ABRAHAM SOLOMON (UNITED STATES) *v.* PANAMA

(June 29, 1933, dissenting opinion of Panamanian Commissioner, undated. Pages 476-481.)

This is a claim on behalf of Abraham Solomon for $30,000 with interest. Solomon was employed by Wm. G. Chase, in the years 1919 and 1920, to live on the Hacienda San Juan, a large estate in Chiriquí Province, and keep order on the property. On May 16, 1920, Solomon arrested Benito Villamonte, a known poacher, whom he found trespassing on the property. Solomon turned his prisoner over to an American soldier and a native, who took him to the San Juan ranch house, 5 hours' journey distant. Solomon remained behind. At the ranch house, Villamonte was locked up, pending his transfer to David to be surrendered to the police. He remained locked up during all of May 17. On this day Solomon also came to the ranch house expecting to accompany Villamonte to David. On the morning of May 18 Villamonte escaped and was not recaptured.

As a result of these occurrences, criminal proceedings were instituted against Solomon before the Judge of the Second Circuit, in Chiriquí. Solomon was convicted and sentenced to 18 months in prison. Both conviction and sentence were affirmed on appeal by the Supreme Court of Panama. Solomon served a year of his term but was relased for the remainder thereof because of good behavior. It is this conviction and sentence which give rise to the claim here presented.

Solomon's arrest of Villamonte, who had been warned to keep off San Juan, seems to have been legal under art. 1575 of the Administrative Code, which allowed the apprehension, by an owner, manager or employee, of a trespasser caught on unfenced property "in which the prohibition to trespass is evident". Indeed Panama conceded this in paragraph IX of her answer, although it was contested on the argument.

But it has been asserted that the detention of Villamonte in the ranch house as opposed to his arrest constituted a crime. Both the opinions of the courts in Panama and the answer of Panama before the Commission indicate that this was the ground on which the conviction was based. The Commission finds that the detention was a not unreasonable incident of the arrest. Villamonte was arrested about 2 o'clock in the afternoon of May 16, arrived at the ranch house at eight in the evening, was held during the 17th, and escaped at breakfast time on the 18th. It was intended to take Villamonte to David, a 12-hour ride. The evidence shows that a day was needed to catch and grainfeed the horses for this journey. Nor was the project of transferring the prisoner to David in itself unreasonable. The evidence shows that the local captain of police followed the same course when he arrested trespassers on San Juan. It is moreover very doubtful if Solomon can be held accountable for the incarceration at the ranch house. This seems to have been ordered by Johnson, the manager of the ranch, and carried into effect by a soldier who was not subject to Solomon's control.

The Commission is therefore of the opinion that there was no criminal act for which Solomon could be held responsible. But assuming for argument that Solomon committed an illegal act, either in arresting Villamonte or in imprison-

ing him, the Commission is nevertheless of the opinion that there was no justification for convicting Solomon for the particular offense of which he was found guilty. The courts held that he had violated art. 488 of the Penal Code, which provides as follows:

"A person who locks up or detains another, depriving him of his liberty, shall be punished with from two to three years *reclusion.*

"The same penalty shall be incurred by him who furnishes the place for the execution of the crime.

"The penalties of this article shall be changed to *presidio*, if injuries have been caused to the detained person, when the crime does not involve a higher penalty."

But art. 491 of the Penal Code provides as follows:

"He who, outside of the cases permitted by the law, shall apprehend a person to turn him over to the authorities, shall be punished by a fine of fifty to one hundred balboas."

The Commission is of the opinion that it was clear from the record before the courts that if Solomon was guilty of any crime, with reference either to the arrest of Villamonte or to his incarceration, he was guilty of a violation of art. 491 only, and not of art. 488. There was no evidence in the record to sustain a finding that Solomon did not intend to turn Villamonte over to the police. There was in the record ample evidence that from the first such was the intention. Solomon, Greenleaf, and Johnson testify to this effect and Villamonte himself swears that he was told that he was to be taken to Horconcitos for punishment.

Solomon's earlier history shows his inclination to co-operate with the authorities. For over a year, from July, 1918, until his employment by Chase in October, 1919, he had been a member of a detachment of American troops stationed in Chiriquí and had repeatedly assisted the police in making arrests. This background was familiar to all who participated in the trial, and was specifically testified to by the David police captain and by Chase. Such a situation emphasizes the unreasonableness of assuming that Solomon arrested Villamonte for any purpose other than to surrender him to the authorities. Incidentally, it should be noted that both the Attorney General of the Republic and the dissenting Justice of the Supreme Court urged that Solomon's sole offense was a violation of art. 491.

