JAMES PERRY (UNITED STATES) *v.* PANAMA

(May 27, 1933, dissenting opinion of Panamanian Commissioner, undated. Pages 71-77.)

After the completion of the pleadings provided for in the rules of procedure, the Agents, by consent of the Commission, filed memoranda in lieu of oral arguments.

This claim is made by James Perry, whose American citizenship is not contested, against the Republic of Panama and arises out of an alleged unjust imprisonment which the claimant, who at the time of his arrest was living in Colón, suffered on a charge of having taken some jewels and other objects, belonging to his employer Everhart, from a trunk found broken open in Everhart's room. An amount of $26,250, with interest, is claimed as an indemnity for his imprisonment during 175 days.

A copy of the official record of the criminal proceedings against Perry has been produced and has been thoroughly discussed in the pleadings. Hereafter follows a summary of the proceedings, indicating the evidence collected as to Perry's supposed guilt: the record begins with the denunciation made by Everhart on October 29, 1910, which caused the examining magistrate to start his investigation. In it Everhart said that he suspected Perry of being the perpetrator of the theft, alleging different actions of the latter to show his unreliability. On that same day Everhart confirmed the denunciation; also the depositions of E. H. W. Mayers and William Loud were taken. Mayers testified to certain proposals concerning ways of robbing Everhart which he said Perry made to him on October 27 and of which he informed Everhart in the evening of that day. William Loud, an employee of Perry [*Everhart*], said that he suspected Perry, alleging as his reason for this suspicion that the latter had, two weeks before, taken keys from Everhart's pocket. On November 1, Perry's indagatory declaration was taken. Perry denied that he made the proposals which Mayers said he had made; as to the actions alleged against him by Everhart and Loud, he denied them, stating at the same time that Everhart used to trust him with two of his keys. On being asked whether he knew why he was on bad terms with William Loud, he answered that Loud harbored ill-will against him on account of his having reported to Everhart improper things which Loud had done. On November 7, the magistrate ordered Perry's provisional detention on the ground that there were on record grave indications against him. On November 25 he took the deposition of Maria Weston. According to her testimony Perry had on October 27 asked her when and how often Everhart was accustomed to return to the house during the day and if she herself was accustomed to do so after her work was concluded and she answered him that when she had finished her work at 11 a.m. she did not return until the next day at 8 a.m. On the same day Jack Everhart appeared before the magistrate and stated that his wife had found on November 18 in a clothes closet in the room, where the alleged theft was committed, a twisted screwdriver, which in his opinion had served to break open the trunk wherefrom the valuables were taken. He said that five days before the theft was

committed he had bought from a person whom he did not know, but whom he could identify, three screwdrivers; that he gave one of these to William Loud to do some work and he still had the other two in his desk; that the one he gave to Loud was lost or taken from the latter, from a handbag in which he kept it; and that the screwdriver was in good condition when he bought it and when it was used by Loud. On December 12 the magistrate forwarded the record of these preliminary proceedings to the Second Judge of the Circuit, who on December 18 stated that the case was within the jurisdiction of the Superior Judge, as the value of the stolen goods exceeded 250 balboas. On December 20 the record was transmitted to the Superior Judge, who, on January 12, 1911, ordered that the preliminary proceedings should be completed, *inter alia* by a confrontation between the accused and the witness Mayers and between the accused and the witness Maria Weston, and by a deposition of William Loud stating: the date he received the screwdriver; the day and hour he found he had lost it; whether he was accustomed to lock the handbag in which he kept it; the place where the handbag was, when the screwdriver was taken from it; whether it was true or not that enmity existed between him and Perry. The confrontation with Mayers did not take place, as he was at Gorgona in the Canal Zone; being confronted with Maria Weston on January 25, Perry denied that he asked her the questions which she alleged he had asked; he maintained that denial throughout the confrontation. Loud was interrogated on January 26. He did not remember the date when he received the screwdriver and could not say when he found that he had lost it; the handbag was not locked and was in a cupboard under the bar in Everhart's saloon when the screwdriver was taken from it; there was no enmity between him and Perry to the point that he wished to harm the latter, but he did consider Perry a treacherous and dangerous man. On February 14 the Superior Judge decided that the testimony of Mayers and Maria Weston furnished grave indications that the accused had committed the theft and ordered that Perry should answer in court on that charge; he also gave order for his imprisonment. The proceedings thereupon followed their course, the jury was formed on March 14, and the trial, which resulted in an acquittal, took place on April 21.

