SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2003/0020

BETWEEN:

[1] THE ATTORNEY GENERAL OF ST. LUCIA
[2] FRANCIS DARIAH

Appellants

and

DONAVAN ISIDORE

Respondent

Before:

The Hon. Mr. Adrian Saunders — Justice of Appeal
The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal [Ag.]

Appearances:

Mrs. Georgis Taylor-Alexander with Mr. Deale Lee for the Appellants
Mr. Michael St. Catherine for the Respondent

2004: February 3;
May 24.

JUDGMENT

[1] GORDON, J.A. [AG.]: On the 5th November 2001 the Respondent was in police custody at the Central Police Station having been arrested on suspicion of robbery. Whilst in custody he attempted to escape and was shot in the back by Respondent No.2. He suffered serious injuries. By Claim form with Statement of Claim, the Respondent claimed damages against the Respondent No. 2 for damages caused by his negligence and against the Respondent No. 1 as the employer of Respondent No.2.

[2] At the trial of the claim, which trial dealt only with the issue of liability, and did not address the issue of quantum, the learned trial Judge found that the Respondents were liable in

damages and that the Appellant was contributorily negligent as to 50%. The Appellants have appealed that decision.

[3] The learned trial Judge summarized the facts admirably in his judgment and I can do no better than to quote him:

> "I am afraid that I could not generally rely on the evidence of the Claimant where it conflicted with that of the two officers. The Claimant changed his mind on a number of points as he went along and his evidence about his escape from the cell was not consistent with the photographs. PC Smith appeared to me an honest and reliable witness. Corporal Dariah appeared competent and experienced and was also honest and reliable on most points though he had the air of one rather too well rehearsed and appeared to me a little insouciant about the whole incident. Based on his evidence I make the following findings of facts.
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> "Just before the incident the Claimant was in one of the cells at the Central Police Station with about nine other prisoners. The two policemen who gave evidence were sitting with two colleagues near the TV, although it was not on and they were just chatting. A colleague of theirs had gone to get some water and left the door which leads out to the street on the latch but not padlocked as it would normally be.
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> "Corporal Dariah had in his waist band a .38 revolver. Normally firearms are kept locked in the armoury which is on the other side of the police station but the revolver in question had been used that night by another officer in the course of his duties providing an armed cash escort to Kentucky Fried Chicken and had been handed back to the Corporal who had decided to keep it with him for no particular reason. He told me in evidence that "if we feel like arming ourselves we keep a gun with us".
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> "It seems that the Claimant and/or others managed to remove a horizontal bar about 18 inches long and an inch in diameter at the base of the cell and bend back two vertical bars, thus making a hole about one foot square. At the time, they were, of course, out of view of the officers, who believed that everyone was asleep. The Claimant and one other prisoner managed to crawl out of the hole and escape from the cell.
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> "Once out of the cell the Claimant grabbed a large bucket containing urine and other debris which is kept just outside the cell and went into the area where the officers were sitting and where the gate to outside world was and threw the bucket and its contents over the Corporal and PC Smith. The contents landed on the officers and went all over the floor and created a smelly and slippery mess. The officers' evidence was that the Claimant was carrying the 18 inch metal bar which had been removed from the cell at this stage. He denied it and though I was not convinced by his evidence in general I am not entirely sure the officers can have

been right about this since it would have been difficult for the Claimant to throw the bucket while holding the rod and it is just as likely that the other prisoner was carrying it, but I do not think much turns on this issue.

"When the bucket was thrown at the officers they stood up and attempted to move towards the Claimant but they were at least initially hampered by the wet floor in the area where they were sitting. The Claimant rushed to the door and started to unlatch and open it (it opens inwards). The police shouted out to him to stop but did not feel able to make a rush at him to attempt to restrain him physically on account of the slippery floor. When he did not stop the Corporal took out the revolver and shot him in the back at a distance of about 10 feet. No warning was issued before the shot was fired.

"The Corporal told me that he was aiming for the Claimant's leg but hit him in the back accidentally because it was not easy to take up a firm stance on account of the state of the floor. I am not sure that I can accept this evidence although I do not think the Corporal was setting out to deceive me about the matter. I just think it far more likely that the officer simply made a split-second decision to shoot in the direction of the escaping prisoner without consciously aiming for any particular part of his body.

"The Claimant fell half in, half out of the door to the outside world which he was now in the course of opening. The other prisoner managed to push past him and run out into the street. The whole incident happened extremely quickly and probably did not last more than a minute."

[4] The Appellants raised four substantial grounds of appeal, namely, 1) that the finding of the learned trial Judge that the maxim "*Ex turpi causa"* did not apply in St. Lucia was wrong in law; (2) that the learned trial Judge gave undue weight to the police Standing Orders in deciding whether the use of force was in the circumstances reasonable; (3) that the learned trial Judge failed to give adequate consideration to the provisions of section 27(1) of the Criminal Code of St. Lucia; and (4) the decision was against the weight of the evidence.

