

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL No. 13 of 1995

BETWEEN

FELIX DA SILVA

Appellant

and

KINGSLEY LAYNE

Respondent

Before:

The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Hon. Mr. C.M. Dennis Byron - Justice of Appeal
The Hon. Mr. Albert N.J. Matthew - Justice of Appeal (Ag.)

Appearances:

Mr. O. Sylvester, Q.C., and Ms N. Sylvester for the Appellant
Mr. A. Cummings and Mr. P. Campbell for the Respondent

1996: July 24;
September 16

JUDGMENT

MATTHEW J.A. (Ag.)

This appeal arises from a decision of Joseph J. delivered on June 25, 1995 in which the learned Judge awarded damages to the Appellant in the sum of \$1500.00 and half of his taxed costs.

By his notice of appeal dated August 2, 1995 the Appellant advanced three grounds of appeal and sought in effect the following reliefs:-

(1) that the award of damages should be increased to reflect the oppressive, arbitrary or illegal actions by the Respondent; and

(2) that the Appellant be awarded his full costs in the Court below as well as the costs of this appeal.

On August 23, 1995 the Respondent gave notice of his intention to contend that the decision of the learned Judge be varied on a number of grounds all to the effect that damages and costs ought

not to have been awarded by the learned Judge against the Respondent and that the Appellant's case should have been dismissed with costs to the Respondent.

BACKGROUND FACTS PERTAINING TO THE APPEAL

On October 9, 1978 the Appellant was appointed Superintendent of Airports, Airport Department, Ministry of Communications, Works and Labour with effect from July 1, 1977.

By letter of January 15, 1988 the Chief Personnel Officer wrote to the Appellant informing him that he was to proceed on one month's leave from January 16, 1988 to February, 1988. The Appellant evidently did not pay heed to that letter and on January 28, 1988 he wrote to the Chief Personnel Officer seeking clarification of the letter dated January 15, 1988.

On February 4, 1988 the Chief Personnel Officer wrote to the Appellant to state that the comments in his letter of January 28, 1988 had been noted.

Then followed a copy of a memorandum dated March 29, 1988 from the Chief Personnel Officer to the Permanent Secretary Ministry of Tourism, Aviation, Culture and Womens Affairs advising that the Appellant should report for duty at that Ministry.

By letter dated April 6, 1988 the Appellant wrote to the Chief Personnel Officer stating that it was not clear to him what was intended in the Memorandum of March 29, 1988 and also stating that he had no interest or training in aviation.

On the said April 6, 1988 the Permanent Secretary of Tourism, Aviation, Culture and Womens Affairs sent a memorandum to the Appellant informing him that the Public Service Commission had approved his transfer to the post of Assistant Secretary in the said Ministry and directed him to make all necessary arrangements for a smooth handing over to Mr. Alistair Alexander who would be carrying out his duties in an acting capacity.

On April 11, 1988 the Appellant wrote to the Permanent Secretary in reply to his memorandum dated April 6, 1988 in which he protested his transfer and stating that it would be impracticable to act in accordance with the memorandum.

It would appear that subsequent to this letter the Public Service Commission heard the Appellant's objection to the transfer and informed him by memorandum dated May 17, 1988 that its earlier decision would stand and that the Appellant was to report to the Ministry to assume duties as Assistant Secretary with effect from May 24, 1988.

In a letter by the Appellant to the Chief Personnel Officer dated May 19, 1988 he stated that he was not interested in any new appointment in the Civil Service and he had no intentions of vacating his existing post.

The events which give rise to this appeal occurred on May 24, 1988 the date on which the Appellant was expected to take up duties as Assistant Secretary in the Ministry of Tourism, Aviation, Culture and Womens Affairs. On that day the Appellant went to work in his office at the Airport and met another officer there. He was informed by the Respondent by telephone that he should leave the premises and subsequently two police officers went to the office with a view to remove him. About that time the Appellant was called to the office of the Commissioner of Police who had a conversation with him and following that conversation the Appellant did not return to his office at the Airport.

ACTIONS AND/OR JUDGMENTS EMANATING FROM THE ABOVE FACTS

By suit 300 of 1988 the Appellant brought tortious actions against the Respondent and the Chief Personnel Officer. In a judgment delivered by Joseph J on July 20, 1991 the learned Judge found that the Appellant was alleging that on May 24, 1988 the Respondent and the Chief Personnel Officer caused policemen to go to the Appellant's office thereby intimidating him and forcing him to leave his work place; and that the Respondent accompanied by policemen went to the Appellant's office thereby humiliating him and showing a desire to physically remove the Appellant from the premises.