The Commission finds that at the outset two irregularities were committed; Perry was arrested and imprisoned in the morning of October 28, 1910, but his indagatory declaration, which should have been taken within 24 hours, was only taken on November 1, and a proper order for his arrest and provisional detention was not issued before November 7. The Commission does not sustain the contention of the American Agency, that there were undue delays in the proceedings.

In order to establish that the Republic of Panama has incurred a liability under international law by the action of her judicial authorities, the American Agency has asserted that upon the evidence of the witnesses Perry's detention and imprisonment were not justified under Panaman law. The Panaman Agency on the other hand has contended that there was just cause for these measures.

Before dealing with these allegations, the Commission thinks it necessary to examine the scope of the provisions of the convention of July 28, 1926, which lay down the law which the Commission shall apply. These provisions are found in arts. I and V. The latter article provides: "The High Contracting Parties being desirous of effecting an equitable settlement of the claims of their respective citizens, thereby affording them just and adequate compensation for their losses or damages, agree that no claim shall be disallowed or rejected by the Commission through the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim." This article is clear, it calls for no

comment, but it may be noted that the High Contracting Parties express as the reason for this provision their desire of effecting an equitable settlement of the claims of their respective citizens, a desire which may be considered significant as to the general trend of the intention of the Parties. However, the article contains a special provision. The general rule is found in art. I, which lays down that the Commission shall decide "in accordance with the principles of international law, justice and equity". There is no reason to scrutinize whether these terms embody an indivisible rule or mean that international law, justice, and equity have to be considered in the order in which they are mentioned, because either of these constructions leads to the conclusion that the Commission shall be guided rather by broad conceptions than by narrow interpretations.

The Commission now comes to the allegations of the Agents with regard to the evidence recorded in the criminal proceedings against the claimant.

Upon examining that evidence, the Commission finds that the testimony of Everhart and Loud did not furnish any indication that Perry had committed the alleged theft. Nor did the finding of the screwdriver in any way connect Perry with the crime, as the object neither belonged to him nor had been seen in his possession. There remains the evidence of Mayers and Maria Weston, on which the judge in his order of February 14, 1911, based his finding that the grave indications, required by the law, did exist. Maria Weston's statements and the negative result of her confrontation with Perry have been related above. Mayer's evidence was taken on October 29. It follows from Perry's indagatory declaration (November 1), that the latter denied that in his conversation with the witness on October 27 he had made the proposals, attributed to him by the witness; the position did not change after that date; the confrontation ordered by the judge on January 12, 1911, did not take place, because Mayers was not in Colón.

The statements of Mayers and Maria Weston, alleging wholly different facts, in no way support each other; they have both been contradicted by the accused and they have no bearing upon the criminal act of which Everhart complained.

The Commission believes that the detention of Perry was a violation of the municipal law of Panama. Under art. 340 of law 105 of 1890, since Perry was not caught in the act, he could only be detained "if there should be against him, at least, the declaration of one competent witness, even though such declaration may not yet have been reduced to writing, or a strong indication *(indicio grave)* that he is the perpetrator, accomplice, abettor or concealer of the criminal act under investigation". (And see Judicial Code, art. 1627, for the same requirements for the order for *plenario* proceedings.) The requirement of the declaration of one competent witness obviously means that of an eyewitness. There was none here, and Perry's detention was expressly put on the ground that there were *indicios graves* against him. But, as has been pointed out above, the testimony upon which the detention was based did not justify the inference that Perry had anything to do with "the criminal act under investigation", which was breaking into Everhart's trunk on the night of October 27 and stealing jewels and other objects therefrom. There was therefore no *indicio grave*, and no right to detain Perry under Panaman law. It may also be noted that even had there been *indicios*, they would have to be *plenamente probados* under art. 1709 of the Judicial Code, and that *plena prueba* can, by art. 1675, be furnished only by the testimony of at least two witnesses who agree as to the act and do not differ notably as to the manner, time, and other circumstances. No two witnesses at any time testified to any act which could be considered an *indicio* of Perry's guilt, and the Panaman authorities concerned in the case should have realized that upon the evidence before them a conviction could not be procured.