The Commission finds that the conviction and imprisonment of the claimant herein constituted a palpable injustice.

The evidence, and particularly that submitted by Panama with its reply brief, establishes beyond question that there was a high state of public sentiment in Panama which had a direct bearing on the prosecution of Solomon. Solomon had been for over a year, just prior to his employment by Chase, one of the best known and most active members of the detachment of American troops under Major Pace which originally went to Chiriquí to supervise the 1918 elections, and remained thereafter to protect Americans residing in that province and to assist the local police in arresting offenders against Americans.

There has been much discussion between the parties hereto as to the functions of this detachment of soldiers. Their functions bear only indirectly on this case, since Solomon was no longer a soldier when he arrested Villamonte. But what does bear on the case is that Panama not only concedes, but vehemently asserts in its pleadings herein, that the presence of these soldiers was extremely distasteful both to the public and to the authorities in Panama. Constant diplomatic efforts were made to have them withdrawn from the

province, and the correspondence and other evidence adduced by Panama shows that popular feeling was intense and that it was shared by the authorities.

Not only Solomon's association with the soldiers but also his employment by Chase was a ground for local enmity. Chase, we know from his claim (Registry No. 10), had been in constant conflict with the authorities since 1912 over the title to San Juan, and was locally unpopular. It is significant that Panama asserts in its reply brief that the real purpose of Pace's detachment in remaining in Chiriquí after the 1918 elections were over, was to protect Chase in his alleged wrongful possession of San Juan. Whether this contention is accurate or not, it must be taken to represent public opinion in Panama, and it accentuates the unpopularity of Solomon's position.

Examples of this hostile state of feeling abound in the record of the trial in Panama. The governor, when asked about the functions of the soldiers, said that as far as he knew they were merely on a pleasure trip, which was obviously not the case.

The fact that four separate investigations were instituted against Solomon, the fact that the charge was changed to illegal imprisonment after an earlier charge of wounding had been dropped for lack of evidence, and that the case was revived after being moribund for months, the unexplained change of trial judges during the final proceedings, the fact that the Fiscal in his address to the lower court denounced the soldiers, emphasized Solomon's connection with them, and quite improperly went out of his way to excite hostility to Solomon by reciting a story about him which had no relation to any evidence in the record, all taken together lend credence to the theory that the proceeding was sustained, not by the ordinary motive of punishing an offense, but by strong local sentiment.

The Commission cannot avoid the conclusion, arising largely out of Panama's own evidence and contentions, that the claimant's conviction was unconsciously influenced by strong popular feeling. So to hold is not to cast any personal aspersions on the judges involved. The unavoidable susceptibility of local judges to local sentiment is a matter of common knowledge. One of the primary purposes of international arbitration is to avoid just such susceptibility, and to remedy its consequences.

The Commission decides that the Republic of Panama is obligated to pay to the United States of America on behalf of Abraham Solomon, the sum of $ 5,000, without interest.

Dissenting opinion of Panamanian Commissioner

The undersigned regrets that he must dissent completely from the decision of the majority of the Commission, since he considers its bases in fact and in law erroneous.

Abraham Solomon, ex-soldier in the American Army, was an employee in the service of W. G. Chase on a farm that the latter had in the San Juan lands, to which Chase had no legal title of domain, for which reason the latter kept up constant disputes with residents or denizens who had settled in that region. On May 16, 1920, Solomon arrested a countryman named Benito Villamonte, on the pretext that he was hunting on the San Juan lands without permission. That was the pretext invoked by Solomon himself in a statement that he made to a newspaper of David called *Ecos del Valle*, and in the first testimony that he gave before the judge. After arresting him, Solomon took him to a house in Galique, where he kept him in his power for some time and then turned him over to an American soldier and a countryman, to be taken to San Juan farm. There Villamonte was kept imprisoned during the whole

night of the 16th, all day and night of the 17th and during the early hours of the 18th, on the morning of which day Villamonte succeeded in escaping from his prison. When Villamonte escaped, Solomon and a soldier started out in pursuit of the fugitive and when Solomon found him in a thicket, he called to him to halt, discharging his firearm. Villamonte later appeared before the authorities with a slight wound on the head, but although the fact of the shots was confessed by Solomom himself, it was not proved legally either that Villamonte's wound was caused by a bullet or that Solomon was to blame for the wound.