The learned Judge made a specific finding that the Respondent attempted to have the Appellant removed by police

officers from the office of Superintendent of Airports. The learned Judge went on to find that the Respondent was acting on his own authority and not on the authority of the Public Service Commission.

But that judgment seems to have been concerned with whether or not the Appellant could maintain the action in the face of the Public Officers Protection Act and the Civil Service Orders. The learned Judge held that the Appellant could not maintain the action against the Chief Personnel Officer but could so maintain the action against the Respondent. The suit against the Chief Personnel Officer was accordingly dismissed.

In the last sentence of the judgment the learned Judge stated:

"The submission in limine in respect of the first defendant succeeds. The submission in limine in respect of the second defendant fails for the reasons given."

Following upon the decision of July 20, 1991 Suit 300 of 1988 was continued in 1995 and these were the proceedings that give rise to the appeal. It appears that the proceedings were treated as concerned only with the issue of damages.

In the course of hearing of the appeal reference was made to another Suit, No. 356 of 1989, between the Appellant and the Attorney General. In his skeleton arguments learned Senior Counsel for the appellant referred to this action against the Attorney General as the Appellant's principal action in which judgment was reserved but had not yet been delivered. But there is a judgment in respect of suit 356 of 1989 delivered by the learned Judge on September 30, 1991 in which the Appellant asked for several declarations and damages. It appears that some of the declarations may have been dealt with but the thrust of the decision seems to be dealing with preliminary submissions made by the learned Attorney General. The last sentence of the judgment dated September 30, 1991 is as follows:

"The submissions in limine made by the Attorney General are not maintainable."

CROSS APPEAL

Learned Counsel for the Respondent did not particularly rely on the grounds in the Notice by the Respondent of his intentions to contend that the decision of the Court below should be varied.

In the course of his submissions Counsel stated that the central question in the appeal relates to where lies the tort. Counsel referred to the Fifteenth Edition of Clerk and Lindsell on Torts at paragraph 14-10 which states:

"An assault is an overt act indicating an immediate intention to commit a battery, coupled with capacity of carrying that intention into effect."

As stated earlier, in her judgment delivered on July 20, 1991 the learned Judge stated as follows:

"I find the said defendant (who was Kingsley Layne, the Respondent) attempted to have the plaintiff removed by police officers from the office of the Superintendent of Airports."

It is conceivable on the finding of the learned Judge that an assault may have been committed. It may also be possible that learned Counsel for the Respondent may have been conceding some slight assault when in his final submissions before this Court he said that the facts of the case do not meet the law of exemplary damages and that damages should only be nominal.

Mr. Cummings further submitted that the Appellant had refused to comply with lawful directions and he was therefore a trespasser and it was lawful and proper to get him out; and in those circumstances no assault could have been committed.

In his opening submissions learned Senior Counsel for the Appellant submitted that the Appellant's post was governed by section 79 of the Constitution of Saint Vincent and the Grenadines. That section applies to the Office of Secretary to the Cabinet, Permanent Secretaries and Heads and Deputy Heads of Departments of Governments and some others. Sub-section (2) of the section provides that the power to appoint persons to hold or act in such offices; the power to exercise disciplinary control over such persons and the power to remove such persons from office shall vest in the Governor General acting in accordance with the

advice of the Public Service Commission. In her judgment delivered on September 30, 1991 the learned Judge stated:

"I am satisfied that the Plaintiff was a departmental head, and that his appointment to hold office vests in the Governor General. So that when the Commission, by letter dated 6 April, 1988 informed the Plaintiff of approval by the Commission of his transfer from 24th May, 1988, there was no authority so to do."

Before the incident of May 24, 1988 the Governor General had not acted in respect of the Appellant and it is difficult to maintain that in such circumstances he could be regarded as a trespasser. It would appear that by a letter dated July 7, 1988 the defect had been cured when the Governor General acted on the advice of the Public Service Commission and removed the Appellant from the post of Superintendent of Airports, and transferred him to the post of Assistant Secretary in the Ministry of Tourism, Aviation, Culture and Womens Affairs, but in my judgment on May 24, 1988 the Appellant was not a trespasser.