The Commission finds that the claimant, after having been arrested and imprisoned without a proper order, remained imprisoned through the failure of the authorities to give to his case proper attention, which failure resulted in a violation of the principle of respect for the personal liberty of the individual recognized by the Panaman law.

The Commission decides that the Republic of Panama is obligated to pay to the United States of America, on behalf of James Perry, the sum of $10,000, without interest, on account of his imprisonment during the period comprised between October 28, 1910, and April 21, 1911.

Dissenting opinion of Panamanian Commissioner

I do not concur in the foregoing decision.

The claimant, James Perry, was arrested for the purpose of being tried, he was tried, and acquitted. He could not be released on bail because the crime for which he was placed on trial did not admit of bail under the law.

The damage is considered to consist in the confinement to which the claimant was necessarily subjected while held for trial.

Responsibility is considered to consist in that the holding of the claimant in confinement was improper in view of the absence of the element of evidence required under article 340 of law 105 of 1890 for decreeing detention, to wit, a declaration of a qualified witness or an *indicio* of being the perpetrator of the criminal act imputed to him.

The law applicable to the claimant (art. 340 above cited) required for the purpose mentioned one of two things:

Either that he be charged with a criminal act in the testimony of a qualified witness, even though the testimony might not have been in writing;

Or that there exist an *indicio grave* against him, sufficient to raise a reasonable suspicion that his guilt or his innocence should be investigated by trial.

When Perry was placed under detention there existed against him the following aggregate of *indicios:*

1st. Everhart's testimony which pointed to Perry as the perpetrator of the robbery and his testimony as to different actions of Perry which brought him under suspicion;

2nd. Mayers' testimony that Perry approached him with proposals to rob Everhart the same day of the robbery, namely, on the 27th day of October, a fact which Mayers communicated to Everhart on the same day;

3rd. Loud's testimony that Perry had taken some keys from Everhart's pocket;

4th. Maria Weston's testimony that Perry had asked her when and how often during the course of the day Everhart was in the habit of going to the house;

5th. The fact that Perry was an employee in Everhart's saloon.

With this aggregate of *indicios*, it was impossible for the judge not to have a reasonable suspicion that Perry might possible have committed the crime and hence that he should be tried.

Against these *indicios* there was only one thing: Perry's denials.

It has been maintained that the *indicios* should be fully proved, that is to say, that regarding each *indicio* there should be two witnesses agreeing as to the manner, the place, and the time.

In the first place, this reasoning is contrary to the nature of this kind of evidence *(indicios)*, which consists essentially of the *aggregate of circumstances*

which they establish. For that reason evidence founded upon *indicios* is very accurately designated in English "circumstantial evidence".

In the second place the *indicios* consist at times of a physical fact or circumstance within the range of the judge's observation or knowledge, and at other times of the testimony of witnesses. In the latter case the *indicio* consists in the *fact* of the testimony of the witness, in which case the testimony is a fact fully proved in itself. As I have stated, the evidence of *indicios* is essentially evidence in the aggregate, that is to say, based upon the concurrence of a number of distinct facts or circumstances which allow only one conclusion; that the individual *is guilty*, when it is the case of a *conviction*, that is, after a full trial; or that an individual *may be guilty* when it is the case of holding him for *trial*.

Let it be observed that a person may be held under confinement (art. 340 of the law cited) when there exists against him *just one declaration* of a qualified witness.

If one declaration is sufficient upon which to base detention for trial, and if moreover one declaration by itself establishes an *indicio*, how can it be maintained that a judge cannot hold an accused person when there exist against him *four declarations of qualfied witnesses* who relate concordant facts pointing to an individual as the probable perpetrator of a crime?

The majority of the Commission considers that a Panaman judge violated the law because, relying upon an aggregate of concordant *indicios* he brought Perry up for criminal trial.

It is an accepted principle of modern penal law that the weighing of evidence is a matter left to the free conscience of the judge. If this principle obtains in pronouncing final sentences, it should be all the more applicable to the mere temporary holding for, and bringing to, trial. International responsibility can be held to exist only when there is a clear and flagrant violation of the law, deliberately committed and in bad faith, as a result of which a person suffers damage. Even assuming that the Panaman judge committed an error in bringing Perry to trial, it is not possible to establish a violation of international law, based only on the value which the judge, in accordance with his conscience, assigned to the circumstantial evidence before him for the sole purpose of bringing the accused to trial.

In this connection it seems pertinent to quote the following passage from the opinion of the eminent Dr. van Vollenhoven in the Chattin case (General Claims Commission between Mexico and the United States, *Decisions of 1927*):

"In Mexican law, as in that of other countries, an accused cannot be convicted unless the judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal never can replace the important first element, that of the judge's being convinced of the accused's guilt; it can only in extreme cases, and then with great reserve, look into the second element, the legality and sufficiency of the evidence".

I likewise consider pertinent to the Perry case the following conclusions taken from the Dissenting Opinion of the Mexican Commissioner, Licenciate Genaro Fernández MacGregor, also in the Chattin case:

"I consider that this is one of the most delicate cases that has come before the Commission and that its nature is such that it puts to a test the application of principles of international law. It is hardly of any use to proclaim in theory respect for the judiciary of a nation, if, in practice, it is attempted to call the judiciary to account for its minor acts. It is true that sometimes it is difficult to determine when a judicial act is internationally improper and when it is so from a domestic standpoint only. In my opinion the test which consists in ascertaining if the act implies damage, wilful neglect, or palpable deviation from the established customs becomes clearer by having in mind the damage

which the claimant could have suffered. There are certain defects in procedure that can never cause damage which may be estimated separately, and that are blotted out or disappear, to put it thus, if the final decision is just. There are other defects which make it impossible for such decision to be just. The former, as a rule, do not engender international liability; the latter do so, since such liability arises from the decision which is iniquitous because of such defects. To prevent an accused from defending himself, either by refusing to inform him as to the facts imputed to him or by denying him a hearing and the use of remedies; to sentence him without evidence, or to impose upon him disproportionate or unusual penalties, to treat him with cruelty and discrimination; are all acts which *per se* cause damage due to their rendering a just decision impossible. But to delay the proceedings somewhat, to lay aside some evidence, there existing other clear proofs, to fail to comply with the adjective law in its secondary provisions and other deficiencies of this kind, do not cause damage nor violate international law. Counsel for Mexico justly stated that to submit the decisions of a nation to revision in this respect was tantamount to submitting her to a régime of capitulations. All the criticism which has been made of these proceedings, I regret to say, appears to arise from lack of knowledge of the judicial system and practice in Mexico, and, what is more dangerous, from the application thereto of tests belonging to foreign systems of law . . .".

In the case under consideration there was no positive acquittal. Perry's innocence was not demonstrated by establishing an alibi, or by showing that it was another who committed the crime, the existence of which was conclusively proved. Perry was acquitted for the negative reason of there not being sufficient evidence against him. The possibility that he was the culprit subsisted, notwithstanding his being definitely freed from any subsequent penal action for the same crime.

Under the circumstances of this case, the Republic of Panama should have been exonerated. If the Tribunal believes it proper to award Perry damages for simple reasons of equity, as the finding of the majority suggests, and taking into account the fact that he was subjected to confinement without being declared guilty, the award should be moderate and proportional to the damage actually suffered.

The record shows that Perry at the time the facts took place was an employee of a saloon and in charge of certain gambling slot machines which the proprietor was exploiting at different locations in the city of Colón. He had previously been a soldier in the army. From his enlistment papers it is shown that when he enlisted he gave his profession or trade as waiter. The claimant has not tried to establish, as is usual in such cases, the amount of Perry's income at that time.

The amount of the damage resulting from confinement must be determined taking into consideration the position and the earning capacity of the person confined.

For the reasons set forth, I am of the opinion that under law this claim should be disallowed, and that if for reasons of equity alone an award should be allowed, it should be for a considerably smaller amount.