[5] The learned trial Judge in his judgment found that if *ex turpi causa* applied in St. Lucia, on the current state of the law in England, the Respondent's claim would be barred. He then went on to consider whether the maxim did apply and found that it did not. The learned trial Judge first examined the provisions of Article 917A of the Civil Code, Ch 242 of the Revised laws of St. Lucia (hereafter the "Civil Code") which states as follows: "The law of England for the time being relating to ….. torts shall mutatis mutandis extend to [St. Lucia]

…." And found that the phrase "for the time being" was to be given "ambulatory effect".. I shall revert to the interpretation of the phrase "for the time being" later in this judgment.

[6] The learned trial Judge arrived at the conclusion that ex turpi causa did not apply in St. Lucia in the following way:

> "I was not referred to any express provision of the Code or any other St. Lucian statute which bars a claim under Article 985 on the basis of the maxim. Although the maxim reflects a principle which one might expect to find in many systems of law I do not think I can simply deduce that this is an oversight and that it is to be presumed to be part of the law of St. Lucia, not least because I note that in the context of the law of contract there is a provision of the Code expressly stating the law in a related area (Article 11: 'An agreement contravening the laws of public order or morality is void')".

Counsel for the Appellant drew our attention to Article 994 which reads as follows:

> "994. The subject of an obligation must be something possible and not forbidden by law or good morals."

Counsel further argued that the word "obligation" was to be understood in the context of Article 1 (15) which I quote hereunder.

> "(15) Each of the terms delict and quasi delict indicates an injurious act or incident which, in the absence of any contract gives rise to an obligation towards the injured person (the creditor) on the part of another person (the debtor)……." (my emphasis).

I agree with counsel for the Appellant's contention that Article 994 when properly interpreted does give rise to the doctrine of ex turpi causa.

[7] But even in the absence of Article 994, it is my view that ex turpi causa is imported into our law. The relevant part of Article 917A reads:

> "917A (1) Subject to the provisions of this Article from and after the coming into operation of this article the law of England for the time being relating to contracts, quasi contracts and torts shall mutatis mutandis extend to this Colony and the provisions of Articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly;…."

Articles 989A to 990 are irrelevant in the circumstances of this case. I take a diametrically opposed view to the learned trial Judge on the significance of the absence of a specific

provision importing ex turpi causa into our law. If, which is not the case here, there was no Article such as 994, then I am of the strong view that Article 917A would import such a doctrine. In the case of Cable and Wireless (West Indies) Limited v. The Crown Attorney of St. Lucia[1] the Court comprising the Chief Justice of Trinidad and Tobago, the Chief Justice of Barbados and the Chief Justice of the Windward and Leeward Islands, after quoting Article 985 stated the following:

> "The St. Lucia Article simply provides that every person capable from discerning right from wrong is liable for his delictual and quasi delictual acts as he would be under the Common Law of England"

and ex turpi causa is a part of the common law of tort (delict). It is to be noted that this was a 1950 case and Article 917A of the Civil Code, Ch. 242 of the Revised Laws of St. Lucia was only added to the Civil Code in 1956. Thus even before the statutory importation of the English law on tort and contract, the Courts were already applying the common law relating to torts. To put it another way, the inclusion of Article 917A in the 1957 revision of the laws of St. Lucia by Sir Allen Lewis, later Chief Justice of this Court, was a codification of an existing jurisprudence.

[8] The origin of the doctrine, ex turpi causa non oritur actio, to give the phrase its full value, can be found in the judgment of Lord Mansfield CJ in the case of Holman v Johnson[2] and is a part of the Common Law. This segues into the issue of Article 917A and the importation of the English law of torts. I believe that there can be little debate that Article 917A imported, at the least, the law of torts as it was in 1956.

[9] In so far as the Common Law of England is concerned The fiction has long been adopted in English judicial pronouncements that custom prevailing throughout England , provided it existed prior to 1189 is part of the common law. In reality, historically, common law was the creation of Judges. The fiction goes further, namely that Judges do not create law, they merely interpret it. Thus the common law of 1957 is the common law of 2004. Any evolution in concept is an evolution in interpretation. The relevance of this to this case is that a recent authority from the English Court of Appeal, Harry Cross v William

[1] Civil Appeal No. 33 of 1950 (unreported)
[2] (1775) 1 Cowp 341

Dickinson Derby[3], seems to have extended somewhat the jurisprudence surrounding ex turpi causa. The judgment of Judge L.J. is worth quoting at some length:

> "In summary, therefore, if ex turpi causa is to apply in tort something more than wrongdoing, whether general or even on the occasion directly in question, is needed. Perhaps the most useful starting point for discovering this additional ingredient is found in the observations of Bingham LJ (as he then was) in Saunders v Edwards [1987] 1 WLR 1116. Although the case was concerned with an illegality arising from a misrepresentation the discussion is of general application:
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> > "Where issues of illegality are raised, the courts have to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up to its skirts and refuse all assistance to the claimant, no matter how serious his loss, nor how disproportionate his loss to the unlawfulness of his conduct. On the whole the courts have tended to adopt a pragmatic approach to this problems, seeking where possible, to see that genuine wrongs are righted, so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn. Where the claimant's action in truth arises directly ex turpi causa he is likely to fail. Where the claimant has suffered a genuine wrong to which the allegedly unlawful conduct is incidental, he is likely to succeed."
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> "This passage was cited by Creswell J at first instance in Standard and Chartered Bank v Pakistan National Shipping Corporation & Others [1998] LLR 684 and later endorsed by Evans LJ in the Court of Appeal, unreported, 3rd December 1999. In this respect it was unaffected, as it seems to me, by the decision of the House of Lords in Tinsley v Milligan, overruling the line of earlier authorities of which it formed part, which has suggested that the foundation for the principle was the need to avoid an "affront to the public conscience".
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> "Lord Bingham's distinction between behaviour which is "incidental" to the criminal conduct and "directly" connected with it does not stand alone. (See, for example, Pitts v Hunt; Euro-Diam Ltd. v Bathurst [1990] 1 QB 1.) In very broad terms this feature has a more ancient pedigree in the phrase "immediate and necessary relation" used in Dering v Earl of Winchelsea (1787) 1 Cox Eq 318 cited by Mr. James Munby QC in his argument in Tinsley v Milligan. More recently, and more authoritatively, in the context of a claim to an equitable interest in property and therefore far removed from the facts of the present case, towards the end of his speech in that case, Lord Browne-Wilkinson used the word "collateral". In general the impression conveyed by "collateral" is similar to "incidental" and contrasts with

[3] (2000) QBENF 99/0526/A2

and is distinct from "direct" or "immediate". These words and the contrast between them help to identify the additional ingredient.

> "In my judgment where the claimant is behaving unlawfully, or criminally, on the occasion when his cause of action in tort arises, his claim is not liable to be defeated ex turpi causa unless it is also established that the facts which give rise to it are inextricably linked with his criminal conduct. I have deliberately expressed myself in language which goes well beyond questions of causation in the general sense.
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> "The principle which I have endeavoured to identify was succinctly encapsulated by Rougier J in his judgment in Revill v Newbery when he concluded that the ex turpi causa principle applied only "if the injury complained of was so closely interwoven in the illegal or criminal act as to be virtually part of it or if it was a direct uninterrupted consequence of that illegal act". He rejected the defence in Revill on the basis that the claimant's injuries "cannot be said to be an integral part or a necessarily direct consequence of the burglary". (See [1996] QB at 571E-G)"

[10] I hold that in this case the Claimant/Respondent was behaving unlawfully and criminally on the occasion when his cause of action in delict arose and that the facts which gave rise to his claim were so inextricably linked to his criminal conduct as to be virtually a part of it. Thus, in my view the Appellants have satisfied the first limb of ex turpi causa.

[11] The second limb is that it has been said that the Defendant should not be exculpated if his behaviour can properly be described as disproportionate. I am of the view, and I do so hold, that the second Appellant reacted swiftly to what must have seemed to be a chaotic situation wherein the Respondent and another, having escaped from their cell and thrown a bucket of urine and what the learned trial Judge delicately calls "other debris" over the Second Appellant and another police man, were trying to exit the door of the police station to the outside world. The Respondent had a responsibility, both as a policeman and as a citizen to prevent the escape.

[12] Section 27 of the Criminal Code is as follows:

> "27 Any person may, with or without warrant or other legal process arrest and detain another person whom he knows to have recently committed a felony, and may, if the other person, having notice or believing that he is accused of a felony, avoids arrest by resistance or flight or escapes or endeavours to escape from custody, use any force which is necessary for his arrest, detention or recapture,

and may kill him, if he cannot by any means otherwise be arrested, detained or retaken."

[13] The learned trial Judge opined that he thought the Respondent might well have been stopped in his tracks by a warning shout by the Appellant No. 2 that he was armed. I do not agree. Indeed, a review of the findings of fact by the learned trial Judge indicates that he found that the police did shout to the Respondent to stop but he did not. It was only after this, according to the finding of the learned trial Judge that the Appellant No. 2 drew his weapon and shot. The Respondent's colleague in crime after the shooting ignored the presence of a gun and made good his escape. The Appellant No. 2 made the decision to shoot in a very short period of time and that decision was what he believed to be the only way to prevent the escape. I do not believe that the decision was so outrageous that a Court sitting with the benefit of hind-sight could say that no reasonable person would have made such a decision. In the circumstances I find no negligence on the part of the Appellant No. 2.

[14] Given my findings above, there is no need to address the other grounds of appeal.

[15] In the premises I would allow the appeal and set aside the judgment of the Court below, both as to liability of the 1st and 2nd Appellants and as to costs. In the circumstances of the parties to this appeal I will make no order as to costs.

Michael Gordon
Justice of Appeal [Ag.]

I concur.

Adrian Saunders
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal