter,
>
> on condition of the person making a full and true disclosure of the whole of the circumstances within the person's knowledge relative to such offence and to every other person concerned whether as principal or abettor in the commission of the offence.

[42] The petitioner's application for the issuance of writs in the nature of certiorari and mandamus leads to a discussion of the issue whether the taking over of the proceedings and issuing a *nolle prosequi* by the Attorney-General as laid down in art 76(4)(b) of the Constitution read with s 61(1) CPC excludes the powers of court to intervene and review the Attorney-General's action by way of judicial review.

[43] The offences complained of being indictable offences are ones in which only the Attorney-General has the power to indict and since the petitioners have no complaint about the Attorney-General's 'right' to indict the petitioners on the charges levelled, save that the

charges are unfair as alleged, in my view, this aspect needs no further consideration. The allegation of 'unfairness of the charges' will be dealt with subsequently.

[44] Hence, in my view what should be considered here is whether the courts can intervene by way of administrative review where the Attorney-General has discontinued proceedings against the skipper by issuing a *nolle prosequi.*

[45] In the case of *The State v Ilori*, all seven judges of the Supreme Court of Nigeria basically agreed with the views expressed by His Lordship, Justice Kayode Eso, who delivered the lead judgment on the issue considered, "the vulnerability of nolle prosequi" to judicial review.

[46] In discussing the issue, Justice Eso cited the English Case of *R v Comptroller-General of Patents* [1899] 1 QB 909 pointing out the position in England in the 19th century where it had been held that when the Attorney-General of England exercised his functions on behalf of the Crown, the Queen's Bench Division or any other court was not empowered to question the issuance of *nolle prosequi.*

[47] With regard to the Nigerian scenario, Justice Eso makes a comparison between the English Common Law and the 1961/1963 Nigerian Constitutions on the one hand and the 1979 Nigerian Constitution on the other. Justice Eso, discussing s 191(3) of the 1979 Nigerian Constitution, stated that the requirement in this subsection that "the Attorney-General in his exercise of nolle prosequi shall have regard to the public interest, the interests of justice and the need to prevent abuse of legal process" is merely declaratory of what the Attorney-General should take into consideration in the exercise of his powers and found no basis for

challenge by a person adversely affected by it. In his judgment, Justice Eso further submitted that the powers of the English Attorney-General and the powers of the Attorney-General/DPP under the pre-1979 constitutions in Nigeria were the same in that they were not subject to review and although the pre-1979 constitutions in Nigeria (1960 and 1963 Constitutions) did not have a provision such as in art 191(3) of the 1979 constitution, such powers were not exercised by the Attorney-General arbitrarily or by a rule of thumb. Justice Eso expressed the view that as the Chief Law Officer of the State, the Nigerian Attorney-General has always exercised this power while having regard to public interest, interests of justice and the need to prevent abuse of legal process.

[48] Justice Eso is critical of the judgment of Kazeem JCA the Court of Appeal who heard the first appeal in *Ilori's case* and concluded in the first appeal that:

> Until the appellant has been able to establish in the proceedings here that they acted maliciously or they were motivated by ill-will against him or that they did not act in the interest of justice, the appellant cannot ask the court to go behind the certificate of discontinuance filed by the Attorney General under section 191(3) of the 1979 constitution to discontinue the case.

[49] Justice Eso critically questions what happens if the view expressed by Kazeem JCA is entertained. He submits that then the courts will have to stop the prosecution and commence an inquiry into the complaint of the accused person. He further submits that art 191(3) does not delimit the powers of the Attorney-General under

the 1979 Constitution and the Attorney-General has as much power as that of the English Attorney-General.

[50] Although all seven Judges in *Ilori's case* which was decided in 1982 were more or less unanimous on the issue that the Attorney-General's power to enter a *nolle prosequi* was not subject to review, the judicial approaches in other jurisdictions and of the Privy Council have not contributed towards this view but seemingly agreed with the view expressed by Kazeem JCA in the first appeal before the Court of Appeal of Nigeria whose decision was overruled by Justice Eso of the Nigerian Supreme Court in *Ilori*'s *case*.

[51] Next I wish to refer to the advice of the Privy Council in *Mohit v The Director of Public Prosecutions of Mauritius* [2006] UKPC 20 delivered by Lord Bingham of Cornhill.

[52] In this case the appellant appealed against the judgment of the Supreme Court of Mauritius that refused judicial review of a decision of the DPP of Mauritius where he entered *a nolle prosequi* in favour of one Mr Berenger (who was holding very high political office) ending the private prosecution brought against Mr Berenger by the appellant. The Supreme Court held in favour of the DPP. The Privy Council allowed the appeal setting aside the decision of the Supreme Court of Mauritius.

[53] Lord Bingham cited s 72 of the 1968 Constitution of Mauritius where the DPP's power to institute, undertake, to take over and continue and to discontinue such criminal proceeding instituted or undertaken by himself or any other person or authority is set out. Basically, these powers are the same as those of the Attorney-General of Seychelles as set out in art 76(4)(a)–(c) of the Constitution. Furthermore the power of the Attorney-General of

Seychelles to take over any proceeding and discontinue any proceeding to the exclusion of any other person or authority is equally seen with the DPP of Mauritius in terms of art 72(5) of the 1968 Constitution of Mauritius. Similarly both the Seychelles Attorney-General (art 76(10) cited above) and the DPP of Mauritius (art 72(6) of the 1968 Constitution of Mauritius) have constitutional protection for their actions as they are not subject to the direction or control of any other person or authority. In my view this 'constitutional protection' is the one of the main matters which is subject to challenge in this application before us.

[54] Their Lordships referred to art 119 of the 1968 Mauritian Constitution which provides that:

> no provision of this constitution that any person or authority shall not be subjected to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question, whether that person or authority performed those functions in accordance with this Constitution or any other law or should not perform these functions.

[55] It is pertinent to point out at this stage that the Attorney-General in his submissions before us drew the attention of the Court to the above provision in the 1968 Mauritian Constitution and submitted that the Constitution of the Republic of Seychelles has no similar provision. However, as seen by the decision in *Matalulu's case* (below) the absence of such provision is not a bar for judicial review.

[56] His Lordship in the course of his opinion refers to the warnings echoed in earlier decisions of the Supreme Court of Mauritius such as in *Edath-Tally v Glover* [1994] MR 200 against over ready identification of the Mauritian DPP with the English Attorney-General and submitted that the Mauritian Supreme Court in *Mohit*, ignoring such warnings, based its decision on *Lagesse v Director of Public Prosecutions* [1990] MR 194 and *Gouriet v Union of Post Office Workers* [1978] AC 435 and the observations of the High Court of Australia in *Maxwell v R* [1996] 1 LRC (Cons) 744 and held that the Attorney-General's power to prosecute, not to prosecute or issue a *nolle prosequi* is not amenable to review.

[57] Their Lordships in the course of their opinion discussed inter alia the prerogative power of the English Attorney-General to enter a *nolle prosequi*, the reviewability of the decisions of the English DPP that existed for some period of time as his office was a statutory one (unlike that of the English Attorney-General which is an office at Common Law) and the change in the legal approach as the English DPP functioned under the Attorney-General, the observations of Lloyd LJ in *R v Panel on Take-overs and Mergers, Ex parte Datafin PLC* [1987] QB 815 at 845 that "If the source of power is statute, or subordinate legislation under a statute, clearly the body in question will be subject to judicial review" and proceeded to agree with the Fijian Supreme Court decision in the Fijian case of *Matalulu v DPP* [2003] 4 LRC 712 [*Matalulu's case*], quoting the following paragraph there from (at pages 735–736):

> It is not necessary for present purposes to explore exhaustively the circumstances in which the occasion for judicial review of a prosecutorial decision may

arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible to judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.

The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written Constitution they are not to be treated as a modern formulation of ancient prerogative authority. *They must be exercised within constitutional limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:*

1) *In excess of the DPP's constitutional or statutory grants of power* –such as an attempt to institute proceedings in a court established by a disciplinary law [see s 96(4) (a)].

2) When, *contrary to the provisions of the constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion*-if the DPP were to act upon a political instruction the decision could be amenable to review.

3) *In bad faith*, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.

4) *In abuse of the process of the court in which it was instituted*, although the proper forum for review of that action would ordinarily be the court involved.

5) *Where the DPP has fettered his or her discretion by a rigid policy*-e.g. one that precludes prosecution of a specific class of offences.

There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But, contentions that the *power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or*

> *discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural Justice*.
>
> [Emphasis added]

The alleged violation of constitutional rights

[58] The petitioners allege that their right to a fair hearing as enshrined in art 19(1) of the Constitution and the right to equal protection of the law as enshrined in art 27(1) of the Constitution have been violated by the decision of the first respondent.

> Article 19(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.
>
> Article 27(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 for a democratic society.

[59] In support of her contention, of the violation of the petitioners' right to fair hearing, counsel for the petitioner relies on the averments in paragraphs 7, 8 and 9 of the petition.

[60] In paragraph 7 the petitioners submit that the right to a fair hearing begins with a fair charge or indictment. No explanation is

given by counsel why the charges against the petitioners are not fair. However, the averments in paragraph 8 of the affidavit shed some light on the petitioners' position why the charges are unfair as they submit. The petitioners rely on the argument that the first respondent, by entering a *nolle prosequi* in favour of the skipper and by leaving the petitioners as the accused, in the purported exercise of the powers under art 76 of the Constitution, has failed to have regard to 'the public interest, the interests of justice and the need to prevent abuse of legal process'.

[61] The petitioners aver in paragraph 9 of the petition that from the time of arrest and detention they exercised their right to silence or gave truthful statements but did not implicate the seventh petitioner. For 'cooperating' with the respondents, presumably for agreeing to stand as state witness, the petitioners submit, the 'prize' of the skipper was a *nolle prosequi* in his favour, entered by the first respondent.

Petitioners reply to the preliminary objection

[62] Counsel for the petitioners responding to the first respondent's objection to the petition submits that:

a) It is not open for the first respondent to say in his objections that the petitioners' application is frivolous or vexatious in terms of art 46 (7) and only court has the power to so conclude.
b) The petitioners' complaint is whether 'the exercise of power by the first respondent under consideration is a valid exercise of power' and against the manner it was exercised.

c) That no time was given before the plea bargaining and it was informed to them only five minutes before the trial.

d) The counsel drew the attention of court to the following excerpt from judgment in *Mohit's case* (above):

> where proceedings initiated by the DPP are before the courts, they must ensure that the proceedings are fair and that a defendant enjoys the protection of the law even if that involves interference with the DPP's discretion as a prosecutor. But the Board is not persuaded by the court's reasons for holding that in DPP's decision to file a *nolle prosequi* or not to prosecute are not amenable to judicial review.
>
> [At page 8 of the internet version of the judgment.]

[63] In the submissions made before the Court counsel for the petitioners submitted that the averments in the petition are relied upon in addition to the submissions made. Hence, I refer to the following averments in the petition as those, in my view, counsel for the petitioners wished to use as material to support the alleged constitutional violation:

> That we object to the "deal" made by the Attorney-General, the first respondent with the skipper of the Vessel Charita in which all charges against him were dropped in return for him to testify against us. Because the first constitutional power to prosecute or not to prosecute has to be exercised in the public interest, the interest of justice and to prevent abuse of the legal process and to reward the skipper by entering a *nolle prosequi* against him because he

'cooperated with the NDEA is against public interest as Seychelles is a maritime nation, against the interest of justice and is an abuse of power. We are being penalized for not co-operating and exercising our right to remain silent.

i) That save for the 7th and 8th deponents who were not present the rest of us were at all material times under the control and command of the captain and to refuse to obey his orders would have brought us foul of the maritime laws and would have us accused of.

ii) In the respondent's affidavit, Michael Hoareau, the Skipper/Captain told agent Jimmy Louise that "He collected the gunny bags containing the herbal material from Providence Island."

iii) We are advised and believe that in the case of *R v Marengo* (2004) SLR 116 the 8 accused were charged with possession of 1141 Kgs of turtle meat and they were released on bail. We have been denied bail.

iv) We are advised and believed that in the case of *R v Murangira* (1993) SLR 90, the ship Malo had the following arms and ammunition: "arms of war, namely, artillery, bombs, grenades, machine guns and small bore breech loading weapons, bullets, cartridges and shells and they were released on bail and only the Captain, Sebastien Murangira, was convicted. The other two were acquitted. The two who were acquitted were the

first and second officers of the vessel. In our case, there was one AK47 and 30 rounds of ammunition and we were simply fisherman and yet, we are in custody.

v) We are advised and believed that in the case of *R v Priyashantha Hettiarachi* of the fishing vessel Lucky Too, Criminal Side No. 5 of 2012 there were five crew members on the ship. Only the master was charged for illegal fishing and the other five crew members were not charged.

vi) We are advised and believed that in the case of *R v Nabi Bux* of fishing vessel Al-Fahad, another case of illegal fishing, only the captain Nabi Bux was charged although he had 27 other crew members and once again, only the Captain was charged with illegal fishing.

vii) We are advised and believed that in yet another case of illegal fishing (The Republic v/s Chabir of fishing vessel Al-Naveed), there were 22 other crew members and once again, only the captain was charged with illegal fishing.

viii) We aver that base on the above we have denied our right for equal treatment before the law because a different standard is being used. In the other cases, the fishermen were not detained for as long as we have been, or at all.

ix) We are advised and verily believe that based on the circumstances of this case that the 1st Respondent failed to have regard to the public interest, the interests of justice and the need to prevent abuse of the legal process and this act, contravened our fundamental right to a fair hearing.

The petitioners' case discussed based on applicable judicial decisions

Alleged violation of art 19(1) and 27(1) of the Constitution

[64] The sum total of the submissions made on behalf of the petitioners, as it appears to me, is that the first respondent (the Attorney-General) has violated the rights of the petitioners enshrined in arts 19(1) and 27(1) of the Constitution by carrying out his statutory functions:

a) By undertaking and discontinuing the proceedings against the skipper by issuing a *nolle prosequi* in terms of art 76(4) of the Constitution read with s 61(1) of the Criminal Procedure Code.

b) By making a conditional offer, a plea bargaining agreement with the skipper as alleged by the petitioners by paying the price for his cooperation with the prosecution, allegedly the entering of *nolle prosequi*.

c) By laying charges that are unfair in that they are duplicitous, malicious and inconsistent with the other charges laid in similar cases.

[65] In fact the complaint of the petitioner is as to the manner of exercise of such constitutional and statutory power vested in the first petitioner and not against the vesting per se. The complaint is that, as mentioned before, the respondent has failed to have regard to the public interest, the interests of justice and the need to prevent the abuse of legal process. Despite the petitioner setting out as above a few instances where the skipper was charged (in my view not relevant to the issue before us) the petitioner has not made out any case on the alleged of 'unfairness of charges.'

[66] Although the petitioners have used the words "failed to have regard to the public interest, the interests of justice and the need to prevent the abuse of legal process" the petitioners have not clothed these words giving any description how the violation was made and such words, without any factual material, as described by the Chief Justice Stone in the US case of *Snowden v Hughes* (below) are mere opprobrious epithets.

[67] I wish to quote the following two paragraphs from the opinion of Chief Justice Stone who delivered his opinion in *Snowden v Hughes* 321 US 1 (1944):

> After setting out these facts the complaint alleges that Horner and respondents Hughes and Lewis, *'willfully, maliciously and arbitrarily' failed and refused to file with the Secretary of State a correct certificate* showing that petitioner was one of the Republican nominees, that they conspired and confederated together for that purpose, and that their action constituted 'an unequal, unjust and oppressive administration' of the laws of Illinois. It alleges that Horner, Hughes and Lewis, acting as state officials

under color of the laws of Illinois, thereby deprived petitioner of the Republican nomination for representative in the General Assembly and of election to that office, to his damage in the amount of $50,000, and by so doing deprived petitioner, in contravention of, 8 U.S.C. 41, 43 and 47(3)8U.S.C.A. §§ 41, 43, 47(3), of rights, privileges and immunities secured to him as a citizen of the United States, and of the equal protection of the laws, both guaranteed to him by the Fourteenth Amendment.

But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another.

The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets 'willful' and 'malicious' applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust, and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequence of the failure to certify, other than that petitioner has been deprived of the nomination and election, and therefore add nothing to the bare fact of an intentional deprivation of petitioner's right to be certified to a nomination to which no other has been certified. Cf. United States v. Illinois Cent. R. Co., 303 U.S. 239, 243, 58 S.Ct. 533,

> 535, 82 L.Ed. 773. So far as appears the Board's failure to certify petitioner was unaffected by and unrelated to the certification of any other nominee. *Such allegations are insufficient under our decisions to raise any issue of equal protection of the laws or to call upon a federal court to try questions of state law in order to discover a purposeful discrimination in the administration of the laws of Illinois which is not alleged.* Indeed on the allegations of the complaint, the one Republican nominee certified by the Board was entitled to be certified as the nominee receiving the highest number of votes, and the Board's failure to certify petitioner, so far as appears, was unaffected by and unrelated to the certification of the other, successful nominee. *While the failure to certify petitioner for one nomination and the certification of another for a different nomination may have involved a violation of state law, we fail to see in this a denial of the equal protection of the laws more than if the Illinois statutes themselves had provided that one candidate should be certified and no other*. [Emphasis added]

[68] The mere act of issuing a *nolle prosequi* and proposing to call the skipper as a state witness is not enough to establish discrimination. To quote again the words of Chief Justice Stone from the above judgment I refer to the following paragraph:

> *The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated*

alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, cf. McFarland v. American Sugar Refining Co., 241 U.S. 79, 86, 87, 36 S.Ct. 498, 501, 60 L.Ed. 899, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, Yick Wo v. Hopkins, 118 U.S. 356, 373, 374, 6 S.Ct. 1064, 1072, 1073, 30 L.Ed. 220. But a discriminatory purpose is not presumed, Tarrance v. State of Florida, 188 U.S. 519, 520, 23 S.Ct. 402, 403, 47 L.Ed. 572; there must be a showing of 'clear and intentional discrimination', Gundling v. City of Chicago, 177 U.S. 183, 186, 20 S.Ct. 633, 635, 44 L.Ed. 725; see Ah Sin v. Wittman, 198 U.S. 500, 507, 508, 25 S.Ct. 756, 758, 759, 49 L.Ed. 1142; Bailey v. State of Alabama, 219 U.S. 219, 231, 31 S.Ct. 145, 147, 55 L.Ed. 191. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. Neal v. Delaware, 103 U.S. 370, 394, 397, 26 L.Ed. 567; Norris v. State of Alabama, 294 U.S. 587, 589, 55 S.Ct. 579, 580, 79 L.Ed. 1074; Pierre v. State of Louisiana, 306 U.S. 354, 357, 59 S.Ct. 536, 538, 83 L.Ed. 757; Smith v. State of Texas, 311 U.S. 128, 130, 131, 61 S.Ct. 164, 165, 85 L.Ed. 84; Hill v. State of Texas, 316 U.S. 400, 404, 62 S.Ct. 1159, 1161, 86

> L.Ed. 1559. *But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race*. State of Virginia v. Rives, 100 U.S. 313, 322, 323, 25 L.Ed. 667; Martin v. State of Texas, 200 U.S. 316, 320, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497; Thomas v. State of Texas, 212 U.S. 278, 282, 29 S.Ct. 393, 394, 53 L.Ed. 512; cf. Williams v. State of Mississippi, 170 U.S. 213, 225, 18 S.Ct. 583, 588, 42 L.Ed. 1012.
>
> [Emphasis added]

[69] Next I wish to refer to the judgment *in Siddappa v The State of* Mysore AIR 1967 Kant 67; AIR 1967 Mys 67; (1966) 1 Mys LJ. Justices Hegde and Bhimiah presided. Hegde J stated in the judgment:

> He urged that the Colleges, which are now affiliated to the Bangalore University, were constituent parts of the Mysore University till about a year back: they had common syllabi; the teaching standards were common; and the examinations held were similar and therefore the Government should not have treated similar things in a dissimilar manner. None of these facts have been set out in the affidavit filed in support of the petition. *It must be remembered that there is a strong presumption that a classification made is a valid classification. The burden of proving that classification is illegal or otherwise violative of Article 14 is heavily on the person who challenges the validity of the classification. When a citizen wants to*

> *challenge the validity of any classification on the ground that it contravenes Article 14, specific, clear and unambiguous allegations must be made in that behalf and it must be shown that the impugned classification is based on discrimination and that such discrimination is not referable to any classfication which is rational and which has nexus with the object intended to be achieved by the said classification.*
>
> … What is of the essence is hostile discrimination - an intentional unequal treatment of persons similarly placed - *We are unable to agree with Mr. S. K. Venkataranga Iyengar, that any and every contravention of a Rule brings the case within Article 14 and the equality clause requires that if one person is wrongly selected, every one else similarly situated is also entitled to be selected. This contention is wholly untenable. In cases of this nature, there is no hostile discrimination. To take an erroneous view of the law does not amount to a hostile discrimination against any one. In such a case there is no question of contravention of Article 14.*

Judicial review

[70] I have set out hereinbefore the applicable position in the Commonwealth jurisdictions based on the five conclusions reached in *Matalulu's case*.

[71] The petitioners have not stated any facts setting forth any situation contemplated in *Matalulu's case* except for setting out three

instances of illegal fishing and one instance of carrying arms and ammunition where the captain of the ship has been charged which matters I have set out under the head 'Petitioners reply to preliminary objection.'

[72] There are no charges of illegal fishing in the background of this application as seen from the matters set out in the petition. Furthermore, the fact that all suspects in a case of possession of turtle meat were released on bail (set out under the same head) has no bearing on this application for constitutional relief.

[73] In *Sharma v Brown-Antoine* [2006] UKPC 57 and [2007] 1 WLR 780, the Privy Council endorsed the *Matalulu* decision once again. This time, however, the application was not in relation to the issue of a *nolle prosequi* but in respect of a decision to indict. The Privy Council, having acknowledged the availability of challenge, refused the application having regard to the vast sphere of prosecutorial discretion available to the Attorney-General and the extreme exceptional situations where it should be granted. It is seen from the judgment that their Lordships are unaware of a single instance that a writ was issued questioning the Attorney-General's right to indict. In *Marshall v The Director of Public Prosecutions (Jamaica)* [2007] UKPC 4 both the *Matalulu* and *Mohit* principles were acknowledged once again.

Presumptions

[74] At this stage I wish to mention that the petitioners have not set out material particulars relating to the charges of trafficking in the sense whether the controlled drug, namely cannabis/cannabis resin on board of "Charitha" was detected at a time when it was arriving from a place outside Seychelles or not. When the detection

was made, whether "Charitha' was arriving from a place outside Seychelles (in the sense outside the waters of Seychelles) will make a difference in the evidentiary position as the presumptions attached changes, depending on whether the applicable section is s 17 or s 18 of the Misuse of Drugs Act (Chapter 133).

[75] Section 17 of the Misuse of Drugs Act (Chapter 133) attaches a presumption, until the contrary is proved, if a controlled drug is found in a vessel or an aircraft arriving from any place outside Seychelles *that the drug has been imported in the vessel or the aircraft with the knowledge of the master or the captain of the vessel or the aircraft*.

[76] Similarly, if a controlled drug is found in a vehicle, vessel or aircraft *other than a vessel or aircraft referred to in s 17 of the Act,* under s 18 of the Act *it shall be presumed that, until the contrary is proved, that the drug is in the possession of the owner of the vehicle, vessel or the aircraft and of the person in charge of the vehicle, vessel or aircraft for the time being*.

[77] The application before this Court does not shed any light on the issue under which section, out of the above mentioned two sections of the Act, the charges have been levelled.

[78] In my view, s 17 of the Act deals with the situation where the vessel or the aircraft arrives from a place outside the territorial waters of Seychelles.

[79] Section 18 clearly attracts the presumption against both the owner of the vehicle, vessel or the aircraft and the person in charge of such vehicle, vessel or aircraft, often being the driver, master/captain or pilot.

[80] In situations where the s 18 presumption applies, in my view, for example, the Attorney-General can exercise his 'prosecutorial discretion' to decide on the evidence before him to prosecute either the owner or the person in charge or both and to launch a prosecution accordingly.

[81] A presumption of fact is a rebuttable conclusion arrived on one thing on the proof of the other. *Black's Law Dictionar* (Abridged Fifth Edition, St Paul, Minn, West Publishing Co, 1983) defines a presumption of fact as "Such are presumptions which do not compel a finding of the presumed fact but which warrant one when the basic fact has been proved."

[82] Therefore, in my view, if the charges are under s 18 of the Misuse of Drugs Act, to call the one with a lesser degree of culpability, out of the skipper and the owner, as a State witness against the other is perfectly in order provided my assumption of facts is correct.

Conclusion

[83] Article 129(7) of the Constitution provides:

> 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 the 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.

[84] I state that the petitioners have failed to set out in their petition sufficient material to maintain violations of arts 19(1) and

27(1) of the Constitution. The mere averment that the first respondent 'has failed to have regard to public interests, the interests of justice and the need to prevent abuse of legal process' which may, in the absence of facts to support a violation, aptly be described as 'opprobrious epithets' in the words of Chief Justice Stone (above), in my view, is in no way sufficient to maintain this application. I also wish to mention that an erroneous decision by a State officer does not amount to an intentional and purposeful hostile discrimination by the State. Hence, in my view the petitioners have failed to establish violations of arts 19(1) and 27(1) of the Constitution by the respondents.

[85] In respect of the second relief sought by the petitioners, I wish to state that the Attorney-General's decision to enter *nolle prosequi* is amenable to judicial review, but, only in very exceptional circumstances as laid down in *Matalulu's case* (and later confirmed in *Mohit's case* and several other cases). In the application before us none of the situations mentioned in those judgments are seen. Moreover, the application is not based on any factual material to support the petitioner's case.

[86] Hence, the petitioner's application for review cannot be maintained.

[87] Therefore, I uphold the preliminary objection raised by the first respondent and reject the petitioners' application for the reasons set out above.

[88] Each party shall bear its own costs.

Intershore Consult v Govinden

Karunakaran J

6 November 2013 CS 127/2010

Judicial review −Magistrate's consent –Mutual Assistance in Criminal Matters Act

The petitioner sought a judicial review of the decision of the Magistrate on disclosure of documents under the Mutual Assistance in Criminal Matters Act. The petitioner contended the decision was irrational and unlawful.

JUDGMENT Petition dismissed.

HELD

1 The power of the Attorney-General may be exercised by the Attorney-General in person or subordinate officers acting with the general or special instructions of the Attorney-General. This delegated power includes the power to carry out all incidental functions such as swearing an affidavit to institute and conduct any proceeding under the Mutual Assistance in Criminal Matters Act.

2 When hearing an appeal, the court is concerned with the merits of the case under appeal. However, when subjecting any administrative decision or act or order to judicial review, the court is concerned only with the legality, rationality and propriety of the decision in question.

3 Where judicial review is sought on the ground of unreasonableness, the court is required to make value judgments about the quality of the decision under review.

4 Fairness or reasonableness cannot be defined, ascertained and brought within the parameters of law; a subjective assessment of the entire facts and circumstances of the case is required and such assessment ought to be made applying the yardstick of human reason and rationality.

Legislation
Constitution arts 76, 125(1)
Mutual Assistance in Criminal Matters Act ss 9(4), 10(2), 32

Cases
Chetty v Tong Civil Appeal 11/93
Cousine Island Company Ltd v Herminie CS 248/2000

Foreign cases
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223
Cumming v Danson [1942] 2 All ER 653
Amin v Entry Clearance Officer, Bombay [1983] 2 All ER 864

Counsel L Pool for the petitioner
S Aglae for the respondent

KARUNAKARAN J

[1] This is a petition for judicial review. The petitioner in this matter seeks a writ of certiorari to quash the decision of the respondent - Senior Magistrate Her Worship Mrs Samia Govinden - dated 25 March 2010, exercising the supervisory jurisdiction of this Court over subordinate courts, tribunals, and adjudicating authority conferred by art 125(1)(c) of the Constitution.

[2] At all material times, the petitioner was and is an offshore company operating in Seychelles. It is licensed by the Seychelles International Business Authority to carry on business as a Corporate

Service Provider. By virtue of its business operations, the petitioner holds confidential information pertaining to its clients. One among the clients is a company by the name "Liaison Marketing Company Limited" (LMCL) which is also registered in Seychelles as an International Business Company.

[3] Be that as it may, on 27 February 2009, the Attorney-General made an ex parte application (hereinafter called the application) to the respondent, by way of a motion supported by an affidavit in terms of s 10(2)(b) of the Mutual Assistance in Criminal Matters Act (the Act) seeking an order for disclosure of certain information and documents from the petitioner pertaining to its client LMCL. The disclosure was sought in relation to a criminal investigation conducted by the Bureau of Combating Organised Crime of Money Laundering and the Crime of Establishment and Support of a Criminal Enterprise and Terrorist Group. The application was made by the Republic of Seychelles through the Attorney-General (the Central Authority under the Act) following a request made by the General Public Prosecution Service of the Slovak Republic, the agency responsible for prosecuting criminal cases in that country. In passing, I should mention here that this agency was simply seeking the assistance of the legal and judicial authorities in the Republic of Seychelles for the purpose of investigating cross-border crimes under the Act.

[4] Consequent upon the said application, in Case No 149/09, the respondent on 9 April 2009, issued a summons to the petitioner to appear through its director or other representative before the Magistrate Court "A" to produce certain documents/give evidence pertaining to certain information held by the petitioner in respect of LMCL. The summons inter alia, reads as follows:

> You are hereby summoned to appear before this Court "A" on 30 April 2009 at 8:30am in the forenoon to produce the following certified documents of the Company (see attached) including any changes in the details specified (a) (b) and (c) (attached) which were registered during the existence of the Company and so on until the matter be concluded.

[5] The disclosure sought were certified documents in the possession information regarding the Company LMCL as to: (a) Persons registered as owners/directors of the Company, (b) registered/permit scope of the business (objects) of the Company and (c) Persons authorized to act (perform legal acts) on behalf of the Company including any changes in the details specified in (a), (b) and (c) above which were registered during the existence of the Company.

[6] The Company was represented in the Magistrates' Court by counsel Mr Boullé and subsequently by counsel Ms Pool. They objected to the application on the following grounds:

i) that the application was unlawfully headed ex parte;

ii) the heading of an application as being ex parte does not give party the right to be heard ex parte;

iii) the Court erroneously heard the application ex parte in violation of the fundamental principle that in all cases the Court must hear both parties unless there is a provision of law, which empowers the Court to hear a matter ex parte. That the application and summons are procedurally and substantively flawed as it has provided

no opportunity for the parties who will be affected by the Court order sought and against whom the evidence will be used to be heard, in violation of the principles of natural justice and the provision of s 9 (4) of the Mutual Assistance in Criminal Matters Act, which implies that notice of proceeding should be served on all parties to allow them to be represented or be present at the hearing; and

iv) on the fact that it is not judicially sound and it is beyond the competence of the Court to act on any matter before it without evidence, of the application. It is to be noted that a submission as is the case with this application which is not even supported by affidavit evidence.

[7] Based on the said grounds, the petitioner's counsel moved the respondent Court to dismiss the application and recall/cancel the summons issued in terms of the application.

[8] On the other side, State Counsel Ms Aglae supported the application before the respondent. In answer to the objection of the petitioner, Mrs Aglae submitted that as per the Court of Appeal judgment dated 11 December 2009 in CA No 6 of 2009, the absence of rules was not an impediment and did not invalidate the application. Hence, she contended that the application was valid in law. The petitioner-company was served with a copy of the application and was given the opportunity to be heard, the matter was not heard in the absence of the petitioner. An answer to the application was filed by the petitioner on 23 January 2010; and lastly that an affidavit had been attached to the application.

[9] The respondent, having heard both sides, overruled the objections of the petitioner to the application and held that the application was properly filed, supported by an affidavit and so valid in law. Hence, the respondent issued the summons ordering the petitioner or its representative "to appear before Court "A" on 30 April 2009 at 8:30 am in the forenoon and produce the certified documents hereinbefore mentioned".

[10] On 30 April 2009, the representative of the petitioner attended the Court. However, at the instance of a request made by the Central Authority, the case was adjourned till 1 June 2009. On the second adjourned date the Court again adjourned the case by telephonic message to 24 September 2009, which date was later confirmed by a notice sent by the Assistant Registrar to the petitioner. On 22 July 2009 the Assistant Registrar sent a notice to confirm the above-mentioned date of 24 September 2009.

[11] As from 24 September 2009 the case proceeded and the parties filed the following pleadings and submission before the Magistrate:

i) The petitioner filed an answer to the application dated 27 January 2010.

ii) The applicant (Central Authority) a Reply to answer to application dated 5 February 2010.

iii) Submission of counsel for petitioner dated 13 February 2010.

[12] On 25 March 2010 the respondent delivered a ruling in favour of the Central Authority, which overruled the objections of the petitioner to the application; granted the application and issued a

summons ordering the petitioner to produce the required documents mentioned hereinbefore.

[13] The petitioner, being dissatisfied with the said ruling (decision) of the respondent - has now come before this Court for a "Judicial Review" seeking a writ of certiorari to quash the said decision of the respondent. According to the petitioner, the said decision is void in essence, on the following grounds.

[14] Irrationality: the decision is irrational as the respondent in her decision has relied and acted upon an affidavit of State Counsel instead of the Attorney-General, who is the designated Central Authority under the Act. Besides, the records of the case before the respondent have been distorted, misinterpreted and partly ignored which renders the decision fatally flawed. The decision is irrational since the respondent as a whole has failed in providing a fair process of adjudication and has not addressed the major issues raised in the answer and the submission of the petitioner. Consequently, the answer and submission remains alive for determination and in terms of which the finding in favour of the applicant (Central Authority) is without proper juridical foundation.

[15] Illegality/Unlawfulness/Breach of the Rules of Natural justice: The said decision is further misconceived and procedurally flawed as the respondent has not complied with the *audi alteram partem* rule. The respondent has evoked local practice and procedures adopted in local case law to justify an ex parte application is a totally flawed process of adjudication on such a fundamental principle as "right to be heard", is guaranteed by the Constitution. In support of its contention that "Practice cannot supersede the mandatory provisions of a statute, the petitioner relied upon the authority in *Chetty v Tong* Civil Appeal 11/93.

[16] Ultra Vires: The respondent has no power to turn an ex parte application into an inter partes proceedings as it is tantamount to substituting itself for the applicant in terms of which the Court was in error to serve an ex parte application in a criminal matter instead of dismissing the application if the Court felt that it could not hear the matter ex parte.

[17] I meticulously perused the records of the proceedings before the respondent (Senior Magistrate) in this matter. I gave careful thought to the arguments advanced by both counsel touching on points of law as well as facts.

[18] For the sake of convenience, I will first proceed to examine the issue of irrationality raised in ground No 1 allegedly emanating from the affidavit of the State Counsel, which the respondent relied and acted upon to base her decision in this matter.

[19] Needless to say, an affidavit is a declaration on oath, reduced to writing, affirmed or sworn to by a deponent, before some person who has authority in law to administer oaths and also attested by the latter. Indeed, an affidavit is nothing but a form of evidence on oath. However, the weight and the credibility of such evidence is questionable or to say the least, whose veracity is untested as the averments made therein were not subjected to cross-examination. Therefore, in any judicial or quasi-judicial process, the decision-maker may rely and act upon any affidavit evidence adduced by a party, although the credibility and the weight that could be attached thereto, fall within the subjective assessment of the decision-maker in respect of each and every averment made in the affidavit. In the instant case, the respondent obviously had no reason to suspect the credibility of the deponent and the veracity of the averments made in the affidavit. Hence, the respondent's decision cannot be faulted for

irrationality as she has rightly and lawfully relied and acted upon the affidavit evidence - like any other reasonable tribunal would do in the circumstances - to base her decision in this matter. Be that as it may, on the issue of swearing an affidavit by State Counsel on behalf of the Attorney-General, (Central Authority), it is pertinent to note that s 32 of the Act reads thus:

> (1) The Central Authority may, either generally or as otherwise provided by the instrument of delegation, delegate to a public officer all or any of its powers under this Act, other than its power of delegation or its powers under s 7.
>
> (2) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Central Authority.

[20] It is thus evident the Act empowers the Attorney-General - the Central Authority - to delegate all the powers (including the power obviously, to swear an affidavit) conferred on him by the Act to State Counsel or any other public officer. Article 76 of our Constitution also states that the power of the Attorney-General may be exercised by the Attorney-General in person or subordinate officers acting with the general or special instructions of the Attorney-General. This delegated power as I see it, includes the power to carry out all functions incidental thereto such as swearing an affidavit etc to institute and conduct any proceeding under the Act.

[21] Hence, it goes without saying that it is neither irrational nor illegal nor improper for State Counsel - who is not only a public

officer but also a subordinate officer of the Attorney-General - to exercise the delegated power conferred on him or her by the Attorney-General to institute and conduct any proceeding under the Act. The respondent therefore acted rationally in relying and acting upon the said affidavit of the State Counsel to base her decision in this matter and so I find.

[22] I will now move on to examine the merits of the case in the light of the record of the proceedings before the Magistrates' Court and the submission made by counsel on both sides. To my mind, four fundamental questions arise for determination in this case. They are:

> Is the decision of the respondent irrational or unreasonable in summoning and ordering the petitioner to produce the documents in question, having regard to all the circumstances of the case?
>
> Is the decision of the respondent illegal in summoning and ordering the petitioner to produce those documents required by the General Public Prosecution Service of the Slovak Republic?
>
> Did the respondent act ultra vires in any manner in summoning and ordering petitioner to produce those documents? and
>
> Was the respondent in breach of any of the principles of natural justice particularly, that of "Audi alteram partem?

[23] Before one proceeds to find answers to the above question it is important to know the objective of the Act, under which the respondent made the impugned order so that the interpretation given

to the provisions therein and the judicial powers and functions exercised in pursuance of the Act accord with the objective. It is evident from the preamble of the Act that the main objective of the Act was to make provision for the purposes of implementing the Commonwealth Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth and to make provision with respect to mutual assistance in criminal matters between Seychelles and a foreign country other than a Commonwealth country. In fact, the pith and substance of the Act is that one Member State may request the other Member State for assistance in order to collect or secure or gather evidence in criminal matter. The State that receives a request for such assistance, is not adjudicating any criminal or civil liability of any person rather it simply gathers or secures evidence in criminal matters in which a foreign country has an interest. It is also pertinent to note that s 10 (2)(b) of the Act reads thus:

> in the case of the production of documents or other things, a magistrate or judge may, subject to subsection (6), require the production of the document or other thing and, where the document or other thing is produced, the magistrate or judge shall send the document or copies of the document certified by the magistrate or judge to be true copies, or the other thing, to the Central Authority.

Section 10(6) therein reads thus:

> Subject to subsection (7), the Evidence Act, Evidence (Bankers) Act and the Criminal Procedure Code shall apply, so far as they are applicable, with respect to the compelling of persons to attend before a magistrate or judge and to give evidence, answering question and

producing document or other thing for the purposes of this section.

[24] Firstly, I would like to restate herein what I have stated before in *Cousine Island Company v Herminie* CS 248/2000. Whatever the nature of the issue factual or legal that may arise for determination following the arguments advanced by counsel, the fact remains that this Court is not sitting on appeal to examine the facts and merits of the decision in question. Indeed, the system of judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of the case under appeal. However, when subjecting some administrative decision or act or order to judicial review, the Court is concerned only with the legality, rationality (reasonableness) and propriety of the decision in question vide the landmark dictum of Lord Diplock in *Council of Civil Service Unions* (supra). On an appeal the question is "right or wrong"? Whereas on a judicial review the question is "lawful or unlawful"? or "reasonable or unreasonable"? Or "rational or irrational"? Or procedurally "proper or improper"?

[25] On the issue of legality, I note, the entity of law is always defined, certain, identifiable and directly applicable to the facts of the case under adjudication. Therefore, the Court may without much ado determine the issue of legality of any administrative decision, which indeed, includes the issue whether the decision-maker had acted in accordance with law, by applying the litmus test, based on an objective assessment of the facts involved in the case. On the contrary, the entity of fairness or reasonableness cannot be defined, ascertained and brought within the parameters of law; there is no litmus test to apply, for it requires a subjective assessment of the entire facts and circumstances of the case under consideration and

such assessment ought to be made applying the yardstick of human reasoning and rationale.

[26] I will now, turn to the first issue as to the alleged irrationality or unreasonableness of the decision in question. What is the test the Court should apply in determining the rationality or reasonableness of the impugned decision in matters of judicial review?

[27] In order to determine the issue as to reasonableness of a decision one has to invariably go into its merits, as formulated in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.Where judicial review is sought on the ground of unreasonableness, the Court is required to make value judgments about the quality of the decision under review. The merits and legality of the decision in such cases are intertwined. Unreasonableness is a stringent test, which leaves the ultimate discretion with the judge hearing the review application. To be unreasonable, an act must be of such a nature that no reasonable person would entertain such a thing; it is one outside the limit of reason (Michael Molan, *Administrative Law*, (3rd ed, 2001). Applying this test, as I see it, the Court has to examine whether the decision in question is unreasonable or not.

[28] At the same time, one should be cautious in that:

> Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. Thus, the judicial review is made effective by the court quashing an administrative decision without substituting its own decision and is to be contrasted with an appeal where the appellate tribunal

> substitutes its own decision on the merits for that of the administrative officer.
>
> Per Lord Fraser *Amin v Entry Clearance Officer Bombay* [1983] 2 All ER 864 at 868.

[29] In determining the issue of reasonableness of the decision in the present case, the Court has to make a subjective assessment of the entire facts and circumstances of the case and consider whether the decision of the respondent is reasonable or not. In considering reasonableness, the duty of the decision-maker is to take into account all relevant circumstances as they exist at the date of the hearing including the objective of the Act. That he must do in what I venture to call a broad common sense way as a man of the world, and come to his conclusion giving such weight, as he thinks right to the various factors in the situation. Some factors may have little or no weight; others may be decisive but it is quite wrong for him to exclude from his consideration matters which he ought to take into account per Lord Green in *Cumming v Danson* [1942] 2 All ER 653 at 656**.**

[30] In my considered view, the respondent in this matter has rightly considered the affidavit evidence on record, all relevant facts and the entire circumstances of the case including the objective of the Act in arriving at her decision. Obviously, the petitioner's contention to the contrary, stating that she has acted irrationally/unreasonably and without evidence is not well-founded. I find that the decision of the respondent is rational; she has relied and acted upon the affidavit of State Counsel. In my view, the respondent as a whole has provided a fair process of adjudication and has addressed the major issues raised in the answer and the submission of the petitioner. Hence, the petitioner's contention that

the respondent acted without proper juridical foundation and evidence did not appeal to me in the least.

[31] In any event, on the face of the affidavit evidence adduced by the Central Authority, it is indeed reasonable for any adjudicating tribunal to arrive at the decision, which the respondent did, in this matter. In view of all the above, I hold that the decision of the respondent in summoning and ordering the petitioner to produce the documents required by the General Public Prosecution Service of the Slovak Republic is not irrational or illegal. As I see it, the respondent did not act ultra vires in any manner repugnant to any provisions of the Act in summoning and ordering petitioner to produce those documents. Moreover, I find that the respondent was not in breach of any of the rules of natural justice particularly, that of *audi alteram partem.*

[32] For the reasons stated hereinbefore, I hold that the decision of the respondent dated 25 March 2010 in this matter is neither irrational nor illegal nor ultra vires. I therefore, decline to grant the writ of certiorari and dismiss the petition accordingly. I make no orders as to costs.

Allisop v Financial Intelligence Unit

Burhan, Dodin JJ

12 November 2013 CP 11/ 2010

Proceeds of Crime (Civil Confiscation) – Constitution – Petition amendment

The petitioner sought, after the respondents had filed submissions, to amend the petition to challenge the constitutionality of ss 3(3), 4(1)(b)(i), 9(1) and 9(3) of the Proceeds of Crime (Civil Confiscation) Act on the ground that they contravened arts 19(1), 19(2) and 26(1) of the Constitution and are inconsistent with art 5 of the Constitution.

JUDGMENT Appeal dismissed.

HELD

1 Section 146 of the Civil Procedure Code does not apply when specific and relevant provisions exist in the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules in respect of the amendment of a petition.

2 A court cannot permit a "new matter" to be considered in an amended petition.

Legislation
Code of Civil Procedures s 146
Constitution arts 5, 19(1), 19(2), 26(1)
Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules rr 2(2), 4(1)(c), 5(3)
Proceeds of Crime (Civil Confiscation) Act ss 3(1), 3(3), 4(1) (b)(i), 9(1)(3)

Cases
Hackle v Financial Intelligence Unit (2010) SLR 98

Counsel A Amesbury and F Elizabeth for the petitioner
K Karunakaran for the respondents

The judgment was delivered by
BURHAN J and DODIN J

[33] This is a ruling in respect of an application made by the petitioner to amend the petition which was filed as far back as 1 December 2010. In the original petition filed the petitioner sought to challenge the constitutionality of s 3(1) and s 9(1) of the Proceeds of Crime (Civil Confiscation) Act 19 of 2008 (POCC Act) on the grounds that it contravened arts 19(1), 19(2) and 26(1) of the Constitution of the Republic of Seychelles. The respondents filed their submissions on 8 December 2012. Thereafter the petitioner filed this application to amend the petition on 18 September 2013.

[34] A perusal of the amended petition shows that the petitioner now seeks by the amendment to challenge the constitutionality of s 3(3), s 4(1)(b)(i), s 9(3) and s 9(1) of the POCC Act as being inconsistent with art 5 of the Constitution and that the sections violate provisions of the Charter of Fundamental Rights and Freedoms. The other relief prayed for is a writ of mandamus against the first respondent compelling them to return the petitioner's property with interest and costs.

[35] An analysis of the amended petition reveals that the challenge in respect of the constitutionality of s 3(1) of the POCC Act has been dropped by the petitioner. The new sections that are being challenged in the amended petition are s 3(3), s 4(1)(b)(i) and s 9(3).

[36] In terms of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules (the Constitutional Court Rules), r 2(2) reads as follows:

> Where any matter is not provided for in these Rules, the Seychelles Code of Civil Procedure shall apply to the practice and procedure of the Constitutional Court as they apply to civil proceedings before the Supreme Court.

[37] Counsel for the petitioner seeks to rely on this rule and submits that in terms of s 146 of the Seychelles Code of Civil Procedure she be permitted to amend her petition.

[38] However r 5(3) of the Constitutional Court Rules reads as follows:

> The Court shall not permit an amendment of a petition which seeks to include any new matter not pleaded in the petition.

[39] Therefore r 5(3) specifically refers to an instance which precludes the amendment of a petition. It cannot be said therefore that the Constitutional Court Rules do not provide for a matter concerning the amendment of a petition. Therefore it is our view that s 146 of the Civil Procedure Code does not apply when specific and relevant provisions exist in the Rules in respect of the amendment of a petition.

[40] The next issue to decide would be whether the amendment contains "any new matter not pleaded in the petition".

[41] It is clear that no relief has been sought in respect of ss 4(1)(b)(i) and 9(3) in the original petition filed and therefore this would amount in the view of this Court to a *"*new matter*"* for the Court to determine as relief has not been sought in the original petition.

[42] We also draw attention to r 4(1)(c) of the Constitutional Court Rules which reads as follows:

> 4(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:
>
> (c) in a case where the likely contravention arises in consequence of any law within 90 days of the enactment of the law.

[43] The amended petition seeks to challenge contraventions arising in consequence of the POCC Act 5 years after the enactment of the law. Be that as it may, in addition, in this instant case, it is apparent that the amendment of the petition is being sought to introduce a new matter after the submissions of the respondents have been filed. In the submissions of the respondents they have clearly indicated their stance on the original petition and the fact that all the matters the petitioner intends challenging in his original petition have already been decided by the highest forum, the Seychelles Court of Appeal which upheld the judgment of the Constitutional Court of Seychelles in *Hackle v Financial Intelligence Unit* (2010) SLR 98. It is therefore quite obvious that the petitioner now intends to introduce *"*new matters*"* to circumvent this issue raised by the respondents in their submissions. This cannot be permitted.

[44] Considering the facts peculiar to this case, the application to file an amended petition is denied. The case will proceed on the merits of the original petition filed.

Alcindor v Morel

Renaud J

21 November 2013 CS 184/2011

Civil Code −Authentication of signature

After a hearing was adjourned, a trial within a trial was held to allow the parties to make the submissions on the disputed authentication of a receipt and the signature. The defendant objected to the production of evidence on the ground that the signature in the receipt was not his.

JUDGMENT For the plaintiff

HELD

1 No presumption of genuineness attaches to private deeds and once the writing or signature of such deed is questioned in the manner provided by art 1323 of the Civil Code, it is for the party who claims under the deed to prove to the satisfaction of the court that such writing or signature is that of the person it purports to be.

2 When a party denies the signature on a document under private signature, it is for the party who wishes to avail himself or herself of it to prove the genuineness of the signature.

3 If a handwriting expert is not available, the judge may make a determination on the comparison of genuine handwriting compared with the disputed handwriting. The judge must bear in mind that justice would be better served by the assistance of an expert.

Legislation
Civil Code arts 1317–1320, 1323

Cases
De Speville v Pillieron (1936–1955) SLR 52
Adrienne v Adrienne (1986) SLR 156
Michaud v Ciunfrini SCA 26/2005

Counsel F Elizabeth for the plaintiffs
F Bonte for the first defendant
D Sabino for the second defendant
A Amesbury for the third defendant

The judgment was delivered by
RENAUD J

[1] At the hearing of this suit counsel for the second defendant wanted to produce in evidence a receipt for R 75,000.00. Counsel for the first defendant adamantly objected to its production on the ground that the signature thereon is not that of his client. The hearing on the merits was adjourned and a trial within a trial was held and thereafter the parties made their respective submissions on that specific issue in order for the Court to give its formal ruling.

[2] Article 1317 of Civil Code of Seychelles (CCS) states that an authentic document is a document received by a public official entitled to draw up the same in the place in which the document is drafted and in accordance with the prescribed form.

[3] Article 1318 of the CCS states that a document which is not authentic owing to the lack of powers or capacity of the official or owing to a defect of form shall have effect as a private document if signed by the parties.

[4] Article 1319 states that an authentic document shall be accepted as proof of the agreement which it contains between the contracting parties and their heirs or assigns. Nevertheless, such document shall only have the effect of raising a legal presumption of proof which may be rebutted by evidence to the contrary. Evidence in rebuttal, whether incidental to legal proceedings or not, shall entitle the Court to suspend provisionally the execution of the document and to make such order in respect of it as it considers appropriate.

[5] Article 1320 states that a document, whether authentic or under private signature, shall be accepted as proof between the parties even if expressed in terms of statements, provided that the statement is directly related to the transaction. Statements foreign to the transaction, shall only be accepted as writing providing initial proof.

[6] In the case of *De Speville v Pillieron* (1936-1955) SLR 52 the plaintiff, the testamentary executrix of the deceased, sought to have a transfer of R 2,000.00 alleged to have been made by the deceased to the defendant set aside as null and void. The defendant contended that the transfer was a valid one made under a private deed. The Court held that:

> 1) No presumption of genuineness attaches to private deeds and once the writing or signature of such deed is questioned in the manner provided by art 1323 CCS, it is for the party who claims under the deed to prove to the satisfaction of the court that such writing or signature is that of the person it purports to be.

2) In the instant case was sufficient for plaintiff to question the alleged signature of the deceased on the private deed to shift the burden of proving the genuineness of that signature on to the defendant.

3) On the evidence the defendant had failed to discharge the burden of proof.

[7] In the case of *Adrienne v Adrienne* (1986) SLR 156, it was held that:

> Where a party denies the signature on a document under private signature, it is for the party who wishes to avail themselves of it to prove the genuineness of the signature.

[8] In the case of *Michaud v Ciunfrini* SCA 26/2005**,** 24 August, 2007, it was held that:

> If a handwriting expert is not available, the judge may make a determination on the comparison of genuine handwriting compared with disputed handwriting. However, the judge must bear in mind that justice would be better served by the assistance of an expert.

[9] At this stage however, I believe that for the suit to progress this court needs to make a clear determination as to whether Item 3 is an authentic document and secondly whether the signature thereon is that of the second defendant.

[10] During the *voir dire* Mr Serge Rouillon testified that he is

a notary public and his signature appeared on Item 3. Mr Serge Rouillon testified that he is an attorney-at-law and notary public, practising at 14 Kingsgate House, Victoria.

[11] Sometimes he gets people coming from the street just to witness a transaction between themselves. He does not know what happened between them whether or not they were selling land or anything. They just walk into his office to pass some money and to have a document drawn up to recognize what is happening.

[12] He does not remember Mrs Amina Morel coming to his office but he remembers Mr Sophola and his secretary going through the processes which basically were to ask the person for ID card to fill out and then he signs it.

[13] Where he stamped at the bottom and signed, Mrs Morel must have signed in his office and it was done in 2010. It was done in his presence. But now he could not remember whether she signed in his presence but the fact that he had signed at the bottom she must have signed in his office.

[14] He could not remember if she did it while he was looking at her signing or when he was passing through the office when they were preparing the transaction and then he signed the document.

[15] When cross-examined by Ms Micock, Mr Rouillon stated that on 17 May 2010 he saw both parties. In his view Item 3 is basically a receipt and is not a document like a transfer or an agreement for these two people's transaction. He added that anyway he could definitely say that the two parties came to his

office and they signed this document in his office. He confirmed that it is his signature at the bottom of that document. Both Amina Morel and Sonny Sophola came to his office to sign the document. The document is recognition of certain sums of money being paid in this matter of the land transfer. The amount paid is R 75,000. They came twice to his office actually. His office prepared a second document on which he saw a signature, but he did stamp at the bottom for some reasons because the funds were going to be paid by a cheque. So they came twice to his office just for a receipt for their transaction. He knew nothing about the land title or how they will be doing the whole transaction.

[16] Mr Elizabeth cross-examined Mr Rouillon who stated that he was not sure whether he saw any money exchange hands between the two parties. The transactions were done somewhere else in his office and he was not sure whether his secretary did the transaction with the parties. That document was drawn up before his secretary. He described the nature of the document as a simple receipt not so much a notarial document. He however saw both people in his office and the parties were in his office when he signed the document.

[17] The evidence of Mr Rouillon in a nutshell is that his secretary drew up a receipt which is now Item 3 before the Court, and that receipt was then given to him to sign and stamp. It is my finding that the document is therefore not an authentic document drawn up by a notary in the form envisaged by law. Mr Rouillon could not be certain whether it was indeed Mrs Amina Morel who actually signed on that receipt.

[18] I conclude that the receipt, Item 3 amounts to no more than a document under private signature and for the purpose of

this suit it shall be considered as such.

[19] Item 3 being not an authentic document I will proceed to consider the second limb, that is, whether the signature thereon is that of Mrs Amina Morel.

[20] There are three different pieces of documentary evidence which have the signature of Marie Amina Morel thereon and these were drawn up on different dates. Firstly, there is an acknowledgement of receipt of R 75,000.00 signed on 17 May 2010 which is Item 3 before the Court; secondly there is Exhibit D2 a photo-copy of a Transfer Deed in respect of Title V12077 dated 2 November 2010; and, thirdly, there is Exhibit D5 signed by Mrs Marie Amina Morel in full view of the Court and counsel on 23 May 2013.

[21] In the absence of a handwriting expert, this Court ventured to make a determination on the comparison of genuine handwriting signed in the open Court with the disputed signature on the receipt. When the Court compared the three sets of signatures it noticed certain subtle dissimilarities in the style, form, steadiness or trembling pattern and pressure used. However, not being a handwriting expert it was not able to set out the fine distinctions between those handwritings.

[22] In the circumstances this Court therefore concludes and rules that justice would be better served by the assistance of an expert, and, in the absence of which, the Court will decide the case on the basis of evidence at the conclusion of the hearing on the merits.

Mauritius Commercial Bank v Kantilal

Domah, Fernando, Msoffe JJA

6 December 2013 Civil App No 53/2011

Bills of lading

A supplier sued the defendant bank for non-payment for goods. The bank had released the shipping document without endorsement to the second defendant shipping company. The Supreme Court held the bank liable for the non-payment on the bill of lading. The bank appealed.

JUDGMENT Appeal dismissed.

HELD

1 The word "order" on a bill of lading is a blank endorsement which means the person who holds the bill is the owner of the goods.

2 There is no duty on the holder of goods to verify how the holder of the bill of lading became the holder.

Legislation
Civil Code art 1384(3)

Counsel KB Shah for the appellant
S Rajasunderam for the first respondent
F Chang Sam for the second respondent

The judgment was delivered by
FERNANDO JA

[1] This is, as per the notice of appeal of the appellant, an appeal "against such parts of the judgment of the Supreme Court as deals with the claim of the plaintiff (now the first respondent)

against the first defendant (now appellant) and with the non-liability of the second respondent" on the following grounds:

1) In the plaint and the amended plaint, the appellant was impleaded under a wrong name. The Mauritius Commercial Bank Ltd is a banking company in Mauritius and not in Seychelles. The Mauritius Commercial Bank (Seychelles) Ltd is a financial institution incorporated in Seychelles under the law.

2) The trial Judge was in error to find as a fact that Mr Dias, the representative of the appellant, had admitted in his testimony in Court that exhibit P2 bore the signature of an ex-employee of the appellant.

3) The trial Judge was wrong to find that in the circumstances the appellant was vicariously liable for the action or omission of any of its employee in the normal course of employment.

4) The Judge failed to take into account of the provisions of para 3 of art 1384 of the Civil Code of Seychelles which exonerate masters and employers from liability for a deliberate act of a servant or employee not incidental to his service or employment.

5) The vicarious liability of the appellant was not specifically pleaded. The finding of the Judge is therefore ultra petita.

6) The Judge was wrong to hold that it was right for the second respondent to deliver the goods even though the bill of lading had not been endorsed by the

> appellant, and hence title to the goods could not have been transferred from the appellant.

[2] By way of relief the appellant has prayed for:

> a judgment allowing the appeal, reversing the judgment of the Supreme Court relating to the claim of the respondent against the appellant and ordering the first respondent to pay the appellant's costs in this Court and in the Court below and alternatively, ordering the second to pay the judgment award fully and partially with costs.

[3] In this case judgment had been:

> entered in favour of the first respondent (then plaintiff) as against the appellant (then first defendant) in the equivalent sum of USD 37,615.00 with accrued interest thereon at the bank commercial lending rate prevailing during the period with effect from the date of entering the plaint to the date of payment under the judgment, plus costs of the suit payable to both the first respondent and the second respondent (then second defendant).

The first respondent's claim for damages had not been granted. There is no cross-appeal by the first respondent. The case against the second respondent had been dismissed.

[4] The first respondent's (plaintiff, before the Supreme Court) case before the Supreme Court as set out in the plaint filed by him before the Supreme Court was to the effect that he was an exporter based in Mumbai, India, and used to export goods, general merchandise to various importers in the Republic of Seychelles based on their orders. One such was M/s Krishna Mart & Co Pty Ltd

which had its office at 5th June Avenue, Victoria, Mahe, Seychelles. The first respondent had sent a shipment of general goods to the said Krishna Mart & Co Pty Ltd under invoice No 424/02-03, dated 29 July 2002 for a value of USD 37,615.00 and sent the shipping documents including the bill of lading (No. POLBOM17000380) to the appellant, through its correspondent bank in India. It was expected of the appellant (then first defendant) as per normal practice to have received payment in Seychelles Rupees from the said Krishna Mart & Co Pty Ltd, to the credit of the first respondent and to transfer the same in foreign exchange to the first respondent through its correspondent bank in India, prior to release of the bill of lading to Krishna Mart & Co Pty Ltd, to take over delivery of the goods consigned. The appellant by its letter of 8 August 2002 had acknowledged the receipt of the shipping documents. It is the complaint of the first respondent that the appellant had released all the shipping documents inclusive of the bill of lading to Krishna Mart & Co Pty Ltd without having received funds in Seychelles Rupees equivalent to USD 37,615.00 and thus allowed Krishna Mart & Co Pty Ltd to take delivery of the merchandise that had been imported into Seychelles. The first respondent had not been repatriated the funds of the imports bill amounting to USD 37,615.00.