EXEMPLARY DAMAGES

In support of his submissions that the Appellant should be entitled to exemplary damages learned Counsel for the Appellant referred to the following authorities:

CASSEL & CO LTD V BROOME 1972 AER 801, 829;
OGUS ON THE LAW OF DAMAGES, SEVENTEENTH
EDITION, PAGES 32-34;
McGREGOR ON DAMAGES, FIFTEENTH EDITION,
PAGE 415.

The principles upon which exemplary damages, as distinct from aggravated damages are awarded are well documented in the above cited authorities. It is only necessary to refer to what Ogus states at page 34:

"There were, according to Lord Devlin, certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law. These same categories have been criticized as being illogical and inconsistent. It remains

to examine the scope of the exceptions and the merits of the criticisms."

One such category is the oppressive, arbitrary or unconstitutional actions by servants of the government. This is the only category that could be relevant to the facts of the case pertaining to this appeal. Ogus states at page 35 a passage from *Lord Diplock* in **CASSELL v BROOME** at page 1130 that the category "would embrace all persons purporting to exercise powers of government, central or local, conferred upon them by statute or at common law by virtue of the official status or employment which they held."

The learned author states that there is force in the argument that the rule should depend upon conduct rather than status.

I turn to the facts of the case to consider whether the award to the Appellant should be increased accordingly. In his evidence before the learned Judge in June 1995 the Appellant stated that on May 24, 1988 he turned up to work as Superintendent of Airports and on arrival he met the Senior Airport Officer in his office. He spoke to him and made certain requests of him but the officer did not accede to his requests. The officer telephoned the Permanent Secretary and the Permanent Secretary telephoned him in return. The Appellant then telephoned the Permanent Secretary, the Respondent, and identified himself. He said the Permanent Secretary was furious and told him to get out of the office or else he would have the police to remove him. He said he hung up the telephone and about twenty minutes later he received a telephone call from Mr. Toussaint, the Commissioner of Police.

He said he requested the Commissioner to see him and he left his office to proceed to see the Commissioner. He further said as follows:

"I was going out of the outer door of the Secretary's office. As you enter through a corridor, you enter first door that takes you into Secretary's office. You have to enter through door to get to office of Superintendent of Airports and departed for Mr. Toussaint's office.

Mr. Layne was outside coming into office with two police officers. He said I had to leave or have police arrest me. I said nothing. I proceeded with great

embarrassment and humiliation to ground floor to my car.

When I arrived at ground floor there was gathering of taxi men, airline personnel and other workers on that floor looking up towards office. There was screaming, jeering and shouting of remarks at me. I proceeded to my car. I left compound and went to see Mr. Toussaint in his office."

There is no evidence that the Respondent or the police officers laid a hand on the Appellant or threatened to do so. It appears that the Appellant had already left his office on his way to Mr. Toussaint when he saw Respondent and the officers proceeding to his office. All the Respondent told the Appellant was he had to leave or else he would have the police arrest him. But he had already left his office.

There was no altercation with the police and the gathering of taxi men, airline personnel and other workers did not see the police do anything to him as a result of which he was sneered or jeered at.

McGregor describes the first common law category for the award of exemplary damages as oppressive conduct by Government servants. Ogus describes it as oppressive, arbitrary or unconstitutional actions by servants of the government.

The learned Judge records the evidence of the Appellant under cross-examination that he did not regard himself as being liable to transfer from the post of Superintendent of Airports and that he would not have accepted transfer from the post of Superintendent of Airports to a post of equivalent rank or equivalent grade. He just was not prepared to be transferred.

The learned Judge found that a wrong had been committed on the Appellant and she awarded him \$1500.00. I am of the view that on the facts of the case the amount of compensation was adequate and that there was no oppressive, arbitrary or unconstitutional actions by the Respondent towards the Appellant.

Having found that the Respondent was liable to the Appellant I am of the view that the Appellant should have had his full costs in

the Court below and not half of his taxed costs as the learned Judge awarded. I do so order.

Subject to my decision on the award of costs in the Court below I would dismiss the appeal and the cross appeal with no further order as to costs.

ALBERT N.J. MATTHEW
Justice of Appeal (Ag.)

I Concur.

SIR VINCENT FLOISSAC
Chief Justice

I Concur.

C.M. DENNIS BYRON
Justice of Appeal