[5] After commencement of the trial before the Supreme Court the appellant had moved for an order to add the second respondent to this appeal as a co-defendant on the ground that it was the second respondent who had released the goods to Krishna Mart & Co Pty Ltd without the appellant having endorsed the bill of lading in favour of Krishna Mart & Co Pty Ltd. The Court having heard both the appellant and the first respondent, who had objected to the

application of the appellant, had made an order adding the present second respondent as the second defendant.

[6] The first respondent had then amended his defence by adding a new paragraph to the effect:

> The first defendant avers that the bill of lading was not endorsed by it for the second defendant to release the goods; hence the second defendant is liable for such delivery of goods, according to the first defendant. The second defendant is therefore added as a necessary party as per the order of this honorable Court.

The first respondent had also amended his original averment in the plaint setting out his cause of action to include both the appellant and the second respondent's action as being in 'faute' in law and that the first respondent had incurred financial loss and hardship due to the 'faute' of both the appellant and second respondent.

[7] The appellant in his defence had admitted that the first respondent had sent a shipment of general goods to the said Krishna Mart & Co Pty Ltd under invoice No 424/02-03, dated 29 July 2002 for a value of USD 37,615.00 and sent the shipping documents including the bill of lading (No. POLBOM17000380) to it. It had been the position of the appellant that in the normal course of business it would endorse the bill of lading to authorize the ship's agent to release the goods only after it had received payment in Seychelles Rupees. The appellant had specifically averred that it did not endorse any bill of lading for the said goods, release the bill of lading to Krishna Mart and Company Pty Ltd and receive any payment for the value of goods. The appellant had averred that the second respondent, in releasing the goods without the appellant having endorsed the bill of lading, was in error and breached its duty

of care to the appellant as the lawful proprietor of the bill of lading at all material times.

[8] In its defence the second respondent had averred that the goods were delivered to the person named as the notified party in the bill of lading on presentation of the original copy of the bill of lading by the representative of the notified party. It had also been the position of the second respondent that in accordance with cl 6 of the terms and conditions of carriage as contained in the bill of lading (P 2/ D 1/ D 6) the case against the second respondent is time barred. Clause 6 states:

> Unless clause 25 applies, the carrier shall be discharged of all liability whatsoever in respect of the goods, unless suit is brought and notice thereof given to the Carrier within nine months after delivery of the goods or, if the goods are not delivered, ten months after the date of issue of the bill of lading.

The date of issue of the bill of lading is 25 July 2002 and the amended plaint is dated 7 May 2007.

[9] As regards the first ground of appeal we wish to say that it is for the first time in this case that this point has been raised by the appellant. The appellant had responded to the letter of demand of the first respondent (exhibit D1) that was addressed to the "Managing Director, Mauritius Commercial Bank, Victoria, Mahe," on the instructions of The Mauritius Commercial Bank of Seychelles (Exhibit D 2); had filed its defence to the amended plaint in which the appellant was named as "Mauritus Commercial Bank Ltd, represented by its Director Mr Joycelyn Ah-Yu having office at Carawell House Victoria, Mahe, Seychelles"; as MCB (Sey) Limited; had not raised this point in its defence; had proceeded with

the trial on the basis that the plaint had been filed against it and filed its written submissions at the conclusion of the trial as MCB (Sey) Limited represented by its Director Mr Joycelin Ah-Yu of Caravelle House, Victoria, the very manner the representation of the appellant had been described in the amended plaint. Derrick Dias, Bank Supervisor at Mauritius Commercial Bank of Seychelles had testified on behalf of the appellant at the trial before the Supreme Court and had never taken issue that the appellant had been impleaded under a wrong name. The appellant having realized this had withdrawn this ground of appeal in its heads of argument filed four days before the hearing of this appeal. Counsel should take more care when raising their grounds of appeal.

[10] As regards ground 2 of appeal the trial court record does not bear out the fact that Mr Dias the representative of the appellant had admitted in his testimony in Court that exhibit P 2 (bill of lading) bore the signature of an ex-employee of the appellant and the appellant is factually correct in this regard. Ground 3 of appeal is couched in such terms as if the trial Judge had decided this case on the basis of the vicarious liability of the appellant and such vicarious liability was based on the erroneous finding of fact referred to in ground 2 of appeal. A reading of the judgment however shows that the trial Judge although had made reference to vicarious liability of the appellant had come to a finding against the appellant on the basis of direct liability:

> In the light of my findings earlier above, *I hold that the action or omission of the 1st Defendant* (*Appellant*) in releasing or causing the release of the 'shipping documents' to Kmart without first collecting and paying over to the Bank of the Plaintiff (*1st Respondent*) for the credit of the Plaintiff the sum

> stated in the invoice *is, in law, a "faute", and due to such "faute" of the 1st Defendant, the Plaintiff has incurred financial loss and hardship which the 1st Defendant is now liable to make good to the Plaintiff.*
>
> [Emphasis added]

[11] The pleadings in this case disclose that this was not a case based on para 3 of art 1384 of the Civil Code of Seychelles, but para 1 of art 1383. Even the appellant in its defence had not claimed that this was a case that falls under para 3 of art 1384. What the appellant had stated in its defence was that it "did not release the bill of lading to Krishna Mart and Company Pty Ltd" and not that an employee of it had done so in answer to the specific averment of the first respondent's averment in the plaint that it was the appellant that had "released all the aforesaid shipping documents to Krishna Mart and Company Pty Ltd". The evidence of Mr Dias, the representative of the appellant was to the effect that in the normal course of events the bank releases the shipping documents to the importer after endorsing them, only when the amount payable for the goods imported is paid in full in Seychelles Rupees. Until then it is kept in the possession of the bank in a strong room at the bank. He had admitted that in this case the documents had gone missing in an "illegal manner" and he had no idea as to how they went missing. When questioned as to what he meant by an illegal manner his answer was: "The way Krishna Mart got it". He had also admitted that the release of the goods was a mistake on the part of the bank. In answer to the question that the bank released the documents to Mahe Shipping when it was basically the responsibility of the bank not to have done so, Mr Dias had said "Suppose, yes". Thus the appellant had not pleaded its defence based on para 3 of art 1384 of the Civil Code of Seychelles.

[12] Facts being such, it is not necessary in an adversarial system of civil justice as ours to explore the circumstances in which a defendant could be made liable for a fault outside what is known to the person who brings the action and plead it. This is sufficient to dispose of ground 3 of appeal.

[13] As regards ground 4 of appeal we reiterate that this was not a case based on para 3 of art 1384 of the Civil Code of Seychelles. Even the appellant in its defence had not claimed that this was a case that falls under para 3 of art 1384. Mr Dias the representative of the appellant had admitted that in this case the documents had gone missing in an "illegal manner" and he had no idea as to how they went missing, thus casting off the possibility of application of the provisions of para 3 of art 1384 of the Civil Code of Seychelles to this case. However the trial Judge had dealt specifically with ground 4 of appeal when he said:

> It is my finding that the first defendant (appellant) have not provided this Court with good, cogent, reasonable and sufficient explanation as to how such very important documents which were kept in its strong room got into the hands of Kmart. There is no evidence before Court that the first defendant had indeed not authorized its employee to endorse such documents as part of its duties.
>
> We therefore see no merit in ground 4 of appeal.

[14] As regards ground 5 we have already stated that the trial Judge did not come to a finding against the appellant on the basis of vicarious liability. We are also of the view that there was no necessity in this case for the first respondent to plead vicarious liability in view of exhibit D 2 (wherein the attorney for the

appellant had requested of the first respondent's counsel, "Kindly let me know the name of the person(s) who is alleged to have connived at and colluded with the importer so that the Bank can fully investigate the matter and take a stand"); and the defence filed by the appellant. There was also no evidence in this case from which one could conclude that the release of the shipping documents was by a servant or employee of the appellant acting within the scope of their employment. The first respondent's case as pleaded in the amended plaint was, that it was the first defendant bank (appellant) that released all the shipping documents to Krishna Mart & Co Pty Ltd without having received funds from Krishna Mart. The appellant in its defence did not claim that the release of the shipping documents was by one of its servants or employees contrary to its express instructions and which was not incidental to the service or employment of the servant or employee nor did it offer any evidence to this effect at the trial. For that matter the appellant never sought to explain how the shipping documents that were in its possession in a strong room at the bank went missing, other than admitting that it was by an illegal manner and it was its mistake. We are therefore of the view that it was not necessary for the first respondent to have pleaded the vicarious liability of the appellant. We therefore dismiss ground 5 of appeal.

[15] A consideration of ground 6 of appeal necessitates firstly an examination of P 2/D 6, namely the bill of lading. The bill of lading on the first right hand column gives the name of the first respondent as the 'shipper', on the second column below it which has to state the 'consignee or order', states, "ORDER" and in the third column the 'Notify Party/Address' states, "M/s KRIHNA MART & CO. (PTY) LTD, P.O.BOX NO.264, MAHE, SEYCHELLES". At the back of the document is an endorsement in small letters to the effect:

"Pay/Deliver to the order of Banque francaise commercial ocean Indien" signed for the Indian Overseas Bank by its manager. We could also see the signatures of a partner of the first respondent, three other signatures, one of Nelson Pillay, the second that of a member of staff of the second respondent and the third unknown. In testifying before the trial Court the Managing Director (MD) of the second respondent has stated that the words "ORDER" in the column 'consignee or order'; is a blank endorsement which means that whoever holds the bill of lading is the rightful owner of that cargo. He had gone on to state that "In principal when there is a blank endorsement like in this case, we must release it to whoever presents us the original bill of lading", and that they also look at the next column which is the notified party, which in this case was Krishna Mart. The second respondent had thus issued the delivery order to Nelson Pillay on behalf of Krishna Mart & Co Pty Ltd as they had no reason for suspicion and because Nelson Pillay was a regular customer who had presented similar bills before on behalf of Krishna Mart & Co Pty Ltd. He had also stated that normally the notified party is the consignee. The MD had denied the suggestion put to him in cross-examination that it was wrong for the second respondent to have released the goods without Banque Francaise Commerciale Ocean Indien endorsing it in favour of somebody else. The appellant has not placed any evidence to challenge the evidence of the MD regarding the correctness of his evidence in respect of the release of the goods to Nelson Pillay on behalf of Krishna Mart & Co in view of the blank endorsement and the notified party being stated as Krishna Mart & Co. Further the answer of Mr Dias, the representative of the appellant when questioned as to his stand regarding the bill, namely "We are waiting for the outcome of this

case and Krishna Mart has to pay", is indicative of the fact that the appellant's claim against the second respondent is not serious.

[16] We are therefore in agreement with the trial Judge when he states:

> It was not legally incumbent on the second defendant (second respondent) to embark on an inquiry to verify how the holder became the holder of bill of lading (exhibit P2). It was perfectly right for the second defendant to deliver the goods to the representative of Kmart which was the holder of the bill of lading (Exhibit P2) at the material time. The second defendant is not answerable to either the plaintiff (first respondent) or the first defendant (appellant) under or in connection with the bill of lading and/or under the Plaint.
>
> We therefore dismiss the sixth ground of appeal.

[17] In the circumstances we have no hesitation in dismissing the appeal with costs to the respondents.

Amelie Builders v R (MEHRD)

Fernando, Twomey, Msoffe JJA

6 December 2013 SCA 14/2012

Employment – Continuous offence

A worker applied to the Ministry for relief after he was dismissed by the appellant company. The appellant failed to comply with the decision of the Ministry. A charge was laid and the appellant found guilty for failing to comply with the decision of the Ministry. The appellant appealed.

JUDGMENT Appeal dismissed.

HELD

1 A charge in respect of an enforcement notice is a continuing offence and until such time as either the decision has been complied with or a reasonable excuse has been accepted by a court.

2 In a continuing offence it is not an essential characteristic of a single criminal offence that the prohibited act or omission took place once and for all on a single day because it can take place continuously or intermittently over a period of time and still remain a single offence.

Legislation
Code of Criminal Procedure ss 326(1), 384
Employment Act ss 6(2)(a)(ii), 76, 77

Cases
Jules v R SCA 11/2005
Rene v R SCA 3/99
Benoiton v R SCA 15/95

Foreign cases
C*hiltern DC v Hodgetts* [1983] 1 All ER 1057
R v Ayres [1984] AC 447

Counsel B Hoareau for the appellant
A Supramanian for the respondent

The judgment of the Court was delivered by
MSOFFE JA

[1] Mr Patrick Denis Agricole was employed by the appellant company as a mason on a fixed term contract. On 1 July 2005 he was dismissed from employment. On 7 July 2005 he lodged a complaint with the Ministry of Social Affairs and Employment – vide the WORKER: GRIEVANCE APPLICATION FORM of that date – in a claim of his terminal benefits from the appellant. One Mr B Alphonse, a competent officer in the Ministry, dealt with the complaint and opined that subject to s 6(2)(a)(iii) of the Employment Act 1995, Mr Agricole was entitled to:

21 days annual leave - R 3452.05

1 month's notice - R 5000.00

12 days compensation - R 2769.23

R 11221.28

Less 5% social security - R 561.28

R 10660.22

[2] The Ministry wrote to the appellant to the above effect – vide its letters dated 12 October 2005 and 4 November 2005. On 27 February 2006 Mr Jean Raguin, a Chief Executive Officer in the

Industrial Relations section of the Employment Department in the Ministry, wrote a letter to the appellant informing it that its appeal had been dismissed. In spite of the above decision and another letter written on 12 June 2006 by Mr Alphonse the appellant did not pay.

[3] It was against the above background that a charge was preferred before the Magistrates' Court against the appellant for failing to comply with the decision of the Minister contrary to ss 76(1)(f) and 77(2) of the Employment Act. The particulars of offence alleged, inter alia, that "during the month of February 2006" the appellant without reasonable excuse failed to comply with the decision of the Minister to pay the above stated sum of money.

[4] At the trial Mr Felix Amelie, a Director of the appellant, testified on its behalf. Its defence was a very brief one. It was that the letter by Mr Raguin dated 27 February 2006 was received in its office "at the end of March 2006 going towards April 2006". The letter was specific and clear that it had to pay within a period of 14 days from the date of the letter. So, according to him, since the particulars of offence alleged that the appellant failed to comply "during the month of February 2006" and it received the letter "at the end of March 2006 towards April 2006" it had reasonable excuse not to comply with the decision of the Minister.

[5] The Magistrates' Court took the view that "the mistake or error as to the date" does not necessarily make the charge defective so as to render the appellant not criminally responsible for the offence charged. This is because the offence was, and still remains, a continuous one till such time as the appellant would have effected payment.

[6] On appeal, the Supreme Court maintained the same view. The said Court (Burhan J) emphasized thus:

> Further considering the abundance of facts set out in the particulars of the offence I am satisfied that no prejudice has been caused to the appellant in this case and that the appellant was well aware on perusal of the statement of offence and the particulars of offence that the charge he faced, being in respect of an enforcement notice was a continuing offence and until such time either the decision had been complied with or a reasonable excuse had been accepted by court the said charge *continued to be in effect and was not limited to the month of February 2006 only*. It appears that learned counsel for the appellant has sought to rely solely on a technicality, despite knowing well the offence was one of a continuous nature.
>
> [Emphasis added]

[7] In this appeal there are two grounds which read:

i) The Judge erred in law and on the evidence in failing to hold that the appellant had reasonable grounds for not complying with the decision of the Minister during the month of February 2006.

ii) The Judge erred in law and on the evidence in holding that the offence was a continuous one, taking into account the particulars of the offence that was before the Magistrate's Court.

[8] At the hearing we had to address Mr Hoareau for the appellant on the provisions of s 326(1) of the Code of Criminal Procedure which allows an appeal to this Court on a matter of law

but not on a matter of fact or mixed fact and law or on severity of sentence. Thus, this being an appeal originating in the Magistrates' Court an appeal would lie on a matter of law only. He quickly saw and appreciated the point and readily conceded that the words "and on the evidence" appearing in the above grounds of appeal are out of place. He accordingly applied for and we granted him leave to amend the grounds by deleting the above words. We hasten to say however that, this exercise was merely academic because, as we shall endeavour to show hereunder, in determining the rights of the parties the point of law at stake, in the circumstances of this appeal, cannot be disposed of conclusively without looking at the evidence on record. The issue is whether or not the courts below were correct in law in the view they took on the definition of a continuous offence.

[9] We propose to begin with the second ground of appeal because we believe that our response to this ground will easily provide an answer to the complaint in the first ground of appeal.

[10] The Supreme Court, correctly in our view, stated the law on what constitutes a continuous offence by citing *Archbold Pleadings Evidence and Practice in Criminal Cases* (42nd Edition) at page 41 that in a continuous offence it is not an essential characteristic of a single criminal offence that the prohibition act or omission took place once and for all on a single day because it can take place continuously or intermittently over a period of time and still remain a single offence.

[11] Further to *Archbold* (*supra*), in *Black's Law Dictionary* (2nd Edition), a continuous crime or offence is defined as one consisting of "a continuous series of facts, which endures after the …period of consummation…".

[12] Applying the above definitions to this case, it follows that the letters dated 12 October 2005, 4 November 2005, 27 February 2006 and 12 June 2006 gave the appellant time limits(s) within which to pay. The letter dated 12 June 2006 is of particular significance in this case because it was written after the letter dated 27 February 2006 which is the basis of the particulars of offence in the charge sheet. On the basis of the above letters, and the law on the subject, it will be evident that there was a series of facts which endured after the period(s) of payment(s) elapsed without the appellant paying as ordered. Hence, the failure(s) to pay by the given time limit(s) led to a new series of facts in the offence in question. In this sense, the offence charged against the appellant was a continuous one notwithstanding that the letter dated 27 February 2006 subject of the charge sheet as aforesaid gave the appellant a period of 14 days to pay. Once this period elapsed without payment the offence remained, and indeed continues to remain, a continuous offence.

[13] This brings us to the first ground of appeal. In view of the position we have taken on the second ground of appeal it follows that our answer to the complaint in this ground is that the appellant had no reasonable grounds for not complying with the decision of the Minister. Since each of the above letters constituted a new series of facts it ought to have known that this was a continuous offence so long as payment was not made within the stipulated period(s). Indeed, the letter dated 12 June 2006 was the last wake up call for it to effect payment, so to speak.

[14] Admittedly, the charge against the appellant could have been better framed or drafted in order to reflect clearly that this was a continuous offence. To this end, Burhan J, citing *Chiltern DC v*

Hodgetts [1983] 1 All ER 1057, was correct that the term "on and since" could have been preferred in the charge sheet. If we may respectfully add, as per *Black's Law Dictionary* (*supra*), it is also settled law that the offence in this case could have been indicated as taking place "……between….or on….diverse days between…..two dates". However, in a fair determination of this matter, like the courts below, we too are satisfied that the failure to charge the appellant along the above stated lines did not occasion a failure of justice. We say so because, again as correctly opined by Burhan J, the appellant was aware that the charge was in respect of failure to comply with an enforcement notice. And once the failure persisted without payment this was a continuing offence in which the term "on and since" could be inferred.

[15] Further to *Archbold*, *Chiltern*, and *Black's Law Dictionary*, we are fortified in the above view by the provisions of s 344 of the Code of Criminal Procedure which states, inter alia, that no finding by a court of competent jurisdiction shall be reversed or altered on appeal on account of any error, omission or irregularity in the charge unless the error, etc. has occasioned a failure of justice. This principle of law finds support in this Court's decisions in *Jules v R* SCA 11/2005, *Rene v R* SCA 3/99 and *Benoiton v R* SCA 15/95. For instance in *Jules* this Court stated:

> If the statement and particulars of offence can be seen fairly to relate to a known criminal offence but have been pleaded in terms which are inaccurate, incomplete or otherwise imperfect, a conviction on that indictment can still be confirmed.

[16] This same reasoning appears in a passage cited in *R v Ayres* [1984] AC 447 at page 460 G ─ 461 B:

> … But if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the proviso must depend on whether, *in all the circumstances*, it can be said with confidence that the particular error in the pleading *cannot in any way have prejudiced or embarrassed the defendant*.
>
> [Emphasis added]

[17] We appreciate that at the hearing Mr Hoareau argued with full force that the particulars of offence in this case did not disclose a continuous offence and to this extent the charge was not defective. We can see the force of argument in this submission. With respect, we agree with him that a look at the particulars of offence per se will, on the face of it, show that no continuous offence was disclosed. But this is the farthest we can go along with him. We do not agree with him that the appeal should be determined squarely and solely on this point, for reasons which we will demonstrate hereunder.

[18] First, a look at the proceedings of 25 October 2006 and 29 November 2006 will show that the appellant had all the relevant documents at the time the plea was being taken. Notable among these documents must have been the letter dated 12 June 2006 which was significant in showing that up to that time Mr Agricole had not been paid and this suggested that the offence was continuous. Yet, counsel did not seize that early opportunity to submit that the

documents, particularly the letter dated 12 June 2006, had no relevance to the date mentioned in the particulars of offence.

[19] Second, the documents, particularly the letter dated 12 June 2006, were produced and admitted at the main trial without objection by counsel. This was yet another opportunity for him to object to their admission in evidence on account of their being irrelevant to the date mentioned in the particulars of offence.

[20] It follows that once the documents were produced and admitted in evidence it was inevitable that the Magistrates' Court was going to use them in making its considered finding that the evidence on record established that this was a continuous offence. Needless to repeat, in law the Magistrates' Court was perfectly entitled and justified in making the above finding, in the circumstances, based on the evidence before it.

[21] So, since the documents were produced and admitted in evidence without objection at the trial, it was too late in the day for counsel in his closing submissions before the Magistrates' Court to take issue on the relevance of the particulars of the offence in relation to the continuous offence laid out in the prosecution case. In similar vein, it was also too late for him to raise the point before the Supreme Court, as is also the case in this Court.

[22] In summary, the fairly strange scenario that obtains or emerges in the case is that the charge as framed was not necessarily "defective" as correctly argued by counsel. But the evidence that was accepted in court without objection made it "defective" for not disclosing clearly that this was a continuous offence. However, on the basis of the evidence and the above authorities there was no

failure of justice since the appellant was not prejudiced because all along it was aware that this was a continuous offence.

[23] In conclusion, it is fair to say that there is no basis upon which we could fault the courts below in their concurrent findings and conclusions in this matter.

[24] In the event, for reasons stated, we are satisfied that the appeal has no merit. We hereby dismiss it.

Chetty v Chetty

Domah, Fernando, Twomey JJA

6 December 2013 SCA 54/2011

Valuation of land–Civil Code article 834 – Third party

The appellants and the second respondent owned land in the proportion seven tenths to three tenths. The second respondent sold her share to the first respondent who then gave a usufruct to the second respondent. The appellants sought an order that the first respondent sell the property back to them under art 834 of the Civil Code. The claim failed for lack of proper evidence. The appellants appealed.

JUDGMENT Appeal dismissed.

HELD

1 A court of law's determination has to depend upon reliable evidence not only as regards the market value of the precise subject property but also as to the method used to set the market value.

2 In the absence of any formal system of regulation of valuers, anyone who shows learning and competence may do valuation subject to the court's appreciation.

3 Obiter discussion of whether "third party" in art 834 of the Civil Code includes a family member of co-owner or means only a total stranger to the co-owners.

Legislation
Civil Code arts 384–389, 488, 544, 578, 582, 617, 718, 727, 784, 834, 1121, 1130, 1161, 1165

Cases
Michel v Vidot (No 2) (1977) SLR 214

Foreign cases
Gajapatiraju v Revenue Divisional Officer, Vizagapatam [1939] AC 302
Re Morgan and London and North Western Rly Co [1896] 2 QB 469
Streatham and General Estates Co Ltd v Works and Public Buildings Commrs (1888) 52 JP 615

Counsel B Hoareau for the appellants
A Derjacques for the respondents

The judgment of the Court was delivered by
DOMAH JA

[1] This is an appeal against the decision of the Chief Justice relating to a dispute between the appellants and the respondents where the appellants were seeking an order under art 834 of the Civil Code for respondent no 1 to sell back a property which had been sold by one of the co-owners (respondent no 2) to respondent no 1. The Chief Justice decided that for an action to succeed under art 834, the parties have to adduce evidence with respect to the actual subject-matter ie the three tenths of the share which was concerned at the time of the offer and the evidence in the case fell short of it. The respondents have also cross-appealed against the decision of the Chief Justice.

[2] The appellants have advanced the following grounds of appeal:

1) The Judge erred in law and on the facts in failing to accept the evidence and reports of the valuers as correctly establishing the value of the property and consequently the value of the first respondent's share in the property, at the time of the offer.

2) Alternatively, the Judge erred in law and on the facts in failing to set the value of the property and that of the first respondent's share in the property at the time of the offer, based on the evidence and the reports adduced in the case.

3) The Judge erred in law in failing to exercise the power that the trial judge had under art 834 of the Civil Code to set, determine and fix the value of the property and that of the first respondent's share.

4) The Judge erred in law in dismissing the appellants' plaint in that the statement of defence filed on behalf of the respondents failed to aver and plead what was the correct value of the property and that of the first respondent's share in the property at the time of the appellants' offer.

5) Consequently, the Judge erred in failing to cancel the usufructuary interest of the second respondent, which the first respondent granted the second respondent after the first respondent had

> absolutely acquired the second respondent's share in the property.

[3] The cross-appeal of the respondents, on the other hand, reads as follows:

> The Honourable Judge erred in law in having rejected the expert valuation report and expert testimony of the Respondents witness, namely Mrs Cecile Bastille.

[4] At the time of hearing this appeal and the cross-appeal, we invited arguments on whether the action which was brought by the appellants against the respondents was properly based on art 834 of the Civil Code. Counsel for the appellants needed time to respond even if he took the view that the action was a proper one under that article. Counsel for the respondents who had raised an issue before the Court below of the constitutionality of art 834 submitted that art 834 was not meant for the type of situation which gives rise to the present action. On the other hand, counsel for the appellants took time to make a submission that the facts show a proper application of art 834. We are grateful to him for his admirable written submission which he forwarded after the hearing as he had stated he would.

[5] The issue which continues to bother us is as follows: whether the term third party in art 834 would include a party who is related in blood to any of the co-owners as a family member or a potential heir to the property or whether it would mean a total stranger to the family property.

[6] The appellants and the respondents became the joint owners of land parcel V5495 in the following proportions: appellants seven tenths and respondent no 2, three tenths. This property comprises

land and buildings which are business premises in Victoria. On 28 July 2008, respondent no 2 transferred her share to respondent no 1 for value. The transfer was duly registered on 13 September 2006. Thereafter, on 24 October 2006, respondent no 1 granted a usufructuary interest in the three tenths sold to her to respondent no 2. The appellants, in August 2008, offered to purchase the said property for R 3,150,000 which was rejected by respondent no 1 as grossly undervalued.

[7] The plaint is not worded strictly in terms of art 834. However, in the affidavit the basis of the action is apparent. For the crucial word "third party," the averment is that at the time of the sale "Mersia Vasantha Chetty was not a co-owner of parcel V5495." As such, the appellants regarded her as a third party.

[8] Article 834 reads:

> In the case of the sale of a share by a co-owner to a third party, the other co-owners or any of them shall be entitled, within a period of ten years, to buy that share back by offering to such third party the value of the share at the time of such offer and the payment of all costs and dues of the transfer.

[9] The question which may have to be decided by the competent court sooner or later is the meaning of the term "third party" in art 834. There is one view that third party in the context can mean only *un tiers acquéreur* who is not a family member of the co-owner. The competing view is that art 834 would not apply where the transfer by sale or donation is made to a family member. Indeed, it would be odd that a donation could not be bought back but a sale could be.

[10] This provision is specific to Seychelles. We have not found its counterpart in any other jurisdiction but the anxiety of the legislator to ensure that property is kept within the family circle is evident. The rationale is that any foreign element in the family property is given 10 years to adjust and if either he or she is uncomfortable or has become a nuisance, he or she can be paid off with the necessary judicial assistance where the other co-owners disburse the market price.

[11] Nor have we come across any case law which has dealt specifically with this point even if a couple of cases have been involved with the application of art 834.

[12] Counsel for the appellants referred to the very case which we thought generated this judicial debate among us: *Michel v Vidot* (No 2) (1977) SLR 214. This decision may be variously interpreted. Mr and Mrs Andrea Michel were the co-owners in *indivision* for half share each in two portions of land at Anse aux Pins, Mahe. One portion was of an extent of 1.9 acres and the other of 3.25 acres. They had eight children. On the death of Andrea Michel, his half share devolved on the eight children. Thereafter, Mrs Andrea Michel sold the bare ownership of her half share in the two proportions to three of her children Irene Michel, Liliane Michel and Reine Michel, reserving for herself the usufruct until her demise. The three children sold the bare ownership to the defendant, Vidot, who by the look of it was a complete stranger to the succession. Vidot was served with a claim for *retrait* which he resisted. Sauzier J, applying art 834 of the SCC decided as follows:

> This article by its very wording entitles a co-owner to buy back a share in the common property which another co-owner has sold to a third party.

[13] The Court, accordingly, held that the co-heir had a right to challenge such a disposition without going through the fiduciary.

[14] What is important to note is that the sale by Mrs Andrea to her three girls was not challenged. What was challenged was the sale made by the three girls to Mr Vidot. In the case in hand, the affidavit in support avers as follows:

> Prior to Mersia Vasantha Netta Chetty (hereinafter "Mersia") acquiring the undivided three tenths (3/10) share in parcel V5495 from Mrs Lea Raja Manikam Chetty, Mersia Vasantha Netta Chetty was not a co-owner of parcel V5495.

[15] Unlike the case of *Michel v Vidot*, the sale here is that of the mother to the daughter.

[16] Be that as it may, counsel for the appellants have presented a commendable submission on why in his view the term "third party" in art 834 should be interpreted as per para [9]. He has referred, inter alia, to various other provisions of the Civil Code relating to devolution of property and succession rights contained in arts 384–389, 488, 544, 578, 582, 617, 718–727, 784, 1121, 1130, 1161 and 1165. All these, to him, support his view. Others would argue that all these only support the view that the Civil Code attached a great importance to the concept of the family, the family property and the rights of children.

[17] We are unwilling to venture into this issue at this stage in this case and as an appellate court. The constitutionality of this provision was broached at one time but not pursued. We are in a civil dispute. The matter has not been raised by either party whether

at the trial stage or at the appeal stage. It is enough for the time being that we bring this to the attention of the Civil Code Revision Group which is currently dealing with the revision of the Seychelles Civil Code so that the term third party may be defined with clarity. Nor is art 834 predicated by any general article from which this specific article could be interpreted. The rationale for its existence and its relevance in our modern society is anybody's guess. Counsel for the appellants has pointed out that a co-owner may donate his or her share to his or her heir. This would not be covered by art 834. But where he or she sells it, it would be covered. That may be another oddity.

[18] With such remarks, we proceed to determine the issues raised in the cross-appeal and the cross-appeal.

[19] The dispute between the parties is not that they are unwilling to sell back the three tenths but that they would only do so at the market value under the law. Both parties adduced evidence as to the market value. The appellants had offered to respondent no 1 the sum of R 3,150,000.00 as consideration for the three tenths less the usufruct which had to be cancelled. This was considered grossly inadequate by respondent no 1. Ms Bastille for the respondents had valued the whole property at R 22,328,000.00 as at 27 September 2010. This the Chief Justice found was not helpful inasmuch as it did not reflect the value of the property at the time of the offer, which was two years earlier.

[20] The appellants had called two experts. One valued the premises – as opposed to the three tenths less the usufruct – at R 11,000,00.00 and the other at R 10,400,000.00. In the view of the Chief Justice, the disparity was so big, he did not wish to accept it to proceed further. His comment was that the value was "clearly less

than the actual open market value of the property." He decided, therefore, that for an action of this nature to succeed, the appellants must offer the correct value of the three tenths at the time of the offer, which they had not done.

[21] It is the submission of counsel for the appellants that the Court should have proceeded to set, to fix and to determine the value on the evidence adduced as an exercise of the Court's duty under art 834. We would grant him that.

[22] However, the question is whether the Court was in presence of sufficient cogent evidence on which it could rely to set, fix and determine the final figure, an exercise which it does as a matter of course in other actions under the law. It was incumbent upon the appellants to show that they had made an offer of the market value of the subject property in question. Likewise, it rested upon the respondents to show that the sum offered for the subject property was grossly inadequate. We have examined the reports of all the three experts and gone through their evidence.

[23] It would be unfair to comment upon their competence to give valuations in a legal environment where the profession of property valuers is not regulated. However, the fact remains that what is good for commercial clients is not necessarily good for a court of law. A court of law's determination has to depend upon reliable evidence not only as regards the market value of the precise subject property but also as to the method that has been used to set that market value. That evidence in this case is defective. For example, the evidence of witness Sebastien Yumboo reads as follows:

> Q: What is the value of the 30% bare ownership of the property?
>
> A: The value of the 30%. It has to be calculated and this wasn't part of my instructions to calculate that per cent with the value of the property.
>
> Q: So I will repeat my question. Sir, does your report, your valuation disclose the value fo 30% bare ownership of this property. Yes or No?
>
> A: No.

[24] The evidence of Mrs Veronique Bonnelame, a land economist, is that the value of three tenths of the property is R 3,300,000 which includes the value of the bare ownership and the usufruct. However, she added that if she were given the instruction to put a value of the usufruct she would do that. According to her, this is a completely different valuation from market valuation because she would need access to the medical records of the person and her income because it relates to the life expectancy of the usufruct holder. The income element is needed because of "the adage that rich people live longer and paupers die sooner." She could not give an answer to the value of the three tenths because her instructions were to value the property as a whole. There were other queries which had been made on the valuation as to whether it included its value as a going concern inasmuch as the value given by her is R 4,000,000 for building and R 7,000,000 for land. This was as at November 2008. Subsequently, there was a fall in the value of the rupee by 68%. What was R 11,000,000 then would be R 16,500,000 today. What is more, she stated she did not quarrel with the figure that the market value of the whole property is R

22,000,000. Except that valuation being what it is, she will only be able to competently comment after she has taken cognizance of the content of the report. The report had not been given to her to carry out this exercise.

[25] Ms Cecile Bastille is a quantity surveyor who has, from the evidence, been giving evidence in courts on such matters for a long time. She arrives at a figure in her evidence for the specific subject property in question: for the land – R 10,680,000; for the building – R 11,198,000; and for the external works – R 450,000.

[26] We have examined her report and gone through her evidence. However, what is the reliability of the valuation of the property from which the subject matter could be calculated? It is silent on the method which has been used for the calculation. There is hardly any comparable. The only comparable we come across in evidence has been for rental value and not sale value. Here we are concerned with a sale and a rental. How does a court of law calculate a sale value from a rental value? That aspect has been broached but not fully explained as is evident by the valuation reports of Sebastien Yumbu and of Veronique Bonnelame.

[27] In such a state of the evidence, the Court found itself little enlightened on the actual market value of the properties in question from which a reliable calculation could be made on the market value of the subject matter of the sale of the three tenths of parcel V5495. The matter was further put in doubt by the fact that the profession - who is entitled to practice as a valuer of properties in the country - is unregulated. While we agree that, in the absence of any formal system of regulation, anyone who shows his or her learning and competence may do so subject to the Court's appreciation, the fact

remains that in this case, each party has challenged the competence of the other party's expert to give a proper valuation.

[28] In actual fact, the three valuations are not very persuasive on precisely what was being valued, which method was being used for the valuation and the rationale and preference for the method, in the circumstances of the case. Two of the reports suggest that it is the comparison method of valuation. This, in fact, is the most commonly used and accepted method in ascertaining the market value of properties. Under the comparison method, the valuation approach entails comparing the subject property with similar properties that were sold recently and those that are currently being offered for sale in the vicinity or other comparable localities. The characteristics, merits and demerits of these properties are noted and appropriate adjustments thereof are then made to arrive at the value of the subject property. However, in the relevant reports, we note that what were compared were not the sale values but rental values.

[29] The valuation of a property for the purposes of assessing its market value is a serious exercise where it is the Court that is required to make a determination and a pronouncement on it. The Court needs to be satisfied that the method that has been used for the valuation is the correct one from the various methods which are used in this science and that the final figure reached has applied the method correctly. It would be otherwise in a commercial transaction where other factors come into play: see *Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302. For the purposes of the Court's determination, the market value is the value which will be paid by a willing purchaser to a willing seller in the market, and not what some valuer thinks ought to be the market value: *Re Morgan and London and North Western Rly Co* [1896] 2 QB 469**.**

The prices paid for comparable property in the neighbourhood are the usual indication as to the market value: *Streatham and General Estates Co Ltd v Works and Public Buildings Commrs* (1888) 52 JP 615**.** There is little evidence that these matters had been in the minds of the valuers when they prepared their report or gave their evidence.

[30] The Court, in these circumstances, could not get into the arena, in a highly contested civil dispute, to take it upon itself to decide in a science without the help of those competent in that science. Courts are courts of law and not marketing firms. They have necessarily to rely on cogent evidence adduced. They are not allowed to speculate. They may not decide arbitrarily.

[31] For the purposes of both the appeal and the cross-appeal, the issue is the same: insufficiency of credible evidence. Parties, in the circumstances, are to go back to their experts and come up with something more credible on either side to enable the Court to decide between the competing values offered, along the principles which the courts have applied over the ages. Parties may also – and they are encouraged to do so – elect a common valuer for the purposes of reducing the number of the issues in their dispute.

[32] The appeal and the cross-appeal are therefore dismissed with costs.

Confait v Nilsen

MacGregor P, Fernando, Twomey JJA

6 December 2013 SCA 13/2009

Cross-examination – Encroachment - Damages

The appellants were found to have encroached on the respondents' land and were ordered to pay damages with interest from the date of the filing of the plaint. They appealed the decision on the basis that the evidence of a witness contained manifest errors and there was no evidence to support the trial Judge's findings. Further, the appellants contended that the award of damages was based on a wrong principle of law and the award of interest from the date of the plaint was unjust and unreasonable.

JUDGMENT Appeal allowed.

HELD

1 The main purpose of cross-examination is to test the evidence of a witness as to its veracity, credibility, accuracy, authenticity or weight with the twofold object of:

   a eliciting information concerning the facts in issue or relevant to the issue that is favourable to the party conducting the cross-examination; and

   b casting doubt upon the accuracy of the evidence given against such party.

2 If a boundary cannot be established with any accuracy, no encroachment can be proved.

3 Damages should not be awarded in contradiction with what was claimed.

4 It is unfair to order interest on an award of damages from the date of the plaint where inordinate delays in the trial cannot be attributed to the defendant.

Legislation
Civil Code art 555(2)

Counsel P Pardiwalla for the appellant
K Domingue for the respondent

The judgment of the Court was delivered by
MACGREGOR P

[1] This case is one of the alleged encroachment by the appellants onto the respondents' land at Amitié, Praslin. The original complaint was made 17 years ago, with a plaint filed in 2001. The case in the Supreme Court took eight years to complete and another two and a half years from the completion of hearing to the delivery of the judgment, in which the trial Judge found that the appellants had encroached on the respondents' land to the extent of 18 square metres and had constructed part of their building thereon. He further found that that as a result of the encroachment, consequent damage had been caused to the respondents' property and ordered the sum of R 33,189.71 as indemnity, together with legal interest from the date of the filing of the plaints together with costs. He also ordered that the encroaching structure be demolished.

[2] The appellants have appealed against this decision on five grounds namely:

1) The learned judge erred in his finding that the evidence of Mr. Leong was not controverted on the question of an encroachment. The cross-

examination of Mr. Leong clearly demonstrated that an error was manifest.

2) The evidence in this case does not support the learned judge's finding that the Plaintiff had proved its case in respect of the encroachment on a balance of probability. Consequently the learned judge erred in concluding that an encroachment had been proved by the plaintiff.

3) The award of damages by the learned judge is flawed and based on a wrong principle of law.

4) The order of the learned judge as to the time within which the encroachment should be demolished is unreasonable in the circumstances of the case. The learned judge failed to take into account that the premises in question was a tourism establishment

5) The order of the learned judge awarding interest from the date of the Plaint is unjust and unreasonable, bearing in mind that the learned judge first set the case for judgment on the 26/1/07.

[3] Ground 4 has not been pursued. We treat Grounds 1 and 2 together and as the other grounds are consequent to our determination of Grounds 1 and 2, they will be addressed at the same time.

[4] We find merit in the appellants' counsel's argument in relation to Ground 1 that the evidence of the Land Surveyor Leong

was indeed controverted in cross-examination, and that he made a manifest error in calculating the alleged extent of encroachment.

[5] Cross-examination can controvert the evidence of a witness. In fact the main purpose of cross-examination is to test the evidence of a witness as to its veracity, credibility, accuracy, authenticity or weight. *Cross and Tapper on Evidence* (12th ed) at 313 states:

> The object of cross-examination is twofold: first to elicit information concerning the facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross- examination is conducted; second, to cast doubt upon the accuracy of the evidence in chief given against such party.

[6] It is clear from the transcript of proceedings that his evidence could not be relied on given the fact that Mr Leong contradicted himself on many occasions.

[7] In the instant case the credibility of the respondents' main witness and the accuracy of his oral evidence were also further controverted by the documentary evidence of exhibit D5 which was not objected to by the respondents. Exhibit D5 is a letter to the Director of Surveys dated 23 April 2003 from David Lebon, a Land Surveyor of long standing and of experience of which we take judicial notice. He states:

> We have spent one day on Praslin endeavouring to find reliable control points on which to base the survey but to our dismay none of the points observed were consistent with one another. We have come to the conclusion that no reliable control points which can be used to provide an unambiguous location of a boundary line in dispute, exist within the locality.

[8] We also note the contents of another letter from an officer of the Ministry of Land Use and Habitat, dated 5 August 1999 which states:

> Since no beacons were to be found it was therefore impossible to ascertain the possibility of an encroachment. Note that we cannot rely on the sketch provided.

[9] In terms of this appeal, a final survey was sought but has proved difficult to conclude. When asked on appeal whether there was any exactitude in terms of the boundary on which this case was based, counsel for the respondent conceded that there could not be. It would appear to us that if a boundary cannot be established with any accuracy, no encroachment can be proved and hence neither damages, nor interests thereon or costs arise.

[10] There is also, as pointed out by counsel for the appellants a manifest error in a simple mathematical calculation on the part of the witness for the respondents, Mr Leong, which seriously undermines his credibility. In his sketch plan there is shown an encroachment of a length of 4.5 metres with a varying width of 0.41 to 0.45 metres. This would result in an encroached area of 1.845 square metres to 2.025 square metres. Both calculations however blatantly contradict the 18 square metres of encroachment averred by Mr Leong in his testimony. We have also taken into account the fact that he never went on site and instead relied on a technician whose name he could not remember and who had since left his employ.

[11] He also implicitly agreed with the appellants' case as to the uncertainty in the boundary between the land of the two parties at page 97 of the transcript of court proceedings.

> Q. What is the total area of what you allege to be the encroachment?
>
> A. Approximately 18 square metres.
>
> Q. Is it possible for you to use the width and the lengths that you have to give us your calculations of PR10?
>
> A. I will not get it correctly because there are no coordinates. The area is not calculated. The lines are not parallel. You cannot calculate exactly but we can get approximate calculations.
>
> And at page 103
>
> Q. You would agree with me that there are beacons which are not 100% accurate?
>
> A. Yes
>
> Q. The most accurate is to take the Government control points if there is one?
>
> A. Yes.

His findings on the encroachment are accepted and relied on by the trial Judge and as this is a clear misdirection of fact, it clearly cannot stand.

[12] Accordingly Grounds 1 and 2 succeed. This relieves us of the need to consider the other grounds appeal.

[13] However, we feel the need to mention that had the appeal not succeeded on these grounds, we would have found in favour of the appellants on the issues of damages, interest and costs. While a claim for R 33,189.72 was made by the respondents for the costs of survey, relocating beacons and moral damage the trial Judge made

an award for "injury to property and aesthetic value." Article 555 (2) of the Civil Code only allows for the payment of damages "for any damage sustained by the owner of land." While damage to property and moral damage could indeed have been awarded, the trial Judge awarded the sum of R 33,189.72 for what he terms "consequent injury to [his] property and its aesthetic value." This was in clear contradiction to what was claimed and could not have been upheld by this Court.

[14] It was also grossly unfair to award interest on the award from the date of the plaint given that the inordinate delays in the completion of the trial could not be attributed to the appellant. We also note that it is unfortunate that counsel despite their attempts in exploring the settlement of this appeal lost a lot of time between August 2010 and November 2013 with 10 adjournments, failing in the end to reach an amicable settlement. This perhaps could have been achieved and may have restored good relations between parties who will nevertheless remain neighbours.

[15] For the reasons set out above, this appeal succeeds. We feel that given the circumstances of this case it would not be fair to order costs in the event. Consequently we order that each party should bear their own costs.

Duval v R

Fernando, Twomey, Msoffe JJA

6 December 2013 SCA 16/2011

Constitution – Minimum mandatory sentence − Role of cross-examination

The appellant was sentenced to eight years of imprisonment for drug trafficking. He appealed conviction and the sentence.

JUDGMENT Appeal dismissed.

HELD

The prosecutor is a quasi-judicial officer and is duty bound to bring out any material or clarify any matter which is favourable to the defence, but it is not the function of the prosecutor to prove the defence case.

Legislation
Constitution
Misuse of Drugs Act

Cases
Poonoo v Attorney-General (2011) SLR 423

Foreign cases
R v Lovelock (1997) Crim LR 821 (CA)
Browne v Dunn (1893) 6 R 67 (HL)

Counsel B Hoareau for the appellant
K Karunakaran for the respondent

The judgment of the Court was delivered by
FERNANDO JA

[1] This was as per the notice of appeal, an appeal against a conviction for trafficking in a controlled drug, namely 39.7 grams of cannabis resin, on the basis of the presumption in the Misuse of Drugs Act and the sentence of eight years imposed on such conviction. As per the formal charge the appellant on 24 August 2007, at Bel Ombre, Mahe, was found in possession of 39.7 grams of cannabis resin.

[2] The appellant in his notice of appeal had raised five grounds of appeal, four of which are against the conviction and one against sentence. The grounds of appeal against conviction revolve around a challenge to the trial Judge's assessment of the evidence of defence witness Esterilla Napoleon (DW 1), the wife of the appellant, in view of the failure of the prosecution to cross-examine her and thus tacitly accepting her evidence which resulted in denying her the opportunity of explaining any contradictions or alleged issues in her evidence. It was also his complaint that there was no proper evaluation of her evidence in that her evidence was used by the trial Judge to contradict the evidence of the appellant but not that of the prosecution. On sentence the appellant had argued that the minimum mandatory sentence of eight years imposed was manifestly harsh and excessive and was in contravention of the Constitution as it was an interference with the independence of the Judiciary and also amounted to cruel, inhumane and degrading treatment. The appellant had prayed that his conviction be quashed or in the alternative that the sentence imposed be reduced.

[3] According to the main prosecution witness PW 1, he, along with a few other police officers were on routine foot patrol in the Bel Ombre area around 2 pm on 24 August 2007, when he saw the appellant at a distance of about 15 metres come running out of his

house with a red plastic bag in his left hand in a suspicious manner. He and PW 2 had then followed the appellant at a distance. The appellant had gone behind the house and hid the plastic bag that was in his hand under a rock that was about two to three metres from the house. When the two of them approached him he had run towards the house. The two of them had then apprehended the appellant at "the stairs" at the rear of the house and brought him back to the place where the plastic bag was hidden by the appellant. PW 1 had thereafter removed the plastic bag from underneath the rock. On examination of the plastic bag in the presence the appellant and PW 2, PW 1 had found a small container which contained another red plastic bag. Inside that plastic bag were two clear plastic bags one containing 24 pieces and the other 10 pieces of a dark substance, which PW 1 suspected to be controlled drugs. When questioned, the appellant had "claimed that he knew nothing about these drugs." The appellant was then arrested and a search of his house was conducted. Nothing illegal had been found inside the appellant's house. Thereafter the appellant was taken to the Beau Vallon police station. Under cross-examination it had been suggested to PW 1 that on a tip-off police found the drugs underneath the rock and since it was found in the yard of the appellant, he was arrested. PW 2 had corroborated the evidence of PW 1 in all material particulars. The only issue being raised by the defence in this case as stated at page 148 of the brief is "whether there was anything seized on the accused."

[4] The dark substances that were hidden underneath the rock by the appellant on analysis by the Forensic Chemist were found to be cannabis resin with a total net weight of 39.7 grams. There is no challenge in this case to the chain of evidence, the expertise of the Forensic Chemist or the analysis of the drugs.

[5] The appellant in his dock statement had stated:

> It was on the 24th of August 2007, at around 2.30 pm, I was at home. I just came from work, I saw a Constable searching but not at my home, it was my neighbour's house, and I was in my home, in the kitchen near the step, when I later saw a police officer coming with a gun near the river near the house. I do not know what he was doing there. And then there was a lady Constable and she came near the steps, I was near her. The man who was with the gun had a bag with him, he handcuffed me and there were some officers and I did not speak to them and I saw them searching my house. And then they told me let's go and it was then when I came to court that I saw the drugs with them and that was it … [verbatim].

He had claimed that he had not seen any drugs while at his house and does not know to whom they belong.

[6] DW 1 Esterilla Napoleon, wife of the appellant, testifying for the defence had stated that she was sitting in the living room with the appellant and her daughter. At a certain stage the appellant had gone to look for tea in the kitchen when two police officers entered their house through the kitchen and handcuffed her husband. She had at one stage said that when the police officers entered the house the husband was in the sitting room and moments later that he was in the kitchen. She does not make reference to having seen a bag in the hands of the police officer who arrested the appellant as narrated by the appellant. Thereafter some police officers had conducted a search of their house. The following questions and answers in cross-examination (verbatim) are of relevance:

> Q: And on that day you said your husband was sitting in the living room he got up. Did you see how long after he came with the police officers?
>
> A: No I can't remember how long it took.
>
> Q: So there was a possibility something had happened that did not see for that amount of time?
>
> A: No I did not see.
>
> Q: That day before you saw your husband coming in with the lady and the gentleman and the female police officer you did not go outside the house you were inside?
>
> A: Yes I was inside the house.

[7] It is clear that the evidence of DW 1 is in clear contradiction to the dock statement of the appellant as to where her husband was at the time of his arrest and as to what he was doing. The inability of DW 1 to give a time period from the time the appellant left to go to the kitchen and him coming back with the police officers and her evidence that she did not see what happened during that period and that she did not go outside the house but remained inside leaves room for a court to accept the prosecution version as being uncontradicted. Further her version of the incident had not been put to the prosecution witnesses by counsel for the defence.

[8] The trial Judge had in his judgment stated that he rejected the defence put forward by the accused and accepted the evidence of the prosecution witnesses as there were no material contradictions or major inconsistencies despite their being subjected to rigorous cross-

examination. These are findings of facts which this Court will be reluctant to disturb unless there is cause to do so. We see no cause to do so in this case.

[9] The appellant's statement that the prosecution had failed to cross-examine DW 1 is not correct as evidenced by page 142 of the brief. The purpose of cross-examination of a witness, in a case like this is not to "allow a witness the opportunity of explaining any contradictions or alleged issues in the witness's evidence" as argued by the appellant but in fact to highlight the contradictions in the witness's own evidence and that of other witnesses who testified for the same side as that of the witness. To allow a witness the opportunity of explaining any contradictions or alleged issues in the witness's evidence is the purpose of re-examination. A prosecutor knows best on what matters he needs to cross-examine a witness and his decision not to cross-examine on all the matters as deponed by a witness does not amount to a tacit acceptance of the entirety of that witness's evidence. The evidence given by a prosecution witness is used by the prosecution, to prove the elements of the offence and to corroborate the evidence of another prosecution witness; and by the defence to contradict the evidence of another prosecution witness or corroborate the defence evidence and thereby cast a doubt on the prosecution case. The evidence given by a defence witness is used by the defence, to cast a doubt on the prosecution case and to corroborate the evidence of the accused or another defence witness; and by the prosecution to contradict the evidence of the accused or another defence witness or corroborate the prosecution evidence. The cross-examination of DW 1 referred to at paragraph [6] above is an illustration of this. In our view there was no reason to cross-examine DW 1, in the way argued by counsel for the defence as her evidence in examination-in-chief was in clear contradiction of the

appellant's dock statement. Although a prosecutor for the Republic is a quasi-judicial officer and is duty bound to bring out any material or clarify any matter which is favourable to the defence, it is not his function to prove the defence case. In *R v Lovelock* (1997) Crim LR 821 it was stated that it is not always necessary to put to a witness explicitly that he is lying, if the overall tenor of the cross-examination is designed to show that his account is incapable of belief. In *Browne v Dunn* (1893) 6 R 67 (HL) it was stated that the story told by a witness may be so incredible that the matter upon which he is to be impeached is manifest, and in such circumstances it is unnecessary to waste time in putting questions to him upon it. The position would be different if the only evidence on a material fact in issue in the case emanates from a particular witness. In such a case failure to cross-examine such witness may amount to a tacit acceptance of the evidence of such witness on such material fact. This was not the position in relation to the evidence of DW 1. Further we take note of the fact that DW 1 is the wife of the appellant who had been living with him for 25 years. We therefore have no hesitation in dismissing all the grounds of appeal pertaining to the conviction and the appeal on the conviction itself.

[10] As for the appeal on sentence, the relevant portion of the plea in mitigation made by counsel for the appellant, who was also counsel for the accused before the Supreme Court is of relevance:

> My Lord, this accused person is a first time offender and he is 57 years old. Relatively middle age he regrets what he has done, by committing the offence and at his age I believe *the court should give the most lenient sentence this court is able to give under the law which is 8 years minimum mandatory ... So I*

> *would submit my Lord, that the minimum mandatory would do justice in this case so I would urge your Lordship to impose the minimum mandatory."*
>
> [Emphasis added]

[11] It is inconceivable that counsel for the appellant having submitted before the Supreme Court "that the minimum mandatory would do justice in this case" had decided to prefer a ground of appeal to the effect:

> that the minimum mandatory sentence of 8 years imposed is manifestly harsh and excessive and is in contravention of the Constitution, as it is an interference with the independence of the judiciary and also amounts to cruel, inhumane and degrading treatment

without urging any reasons as to his change of mind or any new ground on behalf of the appellant. The trial Judge in imposing the minimum mandatory sentence of eight years had taken into consideration that the appellant is a first offender, that he is 57 years, that he is a family man and the type and quantity of drugs involved, all the factors urged by his counsel in mitigation of sentence. We do not find on record any exceptional reasons for the trial Judge not to have imposed the minimum mandatory term of imprisonment. We are also of the view that the sentence imposed does not breach the proportionality principle and/or the appellant's right to a fair hearing as expounded in the case of *Poonoo v Attorney-General* (2011) SLR 423**,** in view of the facts and circumstances of this case. It was therefore prudent on the part of counsel for the appellant, although late, to have abandoned the appeal on sentence in his skeleton heads

of argument, filed four days before the hearing of the appeal. Counsel should however be more cautious in filing grounds of appeal and not file them for the sake of filing and withdraw them at the last moment.

[12] We therefore have no hesitation in dismissing the appeal.

Gopal v Barclays Bank (Seychelles)

Domah, Fernando, Msoffe JJA

6 December 2013 SCA 51/2011

Guarantee – Evidence – Burden of proof

The appellant was a guarantor for a loan agreement. After the principal debtor failed to pay, the respondent filed a suit before the Supreme Court contending that the guarantee agreement was activated by the principal debtor's breach of the loan agreement. The appellant appealed against the decision of the Supreme Court which ruled in favour of the respondent but disallowed the claim for interest.

JUDGMENT Appeal dismissed.

HELD

1 A contract of guarantee is a tripartite agreement which contemplates the principal debtor, creditor and the surety.

2 To succeed on any issue the party bearing the legal burden of proof must:

   i. Satisfy a judge or a jury of the likelihood of the truth of his or her case by adducing a greater weight of evidence than the opponent and

   ii. Adduce evidence sufficient to satisfy the required standard or degree of proof.

Legislation
Civil Code arts 1109, 1319, 1320, 1322, 1134,
Code of Civil Procedure s 75
Evidence Act s 12

Cases
Suleman v Joubert SCA 27/2010

Foreign cases
Re B (Children) [2008] UKHL 35

Foreign legislation
Evidence Act (Tanzania) ss 110, 115

Counsel B Hoareau for the first appellant
S Rajasundaram for the second appellant
C Lablache for the respondent

The judgment of the Court was delivered by
MSOFFE JA

[1] A number of documents were produced and admitted in evidence at the trial before the Supreme Court. In a similar vein, at the trial PW1 Egbert Laurence and PW2 Ms Rona Labrosse testified in support of the respondent's case. The appellants testified in person and denied the claim against them. It seems however that a fair determination of the case basically depends on two documents. The Guarantee Form (exhibit P1) and the Facility Letter (exhibit P2).

[2] The respondent's case was, and indeed still is, that by virtue of the above two documents they extended the following facilities to the appellants:

1) Term loan 1: USD 400,000

2) Term loan 2: USD 140,000

3) Overdraft: UCR 150,000

4) Letter of Credit: Issuance against the linked USD term loan.

The purpose of the facilities was to finance the cost of a printing press and other accessories of the Indian Ocean Printing Services (Pty) Ltd in which the appellants are Directors.

[3] In exhibit P1 the words GOOD FOR THE SUM OF USD ONE HUNDRED AND FORTY THOUSAND ($140,000) were inserted in long hand and were followed by the appellants' signatures. According to PW1 he prepared the Guarantee Form (exhibit P1). He filled in the name of the principal debtor at the beginning of the document, the names of the appellants, and the above words before the appellants signed the document.

[4] Under the proviso to cl 2 of exhibit P1 the words USD 140,000 (United States Dollars one hundred and forty thousand) were also inserted in long hand. The proviso was filled in by Philip Pierre, the Relationship Manager who managed the principal debtor's accounts relationship with the appellants. The appellants' contention was that this was filled in without their knowledge and consent after they had signed exhibit P1. According to them, they only signed a blank form with cl 2 unfilled in. They also challenged this document on the basis that it does not bear any date.

[5] As regards the Facility Letter (exhibit P2) it is evident that it did set out the terms upon which the loans and overdraft were to be made available by the respondent to the appellants. With regard to security it stated:

1. Director's Guarantee supported by:

2. Fixed and floating charge over company's assets;

3. A 2 years renewable contact between IOT and IOPS to incorporate an undertaking from IOT to assign all payments through Barclays Bank;

4. Barclays as agent, noted as Loss Payee under all risks insurance policy;

5. A first line mortgage over property parcel number 54563 with insurance and the Bank's interest noted in the policy.

All indebtness and liabilities, actual or contingent, now or at any time owing or due by the client to the Bank will be secured by the above security in favour of the Bank.

[6] The last paragraph of exhibit P2 contains the following words:

> Please confirm your acceptance of this Agreement by executing and dating this Facility Letter and the closed duplicate. The duplicate should then be returned to the Bank. The date of this Agreement shall be the date signed below. This Agreement will remain available to be accepted for a period of 30 days from the date of this Facility Letter, after which will lapse if not accepted.

Thereafter, the letter was signed by the respective parties. The appellants in particular signed on behalf of Indian Ocean Printing Services (Pty) Ltd.

[7] There is no serious dispute that the principal debtor paid off the USD 143,000 loan and the respondent recovered R 492,460.25 in respect of the overdraft. No repayments were made to the USD 400,000 loan. It was in respect of this state of affairs that the respondent filed the suit before the Supreme Court contending that the Guarantee Agreement was henceforth activated by the principal debtor's breach of the loan agreements and that the appellants were liable to pay the guaranteed sum of USD 140,000 with interest at R 865,687.30 and the costs of the suit. The Chief Justice ruled in favour of the respondent save that he disallowed the claim for interest. Aggrieved, the appellants have preferred this appeal.

[8] It is trite law that a contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of default. The person who gives the guarantee is called the surety, the person in respect of whose default the guarantee is given is called the principal debtor, and the person to whom the guarantee is given is called the creditor. In a contract of guarantee there must be a conditional promise to be liable on the default of the principal debtor. Thus, if the purpose of a guarantee is to secure payment of a debt, the existence of a recoverable debt is necessary. It is of the essence that there should be someone liable as a principal debtor and the surety undertakes to be liable on his default. In a valid guarantee there must be a principal debt. Therefore, a contract of guarantee is a tripartite agreement which contemplates the principal debtor, the creditor and the surety – See Avtar Singh *Law of Contract* (6th ed) 430–431.

[9] In this case, exhibits P1 and P2 have all the hallmarks of a contract of guarantee. The principal debtor is the Indian Ocean

Printing Services (Pty) Ltd. The sureties are the appellants herein. The principal debts are the loans in issue.

[10] In the notice of appeal the appellants canvassed five grounds of appeal. At the hearing grounds 3 and 4 were abandoned thereby leaving grounds 1, 2 and 5. We propose to deal with grounds 1 and 2 together and ground 5 separately.

[11] The complaint in the first and second grounds of appeal is essentially centered on that portion of the judgment of the Chief Justice which reads:

> 13. The defence revolves around the fact that the defendants claim they did not consent to the contents of the proviso to clause 2 that were inserted by Pierre. Given the endorsement at the foot of the document next to the defendants' signatures which states, 'GOOD FOR THE SUM OF USD ONE HUNDRED FORTY THOUSAND ($140,000), existed on the document prior to the defendants' signatures; having been so endorsed by PW1, the defendants cannot conceivably deny knowledge that the guarantee was at least good for the sum of USD 140,000. The defendants acknowledge signing the guarantee form and this information was clearly available on the form at the time of their signing the document next to where they appended their signatures.

[12] The appellants' stance on the above grounds is that the Chief Justice erred because their position has always been that the proviso to cl 2 in exhibit P1 was filled in without their knowledge and or consent after they had signed the guarantee. They only signed

a blank form with cl 2 unfilled in. With respect, on the available evidence there is no basis for us to fault the Chief Justice in his findings and conclusions on the point. The evidence of PW1 is clear that he filled in the name of the principal debtor at the beginning of the document, the names of the appellants and phrase "GOOD FOR THE SUM OF USD ONE HUNDRED AND FORTY THOUSAND ($140,000)" at the foot of the document before the appellants signed the said document. Since these are the same words and figures which feature in the proviso it is too late in the day to disown the document on that aspect. And once they signed, coupled with the uncontroverted evidence by PW2 that of the loans guaranteed there were outstanding amounts to be paid, it followed that the guarantee agreement was activated by the principal debtor's breach of the loan agreements.

[13] At any rate, it is trite law that "he who asserts must prove" (ei incumbit probatio qui dicit, non qui negat) ─ Adrian Keane and Paul McKeown *The Modern Law of Evidence* (9th ed) at 83. This principle of law is supported by both French law and English law. It is a principle which is well cherished in both jurisprudences.

[14] Articles 1319, 1320 and 1322 of the Civil Code of Seychelles are clear on the above point. Article 1319 in particular provides:

> An authentic document shall be accepted as proof of the agreement which it contains between the contracting parties and their heirs or assigns.
>
> Nevertheless, *such document shall only have the effect of raising a legal presumption of proof which may be rebutted to the contrary.* Evidence in rebuttal,

> whether incidental to legal proceedings or not, shall entitle the Court to suspend provisionally the execution of the document and to make such order in respect of it as it considers appropriate.
>
> [Emphasis added]

[15] In the justice of this case, it was incumbent upon the appellants to adduce strong evidence in rebuttal of the respondent's case that the above words and figures in the document were inserted before they appended their signatures. Apparently the appellants' case has all along been a general denial to the effect that the said words and figures were inserted after they had signed the document, without strong evidence to rebut the respondent's case on the point. In the absence of strong evidence to the contrary, it will be fair to say that they did not discharge their evidential burden in the matter.

[16] Section 12 of the Evidence Act gives room for the application of English law of evidence in Seychelles except where it is otherwise provided by special laws. In *Suleman v Joubert* SCA 27/2010 at 6 this Court quoted with approval *Re B (Children)* [2008] UKHL 35 whereby Lord Hoffman using a mathematical analogy in explaining the burden of proof stated:

> If a legal rule requires a fact to be proved (a 'fact in issue'), a Judge or Jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who

> bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

[17] Similarly, s 110 of the Evidence Act of Tanzania (which is essentially English law) provides:

> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

And s 115 thereto is to the effect that in civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. And Sarkar *Law of Evidence* (16th ed) at 1675 defines the word "especially" as facts that are pre-eminently or exceptionally within one's knowledge.

[18] Explaining that the burden of proof may shift from one party to another in the course of a trial *Halsbury's Laws of England* (4th ed) has the following to say at page 11, paragraph 13:

> … The *evidential burden*, however, *may shift from one party to another* as the trial progresses according to the balance of the evidence given at any particular stage; this burden rests upon the party who would fail

> if no evidence at all, or no further evidence, as the case may be, was adduced by either side.
>
> [Emphasis added]

And *Cross and Tapper on Evidence* (12th ed) at 124 defines "evidential burden" as:

> … the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue ….

[19] Yet again, at page 18, paragraph 19 *Halsbury's* (supra) says something on the standard of proof to this effect:

> To succeed on any issue the party bearing the legal burden of proof must (1) satisfy a Judge or Jury of the likelihood of the truth of his case *by adducing a greater weight of evidence than his opponent,* and (2) adduce evidence sufficient to satisfy them to the required standard or degree of proof.
>
> [Emphasis added]

[20] Needless to say, in civil cases the standard of proof is satisfied on a balance of probabilities.

[21] As already alluded to, the appellants' case at the trial was built on the premise that it was "especially" within their knowledge, if we may respectfully say so, that the words and figures in exhibit P1 were inserted after they had signed the document. Yet, they did not adduce evidence of "greater weight" than that of the respondent to discharge their burden of proof on the point. As it is, if we may respectfully repeat, their case was a general statement that the words

and figures were inserted after they had appended their signatures. With respect, more and stronger evidence ought to have come from them to substantiate and justify this assertion. Apparently no such evidence was forthcoming in the case!

[22] Moreover, it is in the evidence of the appellants, particularly that of the first appellant at pages 128–129 of the record before us, that they trusted the respondent bank to do what was in their best interest. If so, we think, it is a contradiction in terms for them to come up later and say that what the respondent did in the matter was not in their best interest!

[23] Furthermore, it was never the appellants' case that their consent in relation to the guarantee in issue was given by mistake, or extracted by duress or induced by fraud so as to bring it within the ambit of art 1109 of the Civil Code. In the absence of a defence to the above effect there is no basis for doubting the respondent in its case against the appellants. As it is, we are satisfied that exhibit P1 constituted a fully concluded and valid agreement which has the force of law between the parties in terms of art 1134 of the said Code.

[24] This brings us to ground 5. The essence of the complaint in this ground is best captured in the contents of paragraph 2.4.4 of the appellants' skeleton heads of argument. It is the appellants' contention that paragraph 1 of exhibit P1 clearly states that the appellants, as guarantors, will become liable only if there is a demand notice made in writing. In their view, there was no evidence that there was any demand made to them in writing. In their further view on the point, the letter of demand which was exhibited in the case was sent to the company and not to them personally.

[25] Apparently the above point was canvassed before the Supreme Court. The Chief Justice dismissed it mainly because it was not distinctly pleaded as required by s 75 of the Seychelles Code of Civil Procedure which states:

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

[26] In dismissing the above point the Chief Justice reasoned as follows:

> My view is that the defendants did not distinctly plead in their defence, as required by section 75 of SCCP that the plaintiff had not made demand from the defendants in their capacity as guarantors on default of the principal debtor. It would have been necessary for the defendants to do so if this was being set up as a defence to the action. To require the other party to strictly prove a fact is not necessarily to plead that such alleged fact did not in fact occur or take place. I do not accept the submission put forward by Mr Hoareau.

[27] If we understood Mr Hoareau for the appellants correctly, and we think we did, he was of the view that contrary to the Chief Justice's finding the above point was specifically pleaded under paragraph 8 of the plaint and specifically denied under paragraph 8 of the written statement of defence.

[28] In order to appreciate the essence of the above point it is instructive that we quote the paragraphs verbatim. Paragraph 8 of the plaint averred as follows:

> In breach of the express term, by virtue of non-payment by the Company as alleged in paragraph 7 above, the Guarantee Agreement has been activated and the Defendants are liable to satisfy the Company's debt plus interest, to which they have failed.

And under paragraph 8 of the written statement of defence it was averred as under:

> In the premise of all the averments stated above, the defendants deny that there is a breach of express term. The Plaintiff is further put to strict proof of "activation" of the alleged guarantee agreement. In isolation of the main loans and the liability attached thereon, no amount is payable under the alleged guarantee agreement with or without interest. In essence, no guarantee agreement is enforceable in isolation of the main loans for which the guarantee is purported to have been given. The non-payment by the Company of two other loans is put to strict proof by the Plaintiff.

[29] With respect, in our careful reading of the averments in the above pleadings, we do not get the impression that the point under scrutiny was clearly and distinctly pleaded thereto. In other words, there is nothing clear and distinct in relation to the letter of demand. To this end, we find no justification for faulting the Chief Justice in his

reasoning on the point. It occurs to us that for s 75 (supra) to apply, in the circumstances of this case, there ought to have been in the first place a clear and distinct averment in the plaint relating to the letter of demand followed by a clear and distinct statement by the appellants denying the existence of any such letter. Apparently none of these existed in any of the said averments in the pleadings.

[30] In spite of the foregoing, it is not quite correct to say, as the appellants would wish us to believe and hold, that there is nothing at all in the evidence to show that they were made aware in writing of the default of the borrower. On the contrary, it cannot be over-emphasized that the appellants were at all material times the shareholders and directors of the borrower. To this end, there was a letter of demand (exhibit P5) dated 31 July 2008 which was written to the first appellant. The record of proceedings at page 81 shows that this letter was produced and admitted in evidence before the Supreme Court on 25 May 2011 without objection by Mr Hoareau appearing on that day on behalf of the first appellant herein. Mr Rajasundaram for the second appellant objected but was overruled. And the existence of the said letter was further confirmed by the first appellant's own testimony in court under cross-examination at page 136 of the record of proceedings thus:

> Q. Were you informed of this US$140,000 claimed when a *claim letter* was issued by Barclays Bank. Was there any mentioned (sic) about US$140,000 claimed in the *demand or claim letter* issued by Barclays Bank, was it mentioned there?
>
> A. In the facility letter?
>
> Q. No in *the claim letter* when you failed to pay according to allegation of the Barclays Bank there

was a claim letter from the Barclays Bank. Was it mentioned that guarantee document stands good for US$140,000?

A. *Yes*.

Q. Was it mentioned there?

A. *Yes*.

[Emphasis added]

[31] In conclusion on the above point, we are of the considered view that much as the issue of the letter of demand was not pleaded, the evidence on record is to the clear effect that there indeed existed the said letter. It is not therefore, correct for the appellants to state to the contrary in the midst of the above glaring piece of evidence which is for all intents and purposes against them.

[32] When all is said and done, we are satisfied that there is no merit in this appeal. We hereby dismiss it with costs.

Knowles v R

Domah, Twomey, Msoffe JJA

6 December 2013 SCA 11/2012

Manslaughter – Sentencing – Duty of counsel −Judicial bias

The appellant was sentenced to 11 years of imprisonment after he was found guilty of manslaughter. The appellant argued that the Judge erred in law and facts by not addressing the inconsistency between the prosecution evidence and not attaching sufficient weight to the evidence provided by the appellant.

JUDGMENT Appeal dismissed; sentence reduced to six years of imprisonment.

HELD

1 A judge takes an oath to do justice to all manner of people without fear or favour, whether friend or foe. In the discharge of this judicial responsibility, a judge's paths cross those of many people in society. That does not prevent the judge from deciding cases with impartiality and independently.

2 Justice should not only be done but should manifestly and undoubtedly be seen to be done. The judicial bias test in *Porter v Magill* [2001] UKHL 67 is endorsed.

3 When a party questions the impartiality and independence of the judge in a case, a court should be slow to accept such an argument without the most cogent grounds for doing so because it would place a premium on post-trial intimidation of judges.

4 Age, gender and degree of culpability influence the length of the sentence.

Legislation
The Penal Code ss 192, 193

Cases
Quatre v R, SCA 2/2006, [2006] SCCA 13
R v Crispin (2008) SLR 300
R v Ernesta No 33/1998
R v Freminot No 20/2011
R v Gonthier CN 36/2000
R v Pierre No 10/1991
R v Quatre (1993) SLR 152
R v Raguin Cr No 18/ 2011
R v Rose SCA 06/2011

Foreign cases
Benmax v Austin Motors [1955] 1 All ER 326
Porter v Magill [2001] UKHL 67
R v Gough [1993] AC 646 (HL)
R v Putnam (1991) 93 Cr App R 281
R v Sussex Justices, *ex parte McCarthy* [1924] 1 KB 256

Counsel J Camille for the appellant
D Esparon for the respondent

The judgment of the Court was delivered by
DOMAH JA

[1] The appellant stood charged under ss 192 and 193 of the Penal Code for the manslaughter of 64 year old Jemmy Simeon on 5 September 2009 at Lovenut Discothèque. He had pleaded not guilty and was assisted by counsel. The Court, after a long drawn-out trial which comprised depositions from 11 prosecution witnesses and 14 defence witnesses, found him guilty as charged and sentenced him to

a term of imprisonment of 11 years. The appellant has appealed and put up the following grounds to challenge the decision of the trial Judge:

1) The trial Judge erred in law in not addressing himself, sufficiently on the inconsistencies between the evidence of the prosecution witnesses, namely PW5, Byron Reid and PW6, Aubrey Monthy, which inconsistencies were raised by the defense and which goes to the root of the case

2) The trial Judge erred in law in having concluded that the defense counsel have cast a lot of doubt on the evidence of PW6, Aubrey Monthy and yet concluded in his findings that the same Aubrey Monthy was a credible witness before the Court.

3) The trial Judge erred in law and on the facts to hold that the evidence of both PW5 and PW6 were free of any major inconsistencies so as to reject their evidence and moreover to hold that both prosecution witnesses were truthful and credible in all circumstances of the case.

4) The trial Judge erred in law and on the facts to hold that the inconsistencies raised by the defense in the case were minor inconsistencies and inconsequential as not to the root of the case.

5) The trial Judge erred in law and on the facts to hold that the defense witnesses were not credible and their evidence not cogent and reliable.

6) The trial Judge erred in law and on the facts in holding that the appellant had in his testimony not disputed most of the facts relating to his presence in the discotheque at the material time.

7) The trial Judge erred on the facts to hold that DW2, Kenny Knowles and DW3, Chris Knowles both testified that as they saw the appellant receive a kick in the face and a man had punched appellant and had fallen on the ground, both DW2 and DW3 had then got involved in the fight and assisted appellant to escape.

8) The trial Judge erred in law and on the facts to hold that there was ample evidence to show that the appellant wanted to go onto the stage despite being warned off and stopped by security personnel and that the same act of the appellant was a pointer to his guilt.

9) The trial Judge erred in law and on the facts to disregard the evidence of both DW4 Conray Payet and DW5 Linda Denise which clearly cast a doubt on the credibility of the prosecution witness Aubrey Monthy and to have concluded that, in not adhering to the demand made by Monthy, same act have left the evidence of Monthy intact before the Court.

10) The trial Judge erred in law in rejecting the evidence of DW6, Freddy Savy and or in not

attaching sufficient weight to his evidence, or at all.

11) The Judge erred on the facts in holding that it was surprising for the appellant and witness DW2, DW3 and DW6, not to have seen the body of the late Jemmy Simeon on the floor inside the discotheque.

12) The trial Judge erred in law in rejecting the testimony of DW7, Nesta Marie as hearsay.

13) The trial Judge erred in law in not attaching any or sufficient weight to the evidence of DW7 Franscina Rose and the exhibit of the police diary records admitted as part of the defence case.

14) The trial Judge erred in law in not addressing himself on the police diary records admitted as defense evidence in the case and which cast a major doubt on the prosecution's case.

15) The trial Judge erred in law and on the facts in not attaching any or any sufficient weight to the evidence of DW10, Clive Roucou, which further cast a major doubt on the case of the prosecution.

16) The trial Judge erred in law in not addressing himself on the evidence of DW10, Clive Roucou sufficiently and dispels any doubt that same testimony throws on the case.

17) The appellant will contend that he has been denied a fair trial as it transpired and came to this knowledge after the conclusion of the case before His Lordship Judge Ducan Gaswaga, by way of new evidence and judicial notice, that Judge Gaswaga was a friend and has been seen in the company of prosecution witness PW 6, Aubrey Monthy, on numerous occasions and that His Lordship Gaswaga is residing in a house being rented out by the Seychelles Judiciary on his behalf on the same property which hold the family house of Aubrey Monthy, the father of Aubrey Monthy, at la Misère, Mahe, Seychelles.

[2] Even if variously expressed, 16 of the above grounds challenge the Judge's findings of fact. The seventeenth ground raises an issue of fair trial on the ground of an alleged post-trial discovery of fact tending to show bias of the trial Judge. The appellant argues that it came to his knowledge that the Judge who heard this case was a friend, and had been seen in the company, of prosecution witness Aubrey Monthy so that his right to a trial before an independent and impartial court was compromised.

[3] Counsel for the appellant subsumed arguments on grounds 1 to 4 under the heading inconsistencies in the evidence of the prosecution witness; on grounds 5 to 16 under the heading material evidence overlooked by the trial Judge of defence witnesses; and on ground 17 under the heading lack of fair hearing.

[4] We are happy to deal with this appeal under these headings.

Grounds 1 to 4

[5] Counsel concedes that the appellate court, relying as it does on a transcript, would be ill-placed to come to a conclusion different from that of the trial court which has the advantage of seeing and assessing *de visu* the witnesses in real life as opposed to reading what has been recorded in black and white of the actual proceedings. However, he also argues that the appellate court is in as good a position as the trial court when, on a specific issue, it is a question of drawing an inference from specific facts: see *Benmax v Austin Motors* [1955] 1 All ER 326 and *Quatre v R*, SCA 2/2006, [2006] SCAA 13.

[6] Counsel has raised three points under the rubric inconsistencies: the fact that PW5 Brian Reed and PW6 Aubrey Monthy differed on their evidence that the appellant had pulled the leg of the deceased Jemmy Simeon which led to the fall of the latter on his back leading to a fracture of the base of his skull.

[7] It is the case of counsel that the prosecution evidence resting as it does principally on the evidence of those two witnesses contains basic, material and significant inconsistencies for it to be accepted as reliable by a court of law for the purposes of proving the guilt of the appellant.

[8] The alleged inconsistency lies in the different positions they showed as to where the deceased fell. It is the argument of counsel that one showed a position closer to the main door and the other closer to the steps going onto the stage yet both of them were adamant of the places where they maintained they saw the appellant pull the leg of the victim.

[9] We have had a look at the relevant photographs in the album and read the transcript. It does not seem to us that the positions

shown by the two witnesses are so far apart that they would be regarded as material contradictions. Times and spots shown by witnesses invariably differ but the differences do not necessarily amount to inconsistencies. They need to be subjected to judicial scrutiny to test, in the light of other factors, their acceptability in the context in which they occur. It is axiomatic that what a witness will see from one place and from one angle will differ from what another will see from another place and from another angle. The Judge in this case effected a locus visit to make this assessment in the light of the depositions of the witnesses. We are unable to see in what way the spots shown are so distant, even on the photographs produced, that they may be adjudged material contradictions.

[10] The second point raised by counsel for the appellant relates to the actual person who assaulted the deceased. It has been his submission that Brian Reed confirmed in cross-examination that in his statement to the police he had stated that it was the appellant only who had dealt blows to the victim. On oath, his deposition was that it was the appellant and his brother who had done so. The same version is given by Aubrey Monthy.

[11] We have gone through the deposition of these two witnesses. To us, the apparent contradiction is no contradiction at all. Too much is being made of too little. The witnesses, when questioned, duly explained the incident. The incident comprised the pulling of the leg followed by the assault by the others. Indeed, at first, the enquiry started as an assault before the scientific evidence came to show which part of the assault happened to be the fatal blow. The evidence has to be understood in the context of the integral whole.

[12] Both prosecution witnesses were categorical that, from where the appellant was at a lower level, he pulled the left leg of the deceased which caused the latter's fall. The nature of the injury received by the victim is consistent with a limp fall backwards. The suggestion of the defence that the front head injury of the victim was caused by a bottle and that the victim may have fallen by that blow is not consistent with the type of injury that caused the fall. When we take into account the layout of the locus, the level of the dance floor to the VIP platform, the stairs, the admission by the appellant of a confrontation and an altercation between the protagonists and a couple of members of the private party, there was ample evidence to support the fact that the manner in which the deceased fell – by the appellant pulling the leg – could not have stemmed from imagination but from actual occurrence. We would add to these considerations the fact that Brian Reed's evidence reads well in the transcript. That cannot be said of the defence witnesses. The same thing can be said of Aubrey Monthy's evidence. Both depositions are straightforward and plausible, aside from the fact that their account of the incident is coherent.

[13] It is also the case of the appellant that the two witnesses differ on the fact that one says he saw the victim fall on his leg and the other fall on his head. He submitted that this defies the law of physics. Having considered the evidence, we take the view that since there was only one leg of the victim which was pulled, it makes sense that the victim fell on the other leg first before falling on his head. What one witness saw was the first movement of the leg fall. What the other saw was the next movement of the head fall. Who catches which part of a scene depends upon what catches the eye of the observer at what point in time.

[14] The third inconsistency pointed out to us is that Brian Reed saw the appellant pushing and toppling the table of drinks first – a scene which was missed out completely by Aubrey Monthy. We gave this matter the consideration it requires. But we are unable to accept this argument of the defence. It should not be overlooked that we are in the atmosphere of a packed discothèque at around 2 in the morning, with not only lots of noise but also lots of drinks. No witness will catch every sequence of every event unless he was directly involved in it. It makes sense that Daniel Simeon did not see much, Brian Reed saw everything because he was directly involved with the appellant and Aubrey Monthy saw only part of it. If all of them would have seen everything in such an environment, their credibility would then have been subject to doubt.

[15] All in all, we have given due consideration to the submission of counsel on the matter of inconsistencies. We have not been persuaded by the nature of the arguments advanced that the Judge erred in his appreciation of the evidence. It is incorrect to conclude therefore that there have been inconsistencies in the prosecution case which go to the root of its case.

[16] The oral evidence of the prosecution finds support in the scientific evidence that the death of Jemmy Simeon was due to the fracture which he sustained at the base of his skull and that this would not have occurred by the facial injury. The fatal act was the act of the appellant pulling the left leg of Jemmy Simeon in circumstances he knew could cause him to fall backward in such a way as to cause him serious bodily harm inasmuch as a limp backward fall of an aged man who has also partaken of drinks necessarily is mischievous as it is grievous.

[17] We find no merit on grounds 1 to 4. We dismiss them.

Grounds 5 to 16

[18] It is the contention of the appellant, under grounds 5 to 16, that the Judge erred when he regarded that the evidence adduced by the defence was not cogent and reliable. The evidence of the defence comprised the content of the police diary on the day of the incident and the depositions of defence witnesses. Alongside the appellant, the defence had ushered in evidence from DW2 Kenny Knowles, DW3 Chris Knowles, DW4 Conray Payet, DW5 Linda Denise, DW6 Freddy Savy, DW7 Nesta Marie, DW8 Francina Rose, PC Donald Victor, DW10 Dr Daniel Bernard Lai Lam, DW 10 Clive Roucou and DW 11 Winsley Leon.

[19] We have gone through their depositions. The defence of the appellant could be summed up as follows: that appellant was not the sinner but he was sinned against; that he was himself kicked in the face by someone unknown; that he did not pull the leg of Jemmy Simeon which caused his fatal fall; that Jemmy Simeon was injured by a bottle flung at him by someone; that the allegation that he pulled the leg of Jemmy Simeon came only later in the day in the investigation; that the prosecution witnesses tried to contact the appellant to strike a deal with him etc.

[20] The appellant gave his version of the events of the day. After work, he proceeded to Barrel Discothèque only to find it empty. He was with his brother Chris. They then decided to go to Lovenut which they reached between 11.00 pm and 11.30 pm. They were not allowed in as it was packed and there was a private party going on. They then "bribed" their way in by giving the Security Guard R 100 who admitted them discreetly and one by one. He went onto the dance floor. He danced with a girl who was drunk. Then he went to the toilet. Here a guy complained to him that he had spilled

water on him. He apologized. When he went back, he saw his other companions: Chris and Kenny and two others. That guy who had complained in the toilet against him pushed him from the back at a time when he was next to the stairs.

[21] He had to go to the toilet again. This time he went with Chris and Kenny. On the way out, they saw the same guy with a girl blocking his way. He then went to the private section, took off his shirt and challenged him. One of two black men held his hand and he freed himself. Then he felt a kick on the right side of his face. The two started fighting with him. They barged on him and he fought back. They threw punches and he threw punches too. At one stage he fell down. His brother Kenny took over against the man. There were bottles being smashed everywhere. His brother then pulled him away and on his way out he threw up. He later came to know that the person who had hit him was Brian Reed, the same Reed who had testified for the prosecution. He stated that he had fallen on the bottles. He found later that the one who had invited him to fight was Daniel Simeon, the same who had complained of water spilling in the toilet and who had testified for the prosecution. The time was around 2.00 am to 2.30 am. He denied he was drunk and sick. He says he had consumed only two beers and no alcohol. The police had arrived by that time and he went to the police station. The police simply took his name and address and allowed him home. After 10 days, the police came looking for him at his place of work and he was charged for the present offence.

[22] His story simply does not hold. He admitted he had crashed the gate by bribing the security officers; that he had an altercation with three of the prosecution witnesses: Daniel Simeon, Brian Reed and Aubrey Monthy who comprised the private party on the VIP

section; that he had kept to the stage at the lower level; that the incidents had turned him mad; that he was prepared, when challenged, to give as good as he got etc. It does not stand to reason that for a mere splash of some water, people who had come to a private party would so pick on him, challenge him to fight and, in the struggle that would ensue, he would end up on the floor littered with broken bottles. All he can show for it, some 10 days later, is an internal injury at his mouth and a minor cut to one of his fingers. The witnesses whom the prosecution had ushered in were witnesses who had direct dealing with the appellant. They could show in course of cross-examination the authentic details they could give of the conduct and behaviour of the appellant. On the other hand, the appellant and his witnesses are selective of detail, giving the impression they are deposing from a written script.

[23] The very picture he gave of himself is contradictory. The image of a well-behaved visitor to the discothèque which he gave in examination-in-chief became the opposite in cross-examination when he stated he turned mad in the course of the challenge that the two main prosecution witnesses had invited him to. His behaviour is incompatible with a person who had partaken of only a couple of beers. His own evidence of his visits to the toilet, his taking off his shirt to challenge people to fight, his throwing up and the other displays of his Dutch courage show that drinks had overtaken his senses.

[24] The other serious weakness in the defence evidence is that they were the result of leading questions in examination-in-chief. These were on disputed issues: for example, with regard to the appellant: the position where he was at the material time, the incident of the toppling of the table, the dispute with the old man etc;

who provoked whom to fight. The appellant made much of the fact that he was hit in the face by a leg blow. To us, it is inconceivable that in such a crowded place where people had barely the space to freely move around, someone would have the luxury of some space to administer a leg blow to his face; and, if anyone was able to do that at all, he would pass unnoticed by everyone else, including the appellant's own witnesses. Not one of the witnesses who were present could identify who that artful assailant was, where he came from and where he disappeared to. In short, the appellant's version, when looked at critically, is characterized, even on transcript, by phantasm.

[25] Counsel also submitted that the Judge did not give due regard to the defence version. In our assessment, that is incorrect. The record shows that he took a serious interest in their evidence down to asking relevant questions on their depositions when the pertinent doubts on their depositions arose. This provoked so many other questions from both counsel.

[26] The Judge further in his judgment dedicated, inter alia, a paragraph or nearly so for every single defence witness: the defendant in paragraphs 19 and 20; Kenny Knowles and Chris Knowles in paragraph 22; Conray Payet in paragraphs 23 and 25; Linda Denise in paragraphs 24 and 25; Freddy Savy in paragraph 27 and 28; Nesta Marie in paragraph 27; Francina Rose in paragraph 29; PC Donald Victor in paragraph 29; Dr Daniel Bernard Lai Lam in paragraph 31; Clive Roucou in paragraph 31 and 32; and Winsley Leon in paragraph 29.

[27] We read the transcript. He duly weighed each and every aspect of their evidence and related it to the material facts insofar as it was relevant, making a comment or two on it before he accepted or

rejected it. The comments he made are borne out by the evidence. When looked at as a whole, the pieces which the defence tried to put together to make up their story simply do not fit.

[28] The appellant relies a lot on the evidence of Freddy Savy to argue that it casts a lot of doubt on the version of the prosecution. That is hardly the case. If Freddy Savy's story is to be believed, he came to the discothèque with his girlfriend simply to stand by the wayside. All he did through the night is to lean against the wall, watch the crowd and watch the time pass by. He did not dance. He did not drink. He just smoked and observed. And after he had completed this self-imposed task, he left with his girlfriend. That is how he saw one leg hit the appellant. For all his watching, he could not tell who flung the leg kick. It is clear that the kick on the face of the appellant is a ghost story and deserves just the probative weight of a ghost story. The appellant's injury inside his mouth could be explained otherwise than by a leg kick. The appellant had fought with prosecution witnesses, on his own admission and been assisted to escape by his companions.

[29] Another unsatisfactory feature in the depositions of the defence witnesses is the nature of the evidence adduced. The evidence tends to show that it is the appellant who had been trying to interfere with witnesses rather than the other way around. There is evidence that the appellant had looked for Daniel Simeon and Nesta Marie. Nesta Marie, the hospital porter, had been visited by the appellant. There were so many unsatisfactory features in the evidence of Freddy Savy that it required questions from the Court followed by questions by his own lawyer and questions by the prosecution counsel as to the time and the circumstances of his meeting with the appellant.

[30] As for Nesta's evidence, it was clearly unreliable as to its truth. It could not have been admitted. As *res gestae,* it took place long after the events between persons who were not involved in the incident at all and the source of the comment was from persons unknown. As hearsay, it was a gossip of the classical type. That Jemmy Simeon was hit in the head, as a result of which he received a laceration was never a disputed fact throughout. The disputed fact was whether the victim could have died with such a blow. Counsel for the appellant should have known better than raising such an issue on such tenuous evidence.

[31] It is true that the original talk of the town was that the deceased had been hit by a bottle. But that was an assumption reasonable to make in the circumstances before the actual truth was going to emerge. Every enquiry starts with an assumption which is affirmed or infirmed as the enquiry progresses and materials are gathered. What emerged a couple of days later is that Jemmy Simeon had sustained an internal skull injury when everyone, including the doctors, had been assuming that he had only the visible laceration on the forehead. Even defence evidence showed that the deceased was confused and not able to respond. The signs of the internal injuries were not readily apparent, concealed behind the fact that he had visible physical injury at the front part of the head, he had partaken of drinks and was bleeding. They took him home and put him to bed and he slipped into the inevitable coma. The cause of his death was discovered only later.

[32] The laceration at the forehead could not have caused a fracture at the base of the skull and a brain hemorrhage. The medical evidence was that the injury was the result of a limp fall backwards, consistent with the victim's one leg having been swept off the floor

by someone and his inability in his state of inebriety to balance himself on his other leg. Dr Zladkivich's evidence pointed to that fact. It should be noted that the appellant stated that he was all the time at the lower level.

[33] The Judge had before him two clear prosecution witnesses with whom the appellant admitted he had had an altercation. It is true that Daniel Simeon testified to his being in Lovenut discotheque on that night and his not having seen this part of the incident. He had seen only part of it: namely, when the appellant was at the middle of the stage trying to gain access to the stage via the stairs. That is explicable.

[34] But witness Brian Reed stated that after the appellant had been told off, he pulled the table spilling the drinks on it. He then pulled the left leg of the deceased. Witness Aubrey Monthy testified to that fact equally. There is no other explanation for the backward limp fall of the deceased.

[35] The Judge had the benefit of visiting the locus to assess the positions described by both Brian Reed and Aubrey Monthy. We do not have that advantage. We are not in a better position to contradict him on a matter which on the record does not show any major difference.

[36] It is our view that the Judge reached the right conclusion after properly considering and weighing the evidence of the appellant and the depositions of other defence witnesses. While the evidence of Kenny Knowles and Chris Knowles related to the events of the night, the evidence of the other witnesses dealt with collateral issues. Conway Payet could not say whether it was Aubrey Monthy himself who had contacted him to say that the latter was proposing a

deal. Linda Denise could only say that someone rang twice giving the name of Monthy. Freddy Savy's evidence is out of this world in that he entered the discotheque to just smoke and watch and left after the incident. In other words, he just saw what he chose to see and no more. The evidence of Nesta Marie, Franscina Rose, Police Constable Victor, Dr Daniel Bernard also were on collateral issues, each of whom was given a separate consideration in his judgment.

[37] A number of allegations were made against the prosecution witnesses and the police, the apex of which was reached when he questioned the impartiality of the Judge himself. When the evidence is looked for in support, we find it lacking in substance. His lawyer requested he give credence to his version by, for example, taping an exchange he would have with any prosecution witness who would contact him. His answer was that he would not do so. All his allegations are gratuitous and in the nature of manipulations.

[38] It is also our view that the defence depositions carry a lot of half truths and suspect evidence, all meant to cover for the aggressive nature of the appellant who, in his inebriety, committed a number of senseless acts: crashing the gate of a private party, taking off his shirt, challenging a couple of the guests trying to get him to behave; overturning the table of drinks and pulling the leg of Jemmy Simeon until - of his own admission - his brothers and companions came to "assist him to escape." He admits challenging some of the persons in the private party. He admits he threw up at a certain time. The nature and the circumstances of his injury in his mouth are not consistent with a leg kick to his face. The defence ended up by raising a couple of ghosts – the ghost of the leg kick and the ghost of a couple of phone calls to supposedly blackmail him – but was

unable to conjure the doubts necessary to cause a dent on the prosecution case.

[39] We find no merit on grounds 5 to 16. We dismiss them.

Ground 17

[40] It is the case of the appellant that he did not have a fair trial on account of what the defence stated were post-trial discoveries: that the trial Judge was a tenant of the father of prosecution witness Aubrey Monthy; that he resides in the same premises as he; and that they have on occasions been seen to be playing tennis together. It came out in evidence that the tenant was not the Judge but the Judiciary and that the incident which showed that the Judge had played tennis was in 2007. This trial started on 11 October 2011 on which date the list of witnesses was communicated to the defence. There is no indication that the Judge entertained at the material time such a familiarity with the witness that his mind was clouded in favour of the witness. A Judge takes an oath to do justice to all manner of people without fear or favour, with friend or foe. In his judicial responsibility, his paths cross so many people in society. That does not prevent him from deciding cases impartially and independently.

[41] Counsel referred to the case of *R v Putnam* (1991) 3 Cr App R 281 and *R v Gough* [1993] AC 646 (HL) arguing that there has been a real danger that the Judge was biased in favour of the prosecution witness.

[42] Our answer to the submission is that a court should be slow to accept such an argument without the "most cogent grounds for doing so" because it would place a premium on post-trial intimidation of the judges.

[43] Besides, the law with respect to bias has been reviewed and the present test is whether a hypothetical observer fully informed of all the facts would come to the conclusion that the judge was biased.

[44] We are happy to endorse and adopt the latest test with respect to challenges for judicial bias that has been laid down in the English case of *Porter v Magill* [2001] UKHL 67, at para 103:

> whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

[45] Applying this test to the facts of this case where the bias alleged is not against the appellant as such but in favour of one of the prosecution witnesses; where that witness happens not to be the key witness but only a corroborative witness; and where there are other pieces of evidence showing the guilt of the appellant, we find the ground of bias frivolously raised.

[46] It is our view that counsel for the appellant should have exercised a degree of professional discernment in giving wind to the sail of the appellant in making such allegations so generously not only against the Judge but against the prosecution witnesses and the police. The principle laid down by Lord Hewart CJ in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259 that it is "of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done" is to be applied realistically. It is subject to the doctrine of necessity. Otherwise, we would need men from Mars and women from Venus to sit in our cases in Seychelles.

[47] The impartiality of the Judge is evident when he exercised his discretion in favour of the defence not to admit the statement of

the appellant. He relied on mere technical lapses on the part of the enquiring officers not to admit evidence when the ground for the non-admission of evidence of a compromising statement so to speak is involuntariness. That shows to what extent the Judge placed defence rights above everything else in his idea of how justice should be properly administered. Even the evidence of Aubrey Monthy, the record shows, was subject to judicial questioning before it was assessed.

[48] In the light of what we have stated, we conclude that ground 17 is unwarranted and frivolously made.

Sentence

[49] Counsel for the appellant has also submitted that the sentence imposed is against the current trend in our case law.

[50] We have had the opportunity of looking at the sentence imposed in cases of manslaughter by our courts. We commend the analysis paper submitted by counsel for the respondent entitled "Sentencing Snapshots – Manslaughter." The statistics show that the trend in the Supreme Court of Victoria, Australia, is not very different from our own. Age, gender and degree of culpability influence the length of the sentence.

[51] The law prescribes life imprisonment for the offence of manslaughter. But it is clear that this was not a case which fell in the category of cases of extreme culpability. The victim died with a head injury from a fall in a *démêlée* in a discothèque following a party where the act of the appellant can be characterized as one of sheer regrettable recklessness on the part of an offender of youthful character.

[52] From the types of sentences which have been inflicted for such offences, the duration has ranged from two and a half years imprisonment to eight years imprisonment, as rightly indicated by the Judge in his judgment, citing *R v Pierre* No 10/1991; *R v Quatre* (1993) SLR 152; *R v Ernesta* No 33/1998; *R v Gonthier* CN 36/2000; *R v Crispin* (2008) SLR 300; *R v Raguin* Cr No 18/2011; *R v Freminot* No 20/2011; *R v Rose* SCA 06/2011. The Judge imposed 11 years, motivated by the fact that the rashness of the appellant continued through the proceedings generally as seen by his unethical behaviour which should have been duly checked by his counsel. Counsel are retained to counsel clients and take control of the cases brought before them.

[53] We cannot overlook the concerns of the Judge. The appellant had no right to go crashing the gate of a private party and become a *trouble fête* at the place. His rashness and his aggressive and egocentricity have a lot to do with the consequences that ensued. His conduct in that discothèque and his conduct thereafter were not of the standard acceptable in a law abiding society. His rash behaviour led to the early demise of an old man who had come to celebrate his birthday in Seychelles.

[54] Without in any way intending to condone the seriousness in the conduct and behaviour of the appellant, we take the view that the sentence of 11 years imposed is excessive. Admittedly, the case dragged on for an unnecessarily long period and the appellant's conduct on the scene and behind the scene has not been of the norm required. However, the sentence should reflect, and be proportionate to, the degree of culpability of the offender. In this case, in his drunken state, it seems he did not appreciate the gravity of his act which he should have done. He needed a lot of guidance in life and

for his case by his counsel who, we get the impression, gave too ready an ear to what he stated.

[55] For the reasons above, the appeal against conviction is dismissed. We believe that the term of six years imprisonment is what appellant deserves in the circumstances. We quash the sentence of 11 years and substitute therefor a sentence of six years.

Laporte v Fanchette

MacGregor PCA, Domah, Twomey JJA

6 December 2013 SCA 57/2011

Defamation – Insult – Moral damages

The appellant was liable for having uttered unlawful words to the respondent. He appealed that decision. He also contended that the moral damages award was excessive.

JUDGMENT Appeal dismissed.

HELD

1 Damages recoverable for injury or loss of right of personality under the Civil Code include mental injuries.

2 Articles 1382 and 1383 mean that where a defendant intentionally or negligently does an act, including uttering or writing words, that person is liable to repair the damage caused by the words or acts. The gravity or minimality of harm is reflected only in the damages awarded and not in liability.

3 An action clearly grounded in delict under art 1382 of the Civil Code cannot be ousted by art 1383(3).

4 It is in any case extremely doubtful that the law of defamation would grant relief for purely abusive and insulting language and mental suffering as these have not in the past been treated as special damage.

Legislation
Civil Code arts 1149(1), 1382, 1383

Seychelles Ordinance of 1948 s 2

Cases
Cable and Wireless v Michel (1966) SLR 253
Couck v Sinon (1990) SCAR
David v Government of Seychelles (2008) SLR 47
Desaubin v USPC (1977) SLR 164
Esparon v Savy SC 20/2008
Francourt v Didon (2006) SLR 186
Fanchette v Attorney-General (1968) SLR 111
Mousbe v Elizabeth SCA 14/1993
Renaud v Arnefy (1974) SLR 98

Foreign cases
Allsop v Allsop (1860) 5 H & N 534
Tuberville v Savage (1669)1 Mod Rep 3 (KB)
Wainright v Home Office [2003] 3 All ER 943
Ass. Plen., 12 juill. 2000; Cass. 1 re civ, 27 September 2005, espèce n 16
Civ. Ire, 30 oct 2008, JCP 2009, 2009 II note E. Dreyer
Civ. Ire, 28 sep. 2011, n 10-11. 547, AJ fam. 20011. 546, obs. L. Briand
Comm. 22 Octobre 1985. Bull. Civ,. IV No. 245 Societe Generale Mecanographie C Societe Sainte- Etienne-Burreau
Lunus (Cass Civ 16.1.1952)

Foreign legislation
Press Law of 29 July1881 (France)
Declaration of Rights of Man and of the Citizens (France)

Counsel KB Shah for the appellant
A Benoiton and F Ally for the respondent

The judgment of the Court was delivered by
TWOMEY JA

[1] There is an old English proverb which asserts that, "Sticks and stones may break my bones but names will never hurt me" but which is contradicted by another English proverb which states that, “The tongue is not steel but it cuts,” proving generally that wisdom is often situational. Generally, however, common law jurisdictions refuse to recognise an independent cause of action for mental suffering caused by insulting or abusive language. One can only recover damages for verbal abuse in English common law in limited cases of trespass to the person (*Tuberville v Savage* (1669) 1 Mod Rep 3) and for emotional suffering where the damage amounts to a medically recognised condition and not mere distress (*Wainright v Home Office* [2003] 3 All ER 943). The matter is slightly more nuanced in civilist countries. As a mixed jurisdiction with French tort law but English defamation rules and a Constitution recognising the right to freedom of expression, Seychellois law on the subject matter is dynamic.

[2] The facts of the case from which this appeal arose are that the appellant, Mr Fanchette, went to the Casino des Iles at Cote d’Or, Praslin where the respondent, Mr Laporte, worked as the manager. He was denied entry to the premises as he had not buttoned his shirt. An altercation took place as a result of which it is averred by the respondent that the appellant stated “I bon ou piti in bez mor” (*it’s a damn good thing that your child has died).* The respondent sued the plaintiff for damages suffered as a result of these words based on the provisions of art 1382 of the Civil Code of Seychelles. The trial Court found liability proven and ordered the respondent to pay R 100,000 in moral damages.

[3] The appellant has now appealed to this Court on two grounds:

> 1) The trial Judge was in error to find that the words allegedly uttered by the appellant to the Respondent were unlawful and amounted to a faute and such words are not an actionable wrong entitling the respondent to damages
>
> 2) Alternatively the award of R 100,000 in damages is manifestly excessive and should be reduced considerably, having regards to all the circumstances of the case.

[4] As far as ground 1 is concerned, our law on the matter has its own legal history and jurisprudence. In French law on which our Civil Code is based, all rights and interests are protected under the provisions relating to delicts and quasi-delicts. In such cases all actions are actionable per se and no special damage need be proved. Article 1382(1) provides that:

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

Article 1382(3) on which the present claim is based states:

> 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.

Article 1383(1) also makes it clear that:

> Every person is liable for the damage it has caused not merely by his act, but also by his negligence or imprudence.

[5] Mr Shah, for the appellant contends however, that where abusive, opprobrious and insulting oral language causes injury to feelings and mental distress the claim for damages could only be based on defamation and not art 1382. He submits there are areas of human conduct which the law should not seek to regulate and that where the damage is physical or economic, the matter would have to be sufficiently serious to justify the intervention of the law. Hence, where the consequence of one's action is hurt feelings, the matter is not serious enough to justify legal intervention. He submitted that the case of *Lunus* (Cass. Civ. 16.1.1962) in which the owner of a horse who died by electrocution was able to recover damages for the distress caused by the death of a horse, to which he was much attached, has attracted much academic criticism and has not been consistently followed. Ms Benoiton relying on the case of *Desaubin v UCPS* (1977) SLR 164 has urged us to give a wide interpretation to the concept of fault and admit any prejudicial act including words to indemnify the person hurt emotionally or mentally.

[6] Unlike the French *Code Civil*, the Seychelles Civil Code makes direct provision for the recovery of damages in delict. Hence, art 1149(2) provides that damages are recoverable for any injury or loss of rights of personality. It also states that these include rights which cannot be measured in money such as pain and suffering. Hence our law considers mental injury just as real as material or physical injury and as deserving of monetary reparation. Similarly, French jurisprudence moved towards the recognition of damages for emotional distress and moral injury. Capitant makes it clear that

damages are recoverable for mental injury arising out of defamation or injurious words:

> La jurisprudence a toujours accordé des dommages-intérêts pour le prejudice d'ordre moral resultant, par exemple, de propos ou d'écrits injurieux ou diffamatoires…
>
> (Henri Capitant, Alex Weill et François Terré *Les Grands Arrêts de la Jurisprudence Civile* (Henri Capitant, 7e edn, Dalloz, 1976), 414)

[7] The laws of defamation of Seychelles are governed by English law (art 1383(3) Civil Code of Seychelles). It is true that in this case an action for slander could have been instituted instead. In cases of slander, however, there are few actions that are actionable per se and it is doubtful if the respondent in this case could have recovered unless he could show special damage: *Renaud v Arnefy* (1974) SLR 98, *Couck v Sinon* (1990) SCAR. It is in any case extremely doubtful that our law of defamation would grant relief for purely abusive and insulting language and mental suffering as these have not in the past been treated as special damage: *Allsop v Allsop* (1860) 5 H & N 534.

[8] In France, a distinction is now made in actions arising out of injurious words where these do not amount to defamation. The factor that comes into play is the freedom of expression which is also protected under our Constitution. A number of Cassation cases in France from 2000 onwards *(Ass. plén., 12 juill. 2000; Cass. 1re civ., 27 septembre 2005, espèce n 16)* decided that actions for abuses of the freedom of expression should proceed under the provisions of the Press Law of 1881 and not under the provisions of art 1382.

However, it qualified this general rule in 2008, stating that where the provisions of the Press Law did not apply, actions could be based simply on the provisions of art 1382. *(Civ. 1re, 30 oct. 2008, JCP 2009, II, note E. Dreyer)*. In 2011, the Cour de Cassation again stated that:

> que les abus de la liberté d'expression prévus et réprimés par la loi du 29 juillet 1881 tels que les propos litigieux, qui portent atteinte à la considération et partant sont susceptibles de constituer des diffamations, ne peuvent être réparés sur le fondement de l'article 1382 du code civil
>
> (Civ. 1re, 28 sept.2011, n° 10-11.547, AJ fam. 2011. 546, obs. L. Briand).

[9] While the above statement makes it clear that the where words are capable of constituting defamation an action lies under the Press Law and not art 1382, what can also be read into this statement is that offences and delicts not provided for in the Press Law do not circumscribe the protection given by art 1382. Article 1382 continues to deal with all kinds of damage resulting from delicts. The French Press Law of 1881 (*loi du 29 juillet 1881*) was never applicable in Seychelles; old French laws based on the Declaration of the Rights of Man and of the Citizen, adopted during the French Revolution in 1789 continued to apply until the Seychelles Ordinance of 1948 which in its s 2 provided that:

> The civil law of defamation shall mutatis mutandis be the English law of libel and slander for the time being.

[10] This provision was incorporated in art 1383(3) of the Seychelles Civil Code by Chloros which therefore only makes a distinction between defamation (where the English law applies) and delictual actions under art 1382. The jurisprudential adventures of the Cour de Cassation in trying to make a distinction in cases arising from breaches of the freedom of expression have a Seychellois parallel only insofar as our civil law similarly makes a distinction between defamation and the written or spoken word that do not necessarily defame but nevertheless cause hurt which is reparable under art 1382.

[11] The respondent's plaint and testimony do not aver that the statements by the appellant were defamatory or that they were calculated to degrade or disparage him in his professional, public and private life. He simply states that the words were uttered with deliberate intention to cause him pain, suffering, anguish, distress and to hurt his feelings in relation to the traumatic death of his son. He stated in his plaint that the appellant's "act, conduct and words … are unlawful and unjustified and amount to a faute in law". It is therefore an action clearly grounded in delict under art 1382 of the Civil Code and which cannot be ousted by art 1383(3).

[12] The appellant in any case does not claim a defence under his constitutional right to freedom of expression (albeit of horizontal application) which might in any case have been trumped by the respondent's right to dignity. His defence is that the words he used were slightly milder: "San mem bon dye in pran ou piti, ou tro insilte dimoun" *(this is why God has taken your child, because you insult people to much)*.

[13] Further, in his cross-examination he accepted intending to hurt the respondent:

> Q. So because he insulted you as a pig, you want to wound and hurt him by saying this to him?
>
> A. Exactly like he hurt me and I hurt him.
>
> [Verbatim, page 28, transcript of Supreme Court proceedings]

Clearly, the fact that the words were intended has a bearing in this case. It would distinguish it from cases where words are said in anger or distress but with no intention to hurt.

[14] Further, it is clear that the respondent suffered mental pain. It is borne out by the following extracts from pages 6, 7 and 9 of the transcript of proceedings:

> Q. So how did you feel exactly? Can you tell the court when you were told that it is damn good that your child has died and you said he said further more to you but you do not recall, how did you feel at the time?
>
> A. One thing I would say to the court when someone says something to you like this about your child, which I am still mourning my son, you feel as if you want to kill that person and pain, anguish and I believe the day of the incident at that point when he said this.
>
> Q. How did he say it to you, do you recall?
>
> A. Yes, he said it in a very loud voice and in a vicious manner meaning to hurt me.

Q. Was he able to hurt you?

A. Yes he did, very deep. I loved my son very dearly …

Q. How have you been affected by what Mr. Laporte said to you and his behaviour to you for you to quantify your loss in such a sum?

A. At this I have suffered anguish, pain, humiliation and all manner people telling me that this is not an incident that should happen and continue to suffer because of that morally and my work also is affected since that day.

Q. When you look at the gentleman over there, how do you feel towards him after what he said to you? Are you able to look at him and talk to him?

A. No, I cannot. I cannot stand in front of him and talk to him because he does not know what I am going into, in the beginning I went for counselling as well.

Q. The beginning of what?

A. After my son passed away.

Q. So you were deeply affected after your son passed away and how did you view Mr.Laporte's reminder of that tragic incident?

A. Hateful person, this has nothing to do with my son when he comes to the casino.

[15] We note that the Chief Justice in the case of *Esparon v Savy* SC 20/2008 which facts are similar to this case was of the opinion that cases of verbal abuse may well be *de minimis non curat lex.* Given the legal provisions in our Code, we are unable to agree with him. We are of the view that the totality of the provisions of arts 1382 and 1383 of our Code mean that where a defendant intentionally or negligently does an act, including uttering or writing words, he is liable to repair the injury or damage he has caused by these words or acts. The gravity or minimality of the harm is only reflected in the damages awarded and not in liability. For these reasons we are of the view that liability in this case clearly arises and find no merit in the first ground of appeal.

[16] The second ground of appeal raises the issue of quantum in moral damage. While it may be easier to prove physical damage or pecuniary loss, moral damage is not so easily assessed. It is damage that is characterised by an injury to a person's non-pecuniary interest and oftentimes to a person's feelings as in the present case. However the Court has on many occasions stated that the difficulty in assessing intangible injury must not be a bar to an award of damages, see *Cable and Wireless v Michel* (1966) SLR 253, *Fanchette v Attorney-General* (1968) SLR 111.

[17] It is clearly the plaintiff in a civil suit who has the burden of proving on the balance of probability that he suffered damage as a result of the defendant's action. He could only bring such evidence by recounting the pain he suffered which he did. The Court cannot ascertain such damage in any other way. No expert can tell us what and how much mental pain, suffering or distress a person is experiencing. Awards in this case can only be made by the trial

Judge assessing the credibility of a plaintiff's evidence and appraising the mental injury related. It is a subjective assessment. The respondent's evidence was not challenged. He was neither cross-examined on the issue of moral damage nor quantum. In his closing submission Mr Shah for the appellant stated that the claim for damages is in any event grossly exaggerated and only merits an apology. The trial Judge, Renaud J agreed to some extent with this submission but stated in his judgment:

> Such fault of the Defendant caused the Plaintiff to severely suffer and continue to severely suffer morally. The Plaintiff has quantified the moral damage he suffered in the sum of SR500,000 and continuing and which the Defendant is liable to make good to the Plaintiff. I am of the considered judgment that the amount is very much on the high side and a reasonable award would be SR100,000 which sum I hereby award the plaintiff as moral damages.

[18] It is a indeed a principle of French law that the trial judge has sovereign discretion in assessing moral damage and the Cour de Cassation has even dispensed with the need for the claimant to show proof of specific *préjudice morale;* see *Comm. 22 octobre 1985. Bull. civ., IV No. 245 Société Génerale Mécanographie v Société Sainte-Etienne Bureau.* It is also true that damages should be compensatory and not punitive: *Francourt v Didon* (2006) SLR 186 and it is obvious that monetary damages could never repair injury to one's feelings.

[19] Two matters militate against this Court's interfering with the award, one of which we have outlined above already in terms of the better position of the trial Judge to assess the credibility of witnesses.

It is a principle of our law that when assessing damages the court should make a subjective assessment of damages in each case: see *David v Government of Seychelles* (2008) SLR 47. Given that the trial Judge was best placed to observe the respondent in this case and appreciate through his testimony the pain and suffering he experienced and which was not challenged, we could only have interfered with the award if it was manifestly excessive: *Mousbé v Elizabeth* SCA 14/1993. By its very nature damage is a very elastic concept and there is a tendency rightly or wrongly by judges to award higher damages where harm is intentionally inflicted as opposed to when it is done negligently and unintentionally. We are of the view that the award is probably on the high side but we are not prepared to find that it is manifestly excessive. In these circumstances this ground of appeal also has no merit.

[20] For the reasons stated above, this appeal is dismissed with costs.

Lefevre v Chung-Faye

Domah, Fernando, Msoffe JJA

6 December 2013 SCA/MA 8/2013

Appeal – Fresh evidence

This appeal required the Court to determine whether an application for the admission of fresh evidence under rule 31(2) of the Court of Appeal Rules should be allowed.

JUDGMENT Application dismissed.

HELD

1 A party in an affidavit may not be precluded from stating facts which are undisputed, or facts which are objectively ascertainable, or express beliefs which are held on good advice received, based on specified facts which have come to the party's knowledge.

2 A party does not need fresh evidence to prove a negative averment, but needs fresh evidence to make a positive averment.

3 The principles on which fresh evidence may be admitted are:

a the evidence could have not been obtained with reasonable diligence for use at the hearing at the lower court;

b the evidence would probably have an important influence on the result; and

c the evidence was apparently credible.

4 Fresh evidence would be needed where there is a need to add to the weight of the evidence, so long as the above mentioned conditions are satisfied.

Legislation
Code of Civil Procedure s 170
Court of Appeal Rules r 31(2)

Cases
Charles v Charles Civil Appeal 1/2003
Payet v R [1966] SCA 21
Zalazina v Zoobert (2013) SLR

Foreign cases
Evans v Tiger Investments [2002] EWCA Civ 161, [2002] 2 BCLC 185
Hertfordshire Investments v Bubb [2000] 1 WLR 2318
Ladd v Marshall [1954] 1 WLR 1489
Shaker v Al-bedrawi [2002] EWCA Civ 1452

Counsel P Pardiwalla and J Bonte for the first appellant
W Herminie for the second appellant
F Ally for the respondent

The judgment of the Court was delivered by
DOMAH JA

[1] A preliminary point has arisen prior to the proper hearing of the above two appeals which stand consolidated. We are called upon to determine whether under r 31(2) of the Court of Appeal Rules this

Court should allow an application made for the admission of fresh evidence.

[2] It is the case of Mr Pardiwalla for the appellants that the facts of the case warrant the exercise of this Court's powers to do so. Mr Ally for the respondent in the two cases is of a different view and has objected to the application.

[3] Both parties have referred to the law and the principles that apply for the admission of fresh evidence for the purposes of appellate proceedings.

[4] Mr Ally's first argument has been that the affidavit which triggers this application has been sworn by a person who is not a party to the case and who has no personal knowledge of the facts of the case so that the procedural flaw is fatal to the application. He referred to the authority of *Zalazina v Zoobert* (2013) SLR.

[5] Twomey JA, in the case, with whom MacGregor PCA and Fernando JA agreed, decided that a witness, in an affidavit sworn by her pursuant to the Seychelles Code of Civil Procedure is "precluded from swearing an oath and making other statements regarding matters of which she has no personal knowledge and cannot prove." The comment related to facts proper to that case. But it was never meant to restrict the application of s 170 of the Seychelles Code of Civil Procedure in any way. The section reads:

> Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory application on which statements as to his belief, with the grounds thereof may be admitted.

[6] Counsel is correct in his submission that the content of affidavits shall be confined to such facts as the witness is able of his own knowledge to prove. However, the ratio of *Zalazina v Zoobert* should not be carried to the extreme. A party in an affidavit may not be precluded from stating facts which are undisputed, or facts which are objectively ascertainable, or express beliefs which he or she holds, on good advice received, based on specified facts which have come to his or her knowledge.

[7] In this particular case, the deponent is the mother of the appellant who states: that she has the authorization of the daughter to swear the affidavit; that her daughter is abroad; that she has been made aware of the fact that the Judge made comments on a particular document (Exhibit 10 dated 13 September); that the second appellant moved to undertake a forensic examination of the document; and that a report has been drawn up following that examination which the appellants wish to produce. There is nothing to suggest that she has no personal knowledge of the facts that she has averred. If the respondents doubted those facts, it was open to them to put in a counter-affidavit to say the contrary.

[8] Mr Pardiwalla has submitted that the person who has sworn the affidavit has the necessary power of attorney to do so; she is the mother of the plaintiff who has been put into the picture of certain facts in the pending case of her daughter who is abroad and who authorized her to swear the affidavit on her behalf. The deponent is only affirming as to a number of objective facts and which cannot be disputed.

[9] We hold, for the reasons advanced by Mr Padiwalla, that the affidavit is admissible subject to whatever weight may be given to

the content depending upon whether the respondent will accept or deny, if the need arises, by a counter-affidavit.

[10] Now on the question of the admissibility of fresh evidence. We have looked at the purport of the evidence which the applicants are intending to adduce. The purport is to produce a copy of the forensic report which has been prepared to show that "the judge was wrong to have carried out his own examination of Exhibit 10 without the benefit of expert evaluation" relating to an issue on which there was no address by counsel.

[11] As can be seen, the applicants are intending to bring fresh evidence to prove a negative fact. The negative fact is that the Judge did not have the benefit of an expert opinion when he made certain adverse comments surrounding the document. There are two reasons we would give for declining the application of the appellants. The first is that one does not need fresh evidence to prove a negative averment. One needs fresh evidence to make a positive averment. For example, if the Judge had come to the conclusion that the paper was not fake, then the need would have arisen to show that the paper was fake by fresh evidence. But, as it is, the Judge has commented that there has been a fraudulent use of the document. We do not need fresh evidence to show an omission: that is, he did not need to have the benefit of expert advice for that. If he was not competent to do it, he was not. It would have been otherwise if, for example, the Judge had ruled that the document was not a forgery. At that time, genuine fresh evidence would have been needed to show that it was a forgery.

[12] As rightly submitted by both counsel, the principles along which fresh evidence may be admitted are found in *Ladd v Marshall* [1954] 1 WLR 1489 namely that:

(a) the evidence could not have been obtained with reasonable diligence for use at the hearing in the lower court;

(b) the evidence would probably have an important influence on the result; and

(c) the evidence was apparently credible.

We made the decision in *Ladd v Marshall* our own jurisprudence: see *Payet v R* [1966] SCA 21; *Charles v Charles*, Civil Appeal 1/2003.

[13] Second, fresh evidence would be needed where there is a need to add to the weight of the evidence so long as the above conditions were satisfied. Here what is in issue is not evidence as such but the Judge's appreciation of evidence. The fresh evidence is not likely to have an influence on the outcome. There should be strong grounds for admitting fresh evidence: *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318; *Shaker v Al-bedrawi* [2002] EWCA Civ 1452. We are not satisfied that those strong grounds exist. The principle is that parties should advance their entire case at trial and not seek to make up for their trial deficiencies at the appellate stage in a bid, as it were, to have a "second bite at the cherry." The discretion to admit fresh evidence on an appeal has to be exercised in accordance with that overriding objective: *Evans v Tiger Investments Ltd* [2002] EWCA Civ 161, [2002] 2 BCLC 185.

[14] Whether the Judge reached the right or the wrong conclusion on document 10 dated 13 September can be decided on the existing evidence without the need for fresh evidence.

[15] For that reason we set aside the application.

Patti v Carrie

Domah, Fernando, Twomey JJA

6 December 2013 SCA 38/2011

Debt

On a claim of debt, it was decided that the respondent was entitled to the sum of money due at the date when the plaint was entered and continuing interest at the rate of 7% per annum until the debt was fully paid. The appellant appealed on the ground that the judge failed to apply the rules on penalty clauses and rules for interpreting ambiguous terms.

JUDGMENT Appeal dismissed.

HELD

1 "Debt" includes unpaid interest.

2 Unless ambiguous language is used there is no need to resort to art 1162 of the Civil Code.

Legislation
Civil Code arts 1162, 1229

Counsel D Sabino for the appellant
F Ally for the respondent

The judgment of the Court was delivered by
DOMAH JA

[1] This is an appeal against the decision of the Supreme Court which, following a hearing on a claim of debt, decided that the

respondent plaintiff was entitled to judgment in the sum of EURO 577,110.45 due as at 7 December 2009 when the plaint was entered and continuing with interest at the rate of 7% per annum as from 15 May 2010 until the debt was fully paid.

[2] The appellant has lodged an appeal on the following two grounds:

1) The Judge failed to apply any of the rules on the interpretation of ambiguous terms as provided for by the Civil Code of Seychelles. This must be interpreted against the party who seeks to benefit from the term, and would result in a much reduced capital debt and on the interest based on the 7% interest calculation.

2) The Judge failed to apply the rules on penalty clauses as provided for by the Civil Code of Seychelles. This would have extinguished the numerous interest (penalty) clauses in the final agreement.

[3] The facts of the case with the relevant documents have been very well set out in the judgment. We are happy to adopt them. For the purposes of determining the points raised in this appeal, we take into account the following salient facts. The appellant subscribed to two loans from the respondent for a total sum of EURO 384,000. The parties had agreed that the loans would be repaid in full on or before 15 May 2003. The interest due was at the time of two types: fixed interest for the sum of EURO 6,000 on one loan and EURO 9,000 on the other which would be payable on the date of payment. It had been agreed also that should the appellant not pay the above

sums by that set date, ie 15 May 2003, then the sums due would be subject to interest at the rate of 7% per annum for the entire year until the debt was fully paid. The defendant did not pay by 15 May 2003. This triggered the application of the 7% interest clauses. As the default continued over a couple of years, the respondent felt bound to seek a compromise agreement with the appellant which was entered into on 15 April 2009.

[4] The Compromise Agreement recalled the history of the default sum which by the material date happened to be EURO 554,075 and which by 31 December 2009 was due to become EURO 591,013. It was also agreed between the parties that if the appellant failed to pay the EURO 458,000 due as set out in the Compromise Agreement, then a sum of EURO 591,013 would be due or any remaining balance, with the applicable interest as agreed. The appellant failed to abide by the terms of the Compromise Agreement.

[5] At the hearing of this appeal, counsel for the appellant submitted that the manner in which the interest had been calculated has been ambivalent and interest has been imposed upon interest. To him, when the agreement referred to the word "debt" it meant the sum borrowed, excluding the sums of the unpaid interest. It is the argument of the appellant that if the document was intended to include the word "unpaid interest" in the meaning of the word "debt", the agreement should have said so. Since it did not, the interpretation should be against the maker of the document. He relied on art 1162 of the Seychelles Civil Code to so argue. This article provides that, in case of doubt, the contract shall be interpreted against the person who has the benefit of the term and in favour of the person who is bound by the obligation.

[6] The same argument had been made before the trial Judge who went to some length in identifying the relevant parts of the agreements between the parties and, in the light of the evidence, concluded that there was nothing ambiguous in the plain language of the clauses. He decided that there was no need to resort to art 1162 of the Civil Code. Indeed, the Judge commented that the appellant is a businessman, is conversant with French and the circumstances showed that he had full knowledge of the purport and the consequences of what he was engaging in and the consequences of the default.

[7] We see nothing wrong in the interpretation of the word "debt" to include unpaid interest. It is a matter of common sense that whatever sum is unpaid by the time the payment has become payable ends in inflating the sums due as unpaid debt. It is plain common sense. There is no ambiguity in it.

[8] The next argument of counsel for the appellant has been that the appellant finds himself in a situation where he is paying three types of interest: the fixed sum interest, the 7% interest and the 5% interest due if the matter is subject to litigation. The end result is that the overall sum due has shot up to 70% of the original sum he had borrowed. His argument is that all he is bound to pay is the capital debt of EURO 384,000 minus EURO 75,000 which he has paid but not any of the other heads of interest or penal sums imposed. In his interpretation, he is due to pay only the interest on the remaining capital sum which is EURO 309,000 which comes to EURO 21,630 per annum. This would reach the figure EURO 129,780 as at the date of the filing of the plaint as opposed to the EURO 225,629 which the respondent has claimed.

[9] The short answer to it is that he is being ingenuous. His calculation hides the stark fact that he would not have ended up in this financial mess, as it were, had he abided by the terms of his original contract. From a sum of EURO 577,110.45 borrowed in November 2002, which sum he had undertaken to pay by 15 May 2003, he had only paid the sum of EURO 75,000. Any sum of money unpaid becomes a debt due. A debt stops being a debt by repayment and not by an appellation of whether it is capital or interest. The whole purpose of the Compromise Agreement which the parties entered into in 2009 was to ensure that the appellant who is a businessman take cognizance of the state of his books and be encouraged to pay back the loans. As the Judge pointed out, he freely entered into the Compromise Agreement in 2009 which he also breached. This is just to show that the plight of the appellant was brought upon him by himself.

[10] As the Judge pointed out, agreements entered into should be performed in good faith. There is little evidence of good faith on the part of the appellant in the discharge of his contractual obligations.

[11] We have given due consideration to the argument of counsel on the question of whether the sums due are not extortionate under art 1229 which provides:

> A penal clause is compensation for the damage (loss) that the creditor sustains as a result of a failure to perform the principal obligation.

[12] That there has been a failure by the appellant to abide by his repayment obligations cannot be disputed. We are in 2013. The loans were taken in 2002. If the sums that he borrowed look too huge to him, it is of his own making. And if the agreement has imposed

litigation interest of 5% on the sums due, that also is of his own making. The delay which has occurred is a calculated delay and not a simple delay as counsel seems to argue.

[13] We find no merit in this appeal. It is dismissed with costs.

Ragain v R

Domah, Fernando, Twomey JJA

6 December 2013 SCA 02/2012

Criminal procedure – Murder – Constructive manslaughter – Manslaughter by unlawful omission − Plea – Jury − Appeal

The accused pleaded not guilty to a charge of murder. There was a late addition of a manslaughter charge to which the accused pleaded in the absence of the jury. The accused was convicted of manslaughter, and the jury was discharged. The accused appealed the sentence of eight years of imprisonment.

JUDGMENT Appellant acquitted.

HELD

1 Once an accused has been put in the charge of the jury, a plea can be taken only in the presence of the jury, and the accused person can only be convicted on the basis of the plea if the jury is prepared to accept the plea.

2 In order to prove constructive manslaughter there must be evidence to establish that the accused intentionally performed an 'act', that the 'act' was unlawful and that the 'act' resulted in the death of a person.

3 Liability will be incurred for constructive manslaughter only if the act which causes the death is criminal in itself, rather than becomes criminal simply because it is performed in a negligent and dangerous fashion.

4 In drafting a manslaughter charge it is necessary to state whether it is one of manslaughter by an unlawful act or manslaughter by an unlawful omission.

5 The criminal justice system is not merely about convicting the guilty and ensuring the protection of the innocent from the conviction. There is an additional and onerous responsibility to maintain the moral integrity of the criminal process.

6 The fundamental principle by which the court is to be guided in hearing an appeal is to ensure that no substantial miscarriage of justice has occurred at the trial.

7 A guilty plea is invalid where there is a misunderstanding on the part of the accused, the prosecutor and the trial judge as to the nature of the offence.

8 When an appeal is lodged, the entire matter is before the court and the court can entertain any matter, however arising, which shows that the decision of the court appealed from is erroneous.

Legislation
Constitution art 19
Code of Criminal Procedure ss 114(a) (iv), 235, 243, 245, 266, 342
Court of Appeal Rules rr 18, 31
Penal Code ss 10, 192, 195, 206

Cases
Reference by the Attorney-General under section 342A of the Criminal Procedure Code, Cr App No 12/1999

Foreign cases
Andrews v Director of Public Prosecution [1937] AC 576
Davies and Cody v The King (1937) HCA 27

Eckle v FRG (1983) 5 EHHR 1
Ex parte Bennett [1994] 1 AC 42
Gipp v R (1988) HCA 21
R v Bateman (1925)19 Cr App R 8
R v A (No 2) [2002] 1 AC 45
R v Cooper (1969) 53 Cr App R 82
R v Forde [1923] 2 KB 400
R v Hancock (1931) 23 Cr App R 16
R v Heyes [1951] 1 KB 29
R v Lee (1983) 79 Cr App R 108
R v McPeake [2005] All ER (D) 349
R v Poole [2002] 1 WLR 1528
R v Rose [1982] AC 822

Foreign legislation
Criminal Procedure Code (England) s 342A

Counsel A Juliette for the appellant
C Brown for the respondent

The judgment of the Court was delivered by
FERNANDO JA

[1] This was an appeal against the sentence of eight years imprisonment imposed by the trial Judge on the appellant, who pleaded guilty to the charge of manslaughter which was filed in addition to the charge of murder, almost at the conclusion of the prosecution case on 16 January 2012, after the evidence of all the eye-witnesses, investigating officers and the doctor had been placed before the Court. The original charge that was filed against the appellant was one of murder to which the appellant had pleaded not guilty and the trial of the appellant had proceeded on the charge of murder until 16 January 2012. As per the trial court brief we note that the last recording of prosecution witness testimony had been at

2.49 pm on 12 January 2012. According to the court brief it is recorded that the rest of the proceedings of that day had inadvertently not been recorded. On the next date, namely Friday 13 January 2012 on a joint application by counsel for the Republic and the appellant the case had been adjourned for the following Monday 16 January 2012 as counsel had indicated that they had certain legal issues to be resolved between them.

[2] As per the proceedings of 16 January 2012 the Court had informed the jurors:

> Learned Counsel for the prosecution filed an amended charge today bringing in a charge of manslaughter. The charge was put to the accused in the presence of his lawyer; the charge was brought as an alternative charge to the charge of murder [*as the copy of the charge handed over to Court during the hearing of the appeal by Counsel for the Respondent does not indicate that the charge of manslaughter was brought in as an alternative to the charge of murder, but rather as a second count*]. The accused pleaded guilty to the said charge of manslaughter and we proceeded to convict him and thereafter learned counsel for the accused made a submission in respect of mitigation and sentence was imposed on him. The sentence is read out to the jury. Jury is discharged.

[3] This proceeding is recorded after the appellant had tendered a guilty plea to the count of manslaughter, the plea in mitigation by counsel for the appellant, and the sentence had been read out in open court, in the absence of the jury. The proceedings of 16 January 2012 do not bear out the accused being charged on the basis of the second count or the accused himself pleading guilty to the second charge as required by law, other than what the trial Judge had told the jury as

set out above. We do not even find on the court brief the second charge. Counsel for the prosecution on been notified of this shortcoming, produced before this Court prior to the hearing of this appeal a copy of an amended charge which he claimed the accused had pleaded to a second time on 16 January 2012. This charge contains two counts, count 1 being murder and count 2, manslaughter. It is noted that the charge of manslaughter has not been filed as an alternative charge to that of murder.

[4] The single ground of appeal filed states that the sentence of eight years is harsh and excessive in all the circumstances of the case and is inconsistent and in disparity with other sentences for similar offences and the appellant seeks by way of relief to allow the appeal and reverse the sentence by reducing the sentence.

[5] Before we even consider the appeal, we find that there is an irregularity of procedure in the manner the plea to the charge of manslaughter had been taken. We find from the proceedings of 16 January 2012 as set out at paragraph 2 above, that the plea had been taken in the absence of the jury and the jury informed of the appellant's plea to the charge of manslaughter only after the appellant had been convicted on the basis of his plea and sentenced. This is contrary to accepted procedure for once an accused has been put in the charge of the jury a plea can be taken only in the presence of the jury and an accused person convicted on the basis of the plea only if the jury is prepared to accept the plea. Section 245 of the Criminal Procedure Code (CPC) states:

> When the jurymen have been sworn or affirmed *the Registrar shall give the accused in charge of the jury by* saying –

> Members of the jury, the accused stands charged by the name A.B. for that he, (reciting the words of the charge). *Upon this charge he has claimed to be tried. Your duty therefore is to hearken to the evidence and inquire whether he is guilty or not guilty.*
>
> [Emphasis added]

[6] As per the oath a juror takes under s 243 of the CPC, he swears that he will well and truly try the matters at issue between the Republic and the prisoner at the bar, according to the evidence.

[7] The trial court brief indicates that all nine members of the jury had taken the oath and that the Deputy Registrar of the Court at the commencement of the trial had complied with the provisions of s 245 of the CPC by stating:

> *Members of the jury the accused stands charge* by the name Leslie Ragain for that on the 19th day of March 2011 at Anse Louis Mahe Seychelles *murdered Julienne Leon. Upon these charges [sic] he has claimed to be tried. Your duty is to hear the evidence and inquire whether he is guilty or not guilty.*
>
> [Emphasis added]

[8] It is the jury according to s 266 of the CPC that is entrusted with the task of deciding which view of the facts is correct and return a verdict which under such view ought, according to the direction of the judge, be returned and decide all questions which, according to law, are deemed to be questions of fact. Thus to take away from the jury the decision of a case that has been entrusted to them is contrary to the provisions of ss 245 and 266 of the CPC. It becomes more problematic when the accused's plea of guilt is to an offence lesser than the one the jury had been entrusted to try. There may be

instances where a jury may be unwilling to accept a plea for manslaughter because they are of the view that the accused is guilty of murder or not guilty of any offence on the basis of the evidence already led.

[9] In trials by jury before the Supreme Court, according to s 235 of the Criminal Procedure Code the Supreme Court is permitted to accept a plea, before it empanels a jury. Section 235 of the CPC reads as follows:

> (1) The charge shall then be read and if necessary explained or interpreted to the accused and the Registrar shall call upon him to plead thereto. If he pleads guilty the court shall hear his counsel *and if the court is satisfied that the accused understands the matter and intends to admit, without qualification, that he committed the offence charged and that the case does not involve any issue which ought to be tried, the court may convict him on his plea.*
>
> (2) In any other event the court shall record the gist of the plea, or the fact that the prisoner does not plead, and a jury shall be formed. [Emphasis added]

[10] In *R v Hancock* [1931] 23 Cr App R 16; *R v Heyes* [1951] 1 KB 29, and *R v Rose* [1982] AC 822 it was held that where the defendant having initially pleaded not guilty subsequently changed his plea and the trial Judge proceeded to sentence without taking a verdict from the jury, the proceedings were held to be a nullity. In *R v Heyes*, Lord Goddard CJ said: "Once a prisoner is in charge of a jury, he can only be either convicted or discharged by the verdict of the jury". *Archbold* (2012 ed) at paragraph 7-435 has submitted that in the case of a change of plea:

> Notwithstanding *Poole* [referred to in paragraph 12 below], good practice should dictate that the rule in *Hancock* and *Heyes* should be followed (for the reasons given by Lord Diplock, and in the commentaries to *Poole* in Criminal Law Week (CLW/01/45/6) and in the Criminal Law Review (2002) Crim LR 242).

[11] The gist of the judgment of this Court *In the Matter of: Reference by the Attorney-General under section 342A of the Criminal Procedure Code*, Cr App No 12 of 1999 was to the effect that the taking of a plea of guilty to manslaughter tendered by the defendant was improper.

[12] Counsel for the respondent submitted that there was no irregularity of procedure in the manner the plea to the charge of manslaughter had been taken and sought reliance on the cases of *R v Poole* [2002] 1 WLR 1528, and *R v McPeake* [2005] All ER (D) 349. In *Poole* the appellant faced charges of indecent assault and of supplying a class B controlled drug, to both of which the appellant had pleaded not guilty.

[13] After the commencement of the trial, she pleaded guilty to the charge of indecent assault in the presence of the jury. The plea had been accepted by the Crown, counsel explaining the reasons to the Judge and jury. Thereafter the Judge had discharged the jury after accepting the plea. Subsequently the appellant applied to vacate the plea of guilt on the basis that the trial was a nullity. At the hearing of the application for nullity the trial Judge came to the conclusion after hearing the evidence of the defendant that the defendant had fully understood her counsel's oral advice to her that she should only plead 'guilty' if she had committed the offence, that

she had understood precisely what she was doing, and appreciated the significance of the document signed by her, before she pleaded guilty, which read:

> I, L. R. Poole have decided of my own free will to plead guilty to count one in the indictment and I have made the decision after speaking with my advisers and my partner … I understand that I will be sentenced on the basis that I did the sexual acts complained of by C. I understand that I could well receive an immediate custodial sentence when sentenced for this offence ….

and had therefore dismissed the application. On appeal from this decision, the Court of Appeal had said that it was clear that:

> this was a voluntary plea, entered by a defendant who understood exactly what she was doing, and the consequences, both in the sense that she was admitting that she was guilty, and also that she was at risk of a prison sentence.

[14] Thus in *Poole*, unlike in the instant case, the guilty plea had been taken in the presence of the jury and the reasons for accepting the plea had been explained by counsel for the Crown to the Judge and jury. Further there was evidence to show that the defendant had understood precisely what she was doing in pleading guilty and appreciated that she was at risk of a prison sentence. The position may have been different if a new indictment was filed with a charge of manslaughter, rather than adding the charge of manslaughter as count 2 to the existing indictment which continued to have the charge of murder as count 1 and which the jury had been called upon to determine.

[15] It is also to be noted that in Seychelles, unlike in the UK, it is only the offence of murder which is tried by the Supreme Court with a jury. The cases of *Poole* and *McPeake* relied on by counsel for the respondent are not of relevance to this case. On a perusal of the proceedings of the trial Court of 16 January 2012 pertaining to what the trial Judge told the jury after having accepted a plea of guilt for manslaughter as referred to at paragraph 2 above there is no way this Court could come to a safe conclusion that the provisions of s 235 of the CPC had been complied with, namely that the Court was satisfied that the accused understood the matter and intended to admit, without qualification, that he committed the offence charged.

[16] According to the evidence of the main prosecution witnesses to the incident, namely the 10 and 14 year old daughters of the deceased, the deceased had returned home around 2 am on the morning of the incident after going to Bazaar Victoria and a party at 'Parti Lepep' at Maison Du Peuple. When the deceased tried to prepare milk for her 1 year old son she came to know that there was no electricity and blamed the appellant, an SPTC bus driver and her concubin of about six years, for having disconnected the electricity. The 1 year old child was by the appellant. The deceased had then called the appellant who had come in his bus and fixed the electricity, which had got disconnected apparently due to the breaker flipping. The deceased had then threatened the appellant not to come into the house and said she would take him to the police station if he came into the house. The appellant had then left the house saying "kiss me darling", and gone towards his bus that was parked outside. The deceased had then thrown a butter knife at the appellant. Thereafter the deceased had followed the appellant outside the house and thrown a stone at the bus which cracked the windscreen. She had been angry and swearing at the appellant. When the deceased was

attempting to throw a second stone, the appellant had got out of the bus wrestled with the deceased and taken the stone from her hand and thrown it away. Thereafter he had got back into the bus to leave. The deceased had then started to walk hurriedly in front of the bus while the appellant had followed her in the bus. According to the 14 year old daughter the appellant had been driving slowly, while the 10 year old had stated "sometimes he would drive fast and sometimes he would drive slowly". At a certain bend of the road the appellant had swerved his bus to a side in the alley in order to proceed straight and at that point the deceased had collided with the bus and fallen down. When she fell the rear wheels of the bus had gone over the deceased. The appellant had then gone forward, parked his bus, come out and inquired as to "what has happened". The appellant had then tried to resuscitate the deceased who was lying on the road and asked for assistance to put her in the bus. The appellant had been there until the ambulance and police arrived and left the scene only when some of the relatives of the deceased who had gathered there by that time, had become boisterous. Before reaching the alley the appellant had not tried to drive the bus onto the deceased. There is no clear evidence as to how the deceased came to collide with the bus or any evidence to the effect that the appellant had deliberately driven the bus on to the deceased or over her when she had fallen down. It is also in evidence that this was a narrow road and the bus was large. The road as per the testimony of another prosecution witness was almost the width of the bus. It had been the testimony of the 14 year old daughter of the deceased that when her mother was hit by the bus it was still dawn and there was insufficient light and thus not clear enough to see everything. The time as per the testimony of one witness was around 6.00 am, another 6.45 am.

[17] Added to the insufficiency of eye witness testimony as to how the incident took place we are hindered as a result of the absence of medical evidence on the appeal court brief as to the cause of death or the injuries suffered by the deceased, especially the internal injuries as a result of colliding with the bus. Although the prosecutor had indicated to the trial Court that a post mortem examination report would be tendered it had not been produced. The only medical evidence on record is from the doctor who had examined the deceased when her body was taken to the Anse Boileau medical centre to the effect that the deceased had "multiple scratches on the body, like superficial wounds with cyanosis seen, nose bleeding and mouth bleeding with clot and an open fracture with deep laceration on the left leg." At the hearing with reluctance we decided to look into the post mortem examination report pertaining to the deceased. We wish to state that in a case of murder in view of the provisions of s 235 of the CPC referred to at paragraph 9 above, before a plea could be accepted by Court or jury for the offence of murder or manslaughter, it is incumbent on the prosecution to place the facts pertaining to the crime and the medical evidence as regards the cause of death before the Court. It is only then we could conclude that the accused had pleaded guilty, having understood the matter and that he intended to admit without qualification that he committed the offence charged. One of the necessary elements that should be proved in respect of the offences of both murder and manslaughter is that the accused caused the death of the deceased. It is not a question whether this Court has been satisfied that there is material to indicate that it was the accused that caused the death of the deceased but whether the accused pleaded having been conscious of that fact.

[18] The evidence of the police officer, who photographed the crime scene and conducted an examination of the bus, does not help us to come to a conclusion as to how the deceased came by her death or injuries. According to her testimony she had not seen any human debris, skin, blood or anything under the bus when she examined it under a ramp. As a result of not having taken a measurement to see the clearance between the road and the bus from underneath the bus; and also the measurements of the body of the deceased who according to the photographs show a large bodied person; it is difficult to conclude from the evidence on record whether the bus in fact went over the body of the deceased. The following dialogue between defence counsel and a witness is of relevance.

> Q: … Had you taken the measurement of the body and the measurement of the clearance of the bus, we would have been able to find out whether it was possible for the bus to actually have rolled on the deceased in the manner that is photographed. The whole bus over the deceased.
>
> A: May be yes may be no.
>
> Q: If we have a certain clearance under the bus, and the body happens to be bigger than that clearance under the bus, if the bus were on the body either the body will lift up the bus or the bus will crush the body. Do you agree?
>
> A: It depends how the accident happened.

[19] A neighbour of the deceased who came on the scene soon after the incident had seen the appellant bending over the deceased who lay fallen on the road trying to revive her and to his question as to what happened to the deceased the appellant had answered "the

deceased crossed in front of the bus, the bus has hit her and the wheel has gone over her." To the ambulance driver who came on the scene after a phone call, the appellant had said on being questioned: "that the person just crossed in front of the bus and he could not avoid her."

[20] Counsel for the respondent has provided to this Court attached to his letter dated 15 November 2013, a note of what the prosecution understand are the facts upon which the appellant was sentenced, that was given to the Court and taken from his note at the time. In this note he states:

> Precisely what his intentions were in performing this manoeuvre the prosecution cannot say, but given that he knew she was there it was very dangerous. We do say he did not deliberately intend to hit her with the bus. But unfortunately he did. She was knocked down.

[21] The offence of manslaughter is defined in s 192 of the Penal Code as follows:

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

[22] Thus there are two main elements of this offence, namely an unlawful act or an unlawful omission and such unlawful act or unlawful omission should have caused the death of another person.

Thus the causal connection between the unlawful act or unlawful omission and resulting death has to be established. Manslaughter by an unlawful act covers 'constructive' (unlawful act) manslaughter while manslaughter by an unlawful omission covers 'culpable negligence' manslaughter. Although these two types have their application to given sets of facts they do overlap to a certain extent.

[23] In order to prove constructive manslaughter there must be evidence to establish that the accused intentionally performed an 'act' and that 'act' is unlawful and that 'act' resulted in the death of a person. According to s10 of the Penal Code "…. a person is not responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident." For an act to be 'unlawful' it should be dangerous to be treated as criminal. In *Andrews v Director of Public Prosecutions* [1937] AC 576, the House of Lords held that only acts which are inherently criminal can form the basis of a constructive manslaughter charge. This is because certain acts are lawful if done properly, but unlawful if done dangerously or negligently, the most common example being, driving offences. It is an objective test that is applied to determine whether an act is dangerous:

> Liability will be incurred for constructive manslaughter only if the act which causes death is criminal in itself, rather than becomes criminal simply because it is performed in a negligent and dangerous fashion. This point is particularly important in connection with deaths arising out of road traffic offences. If the criminality of an act could be provided merely by proof of negligence it would mean that anybody who killed another in the course of speeding, drink driving, or driving carelessly

> would be automatically guilty of manslaughter. (Professor William Wilson, Professor of Criminal Law at Queen Mary, University of London in his book *Criminal Law* (4 ed)).

[24] If however there is evidence to establish malice aforethought on the part of an accused who has been involved in a killing by knocking down a person with his vehicle he may be charged with the offence of murder.

[25] In order to prove gross negligence manslaughter there must be evidence to establish an omission; that omission should be unlawful; that omission should amount to culpable negligence to discharge a duty tending to the preservation of life or health; and as a result of such omission death has ensued. An omission arises as a result of a breach of a duty of care. In cases of vehicular manslaughter it can be said that a duty tending to the preservation of life arises in respect of all those who can be foreseen as likely to be injured by one's careless actions or omissions.

[26] Section 206 of the Penal Code states:

> It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason off any omission to perform that duty.

[27] For there to be culpable negligence there should be gross negligence. In the case of *R v Bateman* (1925) 19 Cr App R 8 it was held for there to be gross negligence manslaughter:

> the negligence of the accused should have gone beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount a crime against the State and conduct deserving punishment.

[28] This case on the basis of what we have stated at paragraphs 22 to 24 above is not one of constructive manslaughter, namely not one by an unlawful act. It is also difficult to conclude beyond a reasonable doubt that it is a case of gross negligence manslaughter, namely by an unlawful omission, for in view of the evidence as set out in paragraphs 16 and 19 above we find it difficult to conclude that the element of 'culpable negligence to discharge a duty tending to the preservation of life" in s 192 are satisfied. Nor can we say that the appellant failed to use reasonable care and take reasonable precautions to avoid danger to the life, safety, or health of any person as set out in s 206 of the Penal Code.

[29] We also find that the amended charge upon which the appellant pleaded guilty to the offence of manslaughter, under the second count that was added to the indictment on 16 January 2012, and which was handed over to us by the counsel for the Republic at the hearing, does not in detail inform the appellant of the nature of the offence with which he was charged as required by art 19(2) of the Constitution.

[30] Article 19(2)(b) of the Constitution states: "Every person who is charged with an offence shall be informed … in detail of the nature of the offence." The added count 2 is as follows:

> Statement of Offence
>
> Manslaughter, contrary to section 192 of the Penal Code, punishable under section 195 of the Penal Code.
>
> Particulars of Offence
>
> Leslie Ragain on the 19th of March 2011 at Anse Louis, Mahe, unlawfully killed Julienne Leon.

[31] Our law of manslaughter as set out in paragraph 21 above and as explained in paragraph 22 above essentially creates two distinct types of manslaughter, namely constructive manslaughter (manslaughter by an unlawful act) and gross negligence manslaughter (manslaughter by an unlawful omission). We are conscious of the fact that the charge referred to at paragraph 30 above had been framed in accordance with s 114(a)(iv) of the CPC which states that the forms set out in the Fourth Schedule to this Code "… shall be used in cases to which they are applicable…" and that nothing more than the particulars as required therein need be given. This provision has now to be read, subject to art 19(2)(b) of the Constitution. We are therefore of the view that in drafting a manslaughter charge it is necessary to state whether it is one of manslaughter by an unlawful act or manslaughter by an unlawful omission, unless the facts reveal that it is manslaughter by both an unlawful act and unlawful omission. Merely stating 'unlawfully killed' as stated in the charge is in our view, not in accordance with art 19(1)(b) of the Constitution. We also tend to think that had the charge been more specific all parties would have had a better understanding as to what the appellant was pleading to.

[32] This in our view is a unique case that has come up before us, for we find that the appellant has pleaded guilty to an offence he had not committed as result of a lack of proper understanding of the elements of the offence of manslaughter and the procedural law. We are constrained to think that this misconception as to the elements of the offence of manslaughter and the procedural law existed in the minds of the appellant, his counsel, prosecuting counsel and the trial Judge. It is clear from the note submitted to Court by counsel for the respondent as referred to at paragraph 20 above he erroneously treated this case as one of manslaughter by an unlawful act on the basis that that the appellant had driven the bus in a "very dangerous" manner. This is contrary to what we have stated at paragraph 23 above in relation to manslaughter by an unlawful act, especially vehicular manslaughter. We believe that appellant had found it necessary to blame the death of the deceased on himself out of remorse as she had been his concubine for a period of almost six years and bore him a child. This is why we find in the plea in mitigation the defence counsel informing the Court that the accused is highly remorseful now and ever since the accident and that it was the intention of the appellant to plead guilty from the outset of this case. But what is puzzling us is the statement of the defence counsel: "As pointed out by the prosecution, there was no intent on his part to kill Julienne. *Accident happened* he had willingly and gracefully accepted." [Emphasis added] Did the appellant thus plead guilty to an 'accident' which is exempt from criminal liability in view of the provisions of s 10 of the Penal Code?

[33] The difficulty we have in this case is that there is no formal written application before us as required by r 18 of the Seychelles Court of Appeal Rules 2005, to have the trial declared a nullity on the basis of non-compliance with the provisions of the CPC or any

other basis. In the Australian case of *Gipp v R* (1988) HCA 21 it was held that:

> the Court is not obliged to ignore a manifest miscarriage of justice demonstrated to it simply because the grounds to demonstrate it were not earlier raised. Any other rule would give priority to form over substance; it would permit procedural rules to defeat correction of a serious miscarriage of justice that has come to the notice of a court of justice.

[34] Article 19(1) of the Constitution states that every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing. We are of the view that the appellant in this case has not had a fair hearing in view of what has been stated at paragraph 28 above. Where there is a breach of this fundamental human right it is not possible to deny justice to him on the ground that there is a lack of specific procedure. In the preamble to the Constitution the people of Seychelles have solemnly declared their unswaying commitment to uphold the rule of law based on the recognition of the fundamental human rights and freedoms enshrined in the Constitution. Article 19(1) guarantees a fair trial in the determination of a criminal charge and this autonomous concept has been interpreted in relation to art 6 of the European Convention on Human Rights in the case of *Eckle v FRG* (1983) 5 EHRR 1, to secure protection of the accused's rights throughout the period from the investigation to the conclusion of an appeal.

[35] We are of the view that our powers under r 31 of the Seychelles Court of Appeal Rules are something of a double-edged sword. On the one hand, we are obliged to ensure fairness in our proceedings; on the other we are permitted to cure defects under the

proviso to r 31(5) and s 344 of the Criminal Procedure Code, thereby rendering the process as a whole fair. In *Ex parte Bennett* [1994] 1 AC 42 at 62, the House of Lords said:

> English courts should not countenance behaviour that threatens either basic human rights or the rule of law, and this sentiment must apply with even greater vigour since the enactment of the Human Rights Act 1998.

[36] In short the legitimacy of the verdict should involve fundamental respect for the court process. The quality of proceedings and not merely their product are central to judicial legitimacy. R Dworkin in "A Matter of Principle" (1986) at 72 states:

> The criminal justice system is not merely about convicting the guilty and ensuring the protection of the innocent from conviction. There is an additional and onerous responsibility to maintain the moral integrity of the criminal process.

[37] This Court cannot ignore non-compliance with procedural requirements, especially s 235 of the Criminal Procedure Code and a plea of guilt based on a lack of understanding of the substantive law pertaining to the offence of manslaughter by the appellant, both counsel for the Republic and the appellant and the trial Judge. In *R v A (No 2)* [2002] 1 AC 45 (HL) Lord Steyn observed that it is well established that the right to a fair trial was absolute in the sense that a conviction obtained in breach of it cannot stand. According to *Archbold* (2012) at 7-46 the principle is the same as for defendants who plead not guilty. In *R v Lee* (1983) 79 Cr App R 108 the Court stressed that although a plea of guilty could not deprive the Court of

jurisdiction to hear an appeal against conviction, it was highly relevant to the issue whether the conviction was unsafe that the appellant had been fit to plead, had known what he was doing, had intended to plead guilty and had done so without equivocation after receiving expert advice.

[38] There is no provision in the Seychelles Court of Appeal Rules 2005 which makes specific reference to interfering with a guilty plea where it has resulted in a "miscarriage of justice" and when there is no written application for the trial to be declared a nullity by the convict, save for the very wide powers the Court has while hearing an appeal under r 31 of the said Rules. Rule 31 provides that appeals to the Court shall be by way of re-hearing and the Court shall have all the powers of the Supreme Court including the power to draw inferences of fact and to give any judgment which the Supreme Court ought to have given or made. These powers may be exercised notwithstanding that the notice of appeal relates only to part of the decision and such powers may be exercised in favour of any of the parties who have not appealed from or complained of the decision. In its judgment the Court may reverse the decision of the trial court as it may seem just. According to the proviso to r 31(5) the fundamental principle by which this Court is to be guided in hearing an appeal is to ensure that no substantial miscarriage of justice has occurred at the trial before the Supreme Court. It is emphasized that the miscarriage of justice should be a 'substantial', one which 'has actually occurred' and not one that is insubstantial or merely theoretical.

[39] When an appeal is lodged, the entire matter is before the court to which the appeal is brought and the court can entertain any matter, however arising, which shows that the decision of the court

appealed from is erroneous. An appeal having been lodged, it is the duty of this Court to so hold, notwithstanding the limited nature of the grounds of appeal. In the Australian case of *Davies and Cody v The King* (1937) HCA 27 as quoted in *Gipp v R* (1988) HCA 21, it was held:

> that the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers not only cases where there is affirmative reason to suppose the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.

[40] In the case of *R v* Cooper (1969) 53 Cr App R 82 it was said that an appeal court:

> must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.

In this case there is more than a lurking doubt and a general feeling in our minds as to whether an injustice has been done.

[41] We are of the view that this case warrants us to act although there is no specific procedure or precedent in regard to exercise of such powers and as to whether we should declare the trial a nullity or quash the conviction based on the plea of guilt tendered by the appellant. We wish to stress that this will be a power that will be rarely exercised and only when there are valid grounds to do so, because of the mischief it could cause, the lack of certainty in plea deals and the need to ensure fairness to the victims and witnesses involved. A guilty plea in our view will be invalid where there is a misunderstanding on the part of the accused, his counsel, the prosecutor and the trial judge as to the nature of the offence; where the plea had been tendered purely out of remorse for the death of someone whom the accused thinks he is morally liable, where the charge had not set out in detail the nature of the offence committed, where on the admitted facts or the evidence led before the court, the accused could not have been convicted of the offence and there is nothing on record to indicate that the trial judge had satisfied himself that the accused understood the nature of the offence and intended to admit, without qualification, that he committed the offence charged. *R v Forde* [1923] 2 KB 400 identified circumstances in which the Court of Appeal would interfere to set aside convictions where there had been pleas of guilty. Those circumstances were (1) that the appellant had not appreciated the nature of the charge, or did not intend to admit that he was guilty of it, or (2) upon the admitted facts the appellant could not in law have been convicted of the offence charged.

[42] In view of the circumstances detailed above under which the appellant had pleaded guilty to the offence of manslaughter in this case, we are strongly of the view that there was a serious irregularity of procedure in the manner the plea was accepted by the trial Court,

leading to a denial of the right to a fair hearing, which makes the conviction unsafe. We therefore quash the conviction of the appellant and acquit him forthwith.

Sayid v R

MacGregor PCA, Fernando, Twomey JJA

6 December 2013 SCA 2/2011

Prosecution of minors – Role of Attorney-General−Interpretation

After the appellants were found guilty of piracy, the Supreme Court imposed 11 years of imprisonment on a first count and 10 years on a second count with a third count to run concurrently with the others. The appellants argued that the Judge erred in making the second term consecutive to the first, as the offences were a continuing act and all the sentences should run concurrently. The Court of Appeal proprio motu raised the issue of jurisdiction in respect of the child appellant.

JUDGMENT Appeal allowed.

HELD

1 The Attorney-General is not subject to direction or control of any other person or authority.

2 The exercise of the powers of the Attorney-General is subject to review by the courts.

3 To ensure the consistency of s 93 of the Children Act and s 225 the Criminal Procedure Code, the two provisions must be read together. The application of the general provisions contained in s 223 of the Criminal Procedure Code is restricted as it does not extend to the trial of a "child" within the meaning of the Children Act.

4 The provisions of the Constitution on the prosecuting powers of the Attorney-General are limited by the

provisions of the Children Act insofar as they indicate how the power of prosecution has to be exercised in relation to a child or young person.

5 In the absence of express language or necessary implication to the contrary, courts must presume that even the most general words are intended to be subject to the basic rights of the individual.

6 A written or oral authorisation is required to show that the Attorney-General is aware a child is being indicted and that instructions have been sought for the prosecution.

Legislation
Constitution arts 31, 76(4)(a), 76(10), sch 2 s 8
Children Act ss 2, 92, 93, 94, 95(1)(a) – (j)
Code of Criminal Procedure ss 225, 344
Court of Appeal Rules rr 3, 31(1)

Cases
Re section 342A of Criminal Procedure Code SCA 1/2000
William v R [2013] SCSC 86

Foreign cases
R v Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115

Counsel A Amesbury for the appellant
S Muzaffer for the respondent

The judgment of the Court was delivered by
TWOMEY JA

[1] On 27 March 2010, nine Somali nationals were charged with three counts of committing acts of piracy on the high seas. The

particulars of the first count were that the accused, together with eight other persons, with common intention committed an illegal act of violence or detention or an act of depredation for private ends on the high seas, against persons onboard another ship namely the *Al-Ahmadhi*, an Iranian vessel by unlawfully taking control of the ship whilst armed with firearms. The second count was in relation to similar acts against the *Galate*, a Seychellois fishing vessel in the Seychelles Exclusive Economic Zone and the third count was in relation to the accused persons unlawfully discharging firearms at the *Topaz*, a Seychellois patrol vessel which had come to the rescue of the two vessels.

[2] After a lengthy trial, all the accused including the appellant were found guilty on all charges and the trial Judge imposed a term of 11 years imprisonment on the first count, a term of 11 years imprisonment to run consecutive to the first sentence on the second count and on the third count a term of 10 years imprisonment to run concurrently with the other sentences, hence a total of 22 years imprisonment. All the convicts began their terms of imprisonment during which they filed notices of appeal solely against sentence. Eight of the nine convicts meanwhile accepted a repatriation offer to Somalia under a bilateral agreement between Seychelles and Somalia. The appellant proceeded with his appeal.

[3] The only ground of appeal originally filed read as follows:

> The judge erred in making the second term consecutive to the first sentence, as the offences for which the appellants were convicted was a continuing act or one transaction and therefore all sentences should have been made to run concurrently.

[4] Before the hearing of the appeal took place, the Court of Appeal having perused the transcript of the trial proceedings and having noticed on the "application for further holding suspects" filed by the police and also on the original charge sheet (later amended) that there were seven children ranging in ages from 13 to 16 invited counsel to make submissions in relation to the provisions of the Children Act 1982 as amended. These provisions concern the conviction and sentencing of children and young adults.

[5] Before we consider this appeal we wish to place on record that we are somewhat dismayed by the fact that the Court of its own volition had to raise the issue of the provisions of the Children Act. Our intervention in this case is permitted under rr 31(1) and (3) of the Seychelles Court of Appeal Rules 2005. We cannot understand how charges were preferred against a number of children ranging from the ages of 13 to 16 without counsel for either party, nor for that matter the trial Judge bringing their attention to the provisions of the Children Act. These are grave criminal offences but this serious lapse cannot be condoned by the highest court and court of last resort in Seychelles whose duty it is to see that the rights of accused persons as protected by the Constitution are upheld and that justice is done, especially so when the appellant in this case is a vulnerable young person.

[6] Spurred on by our intervention the appellant moved the Court for an amendment to his grounds of appeal, which was granted. The amended grounds of appeal submitted are:

Against sentence:

1) The Judge erred in making the third term of imprisonment consecutive to the 1st sentence, as the offences for which the Appellant was convicted was a continuing act or one criminal enterprise and therefore he could have exercised his judicial discretion in favour of the Appellant and ordered that all sentences run concurrently.

2) The Judge failed to take into consideration the fact that the Appellant was a 16 year old child at the time of the commission of the offences and disregarded the totality principle and imposed a "crushing sentence" of 22 years imprisonment on him.

3) The Judge failed to consider the available options under section 95 (1) (a) – (j) of the Children Act as possible sentences for the Appellant who was a child as defined under the said Act at the time of the commission of the offence.

4) The Judge failed to individualise the sentence to reflect the level of criminal culpability of the appellant who was a juvenile on the high seas and not in control of, nor the leader of the operation.

Against conviction:

1) The conviction was unsafe and unsatisfactory as the learned judge erred when he failed to ensure that the Respondents had the Attorney-General's instructions/consent before prosecuting the Appellant who was a child at the time the offences were

> committed as is required under s 92 of the Children Act.

[7] We have decided to consider the ground against conviction first as is the normal practice. The Children Act of 1982 as amended imposes a number of restrictions on the conviction and sentence of children. It defines a child in s 2 as:

> except where used to express a relationship and except in sections 9 to 14, means a person under 18 years of age and includes a young person.

[8] The most relevant provisions of the Children Act in relation to this case are the following:

> Section 92(1)
>
> No child shall be prosecuted for any offence except-
>
> (a) the offence of murder or an offence for which the penalty is death; or
>
> (b) on the instructions of the Attorney-General ....
>
> Section 94(2)
>
> No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other way provided for under this Act.

[9] Section 95(1) then outlines the ways in which a child or young offender can be dealt with if the court is satisfied of his guilt. These include conditional discharges, probation orders, and committal orders to Juvenile Centers but also imprisonment.

[10] Despite the fact that no certificate of birth was tendered by the appellant, his age was never disputed. It was in fact entered by the Attorney-General or his subordinate officers on pretrial documents in relation to the appellant's detention in police custody, on the appellant's statement and also on the original charge. The appellant was also given the assistance of a probation officer during the interview process as is usual in Seychelles when a child is interviewed without a parent being available.

[11] The appellant's counsel submits that the *fiat* of the Attorney-General is required for the prosecution of children under s 92(1) of the Children Act (supra). She relied on the case of W*illiam v R* [2013] SCSC 86 in which McKee J, in the case of a sixteen year old child charged jointly with an adult for burglary stated (at [34]–[35]):

> I take into account the precise wording of section 92…. In my opinion these words mean exactly what they say….
>
> Section 92 of the Children Act is quite clear; it means exactly what it says. In the present matter the prior written instruction of the Attorney-General was required for the prosecution of the Appellant. No such instruction was obtained by the Prosecution.

McKee J was also of the opinion that the fact that a child is charged jointly with an adult in a criminal case rather than separately makes no difference in terms of the requirement of the *fiat* of the Attorney-General under the provisions of the Children Act.

[12] Counsel for the respondent submitted that it has been the norm for the Attorney-General to sign a document entitled "Sanction

of the Attorney-General" pursuant to s 92 of the Children Act, sanctioning the prosecution of a child for a particular offence. She concedes that no such document exists in this case. She stated however that there is no statutory requirement for such a document.

[13] She also submitted that the Children Act came into force in 1982 and that the Constitution was promulgated in 1993 and since art 76(4)(a) empowers the Attorney-General to "institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person," it therefore supersedes the Children Act, permitting the Attorney-General or his subordinate officers without any further requirements or caveats to prosecute any person, including a child for any offence. She stated that were the Court not to find favour with this submission, the very fact that this case was prosecuted implies that the *fiat* of the Attorney-General was given. She added that if her submissions were not accepted, the proviso of s 344 of the Criminal Procedure Code should be applied as the objection could have been raised earlier.

[14] One of the difficulties in relation to criminal trials in our jurisdiction is the fact that there are no separate offices of Attorney-General and Director of Public Prosecutions. This sometimes leads to situations where the Attorney-General is called upon to exercise two distinct functions potentially in conflict with one another. In this particular case the Attorney-General or his subordinate officers instituted the proceedings against the appellant. However, since the appellant was also a child, the Attorney-General had to acquit himself of his duties as amicus curiae for children, especially so as in this case the accused had neither a parent nor a guardian in Seychelles. It was therefore incumbent on him to guard the interests

of the child and to ensure a fair prosecution. A child's rights like those of other individuals are guaranteed under the Charter of Fundamental Rights and Freedoms in the Constitution. These include the right to a fair hearing and special rights as a minor under art 31 which is particularly relevant to this case as it states:

> The State recognizes the right of children and young persons to special protection in view of their immaturity and vulnerability ….

[15] It is therefore especially ironic that counsel for the respondent submitted that the Attorney-General's constitutional functions supersede the law. That argument is in any case both dangerous and flawed. Applying a literal interpretation to the constitutional provisions would result in legislation being thwarted and that was certainly not the aim of the drafters of the Constitution. Article 76(4)(a) grants power to the Attorney-General to institute and undertake criminal proceedings and art 76(10) makes it clear that in the exercise of these powers he is not subject to the direction or control of any other person or authority. However nothing in art 76 places the Attorney-General above the law in the exercise of his powers. He is permitted to bring prosecutions but he does so according to law; including the law that predated his constitutional functions. In any case the provisions of the Children Act are not inconsistent with his powers of prosecution.

[16] A similar issue was raised before this Court in the case of *Re Section 342A of Criminal Procedure Code* SCA 1/2000 which also concerned the trial of a child of sixteen years. On that occasion the Court of Appeal had to decide whether there existed an inconsistency between s 225 of the Criminal Procedure Code which provides that in cases of murder the accused shall be tried by the

Supreme Court with a jury and s 93 of the Children Act which provides for the trial of child offenders in the Juvenile Court. It decided that:

> Both provisions of law should be read together. When so read, it is our view that the application of the general provision contained in section 223 of the Criminal Procedure Code is restricted, inasmuch, as it does not extend to the trial of a "child" within the meaning of the Children Act …. In other words, section 93(1) and (2) of the Children Act limits the applicability of the general words of wide import in section 225 of the Criminal Procedure Code.

[17] Similarly, I am of the view that the wide import of the provisions of the Constitution as regards the prosecuting powers of the Attorney-General is limited by the provisions of the Children Act insofar as they indicate how the power of prosecution has to be exercised in relation to a child or young person. This assertion stems from fairly basic canons of statutory interpretation:

1) the principle of legality as expressed by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at page 131:

> The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the

> absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

2) *generalia specialibus non derogant* summarised in Halsbury's *Laws of England* (4th ed) vol 44(1), para 1300 as:

> It is difficult to imply a repeal where the earlier enactment is particular, and the later general. In such a case the maxim generalia specialibus non derogant (general things do not derogate from special things) applies. If Parliament has considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to interfere with that provision; and therefore, if such an enactment, although inconsistent in substance, is capable of reasonable and sensible application without extending to the case in question, it is prima facie to be construed as not so extending. The special provision stands as an exceptional proviso upon the general.

[18] In any case, the exercise of the powers of the Attorney-General, being those of the executive branch of government is subject to review by the courts. Further s 8(a) of sch 2 made under art 6 of the Constitution containing the principles of interpretation makes it clear that the provisions of the Constitution shall be interpreted in such a way to give them "their fair and liberal meaning." The purport of the Children Act was to safeguard and promote the welfare of children even in circumstances where they

have committed criminal offences. It was in recognition of the special status that children have within our community. An interpretation of art 76 of the Constitution to rob children of the most basic protection in relation to criminal proceedings would neither be liberal nor fair.

[19] Further, the provisions of s 92(1)(b) of the Children Act would be devoid of meaning if we were to imply that the *fiat* of the Attorney-General is implied by his very prosecution of a child or young person. I am however, not of the same view as McKee J that only written instructions of the Attorney-General in such cases will suffice. The provisions of s 92(1)(b) do not exclude the possibility that the authorisation of the Attorney-General could be communicated orally at the initiation of criminal proceedings. The authorisation, written or oral, is required to show that the Attorney-General is aware that a child is being indicted and that his instructions have been sought for such prosecution and granted. In this case, nothing in the transcript of proceedings indicates that the Attorney-General was aware of this fact; the matter was raised only at appeal by the Court itself.

[20] This is a case where both the trial and sentence process was defective. *Archbold* states:

> If an indictment is founded on an invalid committal it will be liable to be quashed and any proceedings upon that indictment will be a nullity: R v Gee [1936] 2 KB 442 …. failure to follow the prescribed procedure may render a committal invalid, especially if the failure relates directly to the rights of the accused: See R v Barnet Magistrates' Court, ex p. Wood [1993] Crim. L. R. 78....Where some consent is required to

> the institution of proceedings is not obtained, the whole of any trial that takes place, including the committal proceedings is a nullity and a conviction that occurs in such circumstances will be quashed. R v Angel, 52 Cr. App. R. 280, CA; R v Pearce, 72 Cr. App. R. 295 …
>
> *Archbold on Criminal Pleadings, Evidence and Practice* (2012 ed) 1-283 – 1-286).

[21] Neither counsel for the parties, nor the trial Judge were aware of the defect until this Court raised the issue in the present appeal. We have given anxious consideration as to whether the conviction should be set aside. Section 344 of the Criminal Procedure Code provides that where an error, omission or irregularity occasions a failure of justice, no finding of sentence or order passed by a court shall be reversed or altered on appeal if the objection could have been raised earlier. We have outlined in this judgment the reasons why this objection could not have been raised earlier. In view therefore of the serious failure of justice occasioned in this case, we have decided to allow the ground of appeal on conviction.

[22] In view of our decision in relation to the ground on conviction, it would be purely academic to consider the grounds of appeal on sentence. The appeal is therefore allowed and the appellant's conviction is hereby quashed.

Valentin v R

Domah, Fernando, Msoffe JJA

6 December 2013 SCA 19/2011

Mandatory minimum sentence

The appellant was found guilty of trafficking in a controlled drug and sentenced to eight years' imprisonment. The appellant contended that the judge erred in failing to attach weight to the inconsistency of the evidence of the prosecution witnesses and the sentence was harsh and excessive.

JUDGMENT Appeal dismissed.

HELD

The fact that an accused is a first offender with a family, had been orphaned at an early age, and had had a hard life were not exceptional reasons for the purpose of departing from the minimum mandatory sentence.

Legislation
Misuse of Drugs Act s 14(d)

Cases
Beeharry v R (2010) SLR 470
Poonoo v Attorney-General (2011) SLR 423

Counsel N Gabriel for the appellant
V Benjamin, Asst Principal State Counsel, for the respondent

The judgment of the Court was delivered by
FERNANDO JA

[13] This is an appeal against a conviction for trafficking in a controlled drug, namely 100.7 grams of cannabis (herbal material)

on the basis of the s 14(d) presumption in the Misuse of Drugs Act and the sentence of eight years imposed on such conviction. As per the formal charge the appellant on 4 November 2010, at Anse Aux Pins, was found in possession of 100.7 grams of cannabis (herbal material).

[14] The grounds of appeal are as follows:

a) The trial Judge erred on the evidence in not attaching great weight to the inconsistencies of the prosecution witnesses.

b) The trial Judge erred on the evidence in not attaching sufficient weight to the fact that the appellant's pocket was not large enough to hold the packet containing drugs.

c) The trial Judge failed to objectively evaluate the evidence and failed to exercise his mind to the possibility that the drugs were found on the ground and not in the hand of the Appellant.

d) The sentence of eight years is manifestly harsh and excessive.

[15] According to the evidence of the two prosecution witnesses, PW1 and PW2, from the National Drug Enforcement Agency (NDEA), who were involved in the arrest of the appellant with the drugs in his hand, they were on patrol duty with other police officers at Anse Aux Pins around 10 pm when they saw the appellant walking along the Capuchin secondary road. On bringing their vehicle to a halt next to the appellant, the police officers had identified themselves as NDEA officers and said that they were

going to carry out a search on him. The appellant had then taken to his heels. The two police officers had then given chase behind the appellant. From the lights from the jeep and a torch one of the police officers was carrying they had seen the appellant removing a blue coloured plastic bag from his right side trouser (shorts) pocket, while still on the road. The appellant had then jumped over a small wall by the side of the road and fallen into the gutter. One of the police officers had then jumped on the appellant and arrested him after informing him of his rights. The plastic bag was in the right hand of the appellant when he was handcuffed. On opening the plastic bag the police found that it contained some herbal material which they suspected to be drugs. The police had on their way to the NDEA taken the appellant to the hospital as the appellant had sustained some bruises when he fell into the gutter and in the process of being arrested. The appellant had refused to be examined by a doctor.

[16] In his skeleton heads of argument the appellant in relation to ground (a) has listed the inconsistencies in the evidence of PW 1 and PW 2 with regard to their police statements and between them as follows:

a) *PW 1 has not mentioned in his statement about the appellant jumping over a wall before he fell into the gutter*. However in court he had stated that it was a little wall and that he did not consider it important to mention it in his statement and his evidence to court was more detailed. The trial Judge in dealing with this matter in his judgment had stated:

> Agent Charles stated that the wall was a small wall which you usually get on either side of a public road and it is apparent by his description that it is more like

> a ledge rather than a tall boundary wall. I cannot come to a conclusion that the witness evidence should be disbelieved merely because he has failed to mention same in his statement and proceed to accept the explanation given by him.

b) *The discrepancy as to how many police officers were in the vehicle when they accosted the appellant on the road*. Here the matter being contested by counsel appellant is that in answer to one of his questions both PW 1 & PW 2 had failed to mention the presence of a fourth police office in the vehicle. But it is clear that both these witnesses had referred to the presence of four police officers in the vehicle in their examination-in-chief. Counsel for the appellant has not pointed out to us how these inconsistencies, even if they are to be treated as such, cast a doubt on the prosecution case.

[17] The quotation cited by counsel for the appellant from *Beeharry v R* (2010) SLR 470 goes against his submission as regards inconsistencies, namely in that case this Court stated:

> In all criminal cases discrepancies in the evidence of witnesses are bound to occur. The lapse of memory over time coloured by experiences of witnesses may lead to inconsistencies, contradictions or embellishments. The Court however on many occasions is called upon to assess whether such discrepancies affect the very core of the Prosecution case; whether they create a doubt as to the truthfulness of the witnesses and amount to a failure by the prosecution to discharge its legal burden.

[18] Counsel for the defence at the hearing of the appeal conceded that the above-mentioned inconsistencies did not "affect the very core of the Prosecution case". Counsel should refrain from coming up with such frivolous arguments.

[19] In relation to grounds (b) and (c) we wish to state that it had been suggested under cross-examination to one of the prosecution witnesses that the blue plastic bag was behind the wall where the appellant was arrested. It was also suggested by the defence that the bag containing the herbal material could not have been pulled out from the pocket of a pair of shorts as it was too big to be put into the pocket of a pair of shorts. The trial Judge in dealing with this suggestion had stated in his judgment:

> Agent Ricky Charles testified even though it was a pair of shorts the pockets were the size of the trouser he was wearing and proceeded to clearly demonstrate how it could be put in and be pulled out from the pocket when the packet was folded.

[20] We also take note that the appellant was in possession of 'herbal materials and seeds' and not a solid substance like cannabis resin. The trial Judge had gone on to state that "the corroborated evidence of the prosecution which was tested by cross examination far outweighs the evidence contained in the unsworn statement of the accused…". We are not prepared to disturb these findings of fact which the trial Judge had reached having had the benefit of seeing the demeanour of the prosecution witness before the trial court.

[21] The appellant in his dock statement had said:

> On that day whilst I was coming from the shop I came purchasing some goods from Marc Didon on the Anse

> Aux Pins road, upon going down a red vehicle stopped next to me and I ran and jumped on the side of the road I felt something hit me in the head … and they put me in … the vehicle and they took me and went to another road at Anse Aux Pins at Chetty Flat. … Then they brought me to the hospital and I refuse to see the doctor and they took me to the NDEA base …
>
> [Verbatim]

[22] The appellant had not stated that the drugs were found on the ground and not in his hand nor had he spoken of a possibility of the drugs being found on the ground. The appellant by his dock statement had corroborated the evidence of PW 1 and PW 2 as to the manner he was accosted by the police and his arrest. We therefore dismiss grounds (b) and (c) of appeal.

[23] The drugs seized from the appellant had been kept in the custody of PW1 who had taken it to the Government Analyst for purposes of analysis on 16 November 2010. PW 1 had testified that from the moment of the seizure of the drugs up to the time it was handed over to the Analyst it was in his custody and no one could have had access to it. At the police station it was in a locker where PW1 alone had the key to it. We are satisfied that there are no doubts in regard to the chain of evidence, the expertise of the Analyst and the analysis of the drugs as cannabis herbal material. There was also no challenge by the appellant to the chain of evidence.

[24] The trial Judge in imposing the minimum mandatory sentence of eight years had taken into consideration that the appellant is "a first offender and that he is a familied individual who has come up the hard way in life as he has been an orphan at a young

age". His counsel before the Supreme Court had pleaded for the court to "consider the minimum that is provided under the Misuse of Drugs Act which is 8 years". We do not find on record any exceptional reasons for the trial Judge not to have imposed the minimum mandatory term of imprisonment. We are also of the view that the sentence imposed does not breach the proportionality principle and/or the appellant's right to a fair hearing as expounded in the case of *Poonoo v Attorney-General* (2011) SLR 423, in view of the facts and circumstances of this case.

[25] We therefore have no hesitation in dismissing the appeal both on conviction and sentence.