For these acts Solomon was indicted as a violator of chapter I, title XIII, book II of the Penal Code in force in 1920, which treats of illegal detention. In the third paragraph of article 488 of that chapter a major penalty is provided when wounds have been caused in making the illegal arrest. The judge consequently had to investigate the accusation made by Villamonte that Solomon had wounded him with a firearm, but as there was not sufficient proof of this he was exonerated of that charge in the decision. On the other hand, considering the fact of illegal arrest and detention fully proved, he declared Solomon guilty and sentenced him to the minimum penalty of two or three years' imprisonment provided by article 488 of the Penal Code, which was, however, reduced by one-fourth, that is, the sentence imposed was one of 18 months.

During the trial, Solomon had his defender and enjoyed the benefit of freedom on bail. Of the 18 months' imprisonment to which his sentence was reduced, he served only one year, at the end of which he was granted conditional liberty for the rest of the sentence and did not serve his sentence in the common jail, as should have done a convict on which the penalty of imprisonment *(reclusion)* had been imposed, but, on account of the mediation of the United States Government in his favor he passed it at the central police barracks, occupying the room of the chief of police and being treated with special consideration, as Solomon himself declares.

The decision on this claim is based on the opinion held by the majority of the Commission that the Panama courts which passed on the case brought against Abraham Solomon should not have sentenced him as guilty and that in case he was guilty they should not have applied article 488 of the Penal Code, but article 491. Both the decision of the court of first instance and that of the Supreme Court of Justice abound in juridical reasoning that has not been refuted, but rather re-enforced, before this Commission, and the grounds for this decision are not in conformity, in the writer's opinion, with the facts brought out in the case.

The majority commits an error in describing Villamonte, the victim of the arrest and illegal detention perpetrated by Solomon, as a "known poacher". In the proceedings is no evidence showing that Villamonte was a poacher. It has been demonstrated, moreover, that poaching, under Panamanian law, does not constitute a crime, and therefore nobody can be arrested for poaching. And the very legal basis that is cited in justification of the arrest by Solomon is article 1575 of the Administrative Code, which does not refer to poachers, but to trespassers.

Neither is there any basis in the proceedings for the statement that is made in the decision of the majority, that Villamonte had been told not to enter the San Juan lands. Those lands did not form a fenced property, nor was there on them "a plain prohibition to enter"; neither Chase nor his employees could make such a prohibition, because he was not the owner of those lands, as is proved by the documents connected with his claim (Register No. 10).

The evidence which appears to have formed the criterion for the majority is evidence *ad hoc*, consisting of affidavits signed by the very persons

responsible for the illegal acts that took place in the Province of Chiriquí under the military occupation which that Province suffered during the years 1918 to 1920. Those persons are, first, the claimant Solomon, his employer *(patrón)* Chase and an employee of Chase named Johnson. These statements are partial on account of personal interest, and their lack of merit is generally demonstrated by the numerous contradictions that there are between those affidavits, prepared *ex profeso* for the benefit of this claim, years after the occurrences, and the documents and statements of those same persons at the time when the acts took place, beginning with the arrest and illegal confinement of Villamonte and ending with the sentencing of Solomon.

The statement made in the decision, that it was intended to take Villamonte to David, and that for that reason he was kept locked up at San Juan for two days, proves that illegal arrest and detention took place. If there really was such intention, there was no justification for it, because it has been proved before this Commission, with quotations from the pertinent provisions of law, that there was no official at David who could have passed judgment as a court of first instance on Villamonte as a "trespasser". If there actually had been "trespassing", Villamonte should have been taken at once before the Alcalde of the District (who was a two or three hours' journey distant from the place of the arrest) by the same person who arrested him and not turned over to other unauthorized persons for the latter to keep him deprived of his liberty as was done, from early in the afternoon of the 16th of May until the morning of the 18th, that is, on three different days. The fact that Johnson or a soldier locked Villamonte up at San Juan, after Solomon had arrested him and had turned him over to a soldier and a peasantman who was a friend of Chase, did not relieve Solomon of responsibility, for although he had helpers in his crime, he continued to be the principal author of it. Solomon committed the offense defined and punished by article 488 of the Penal Code in force in Panama in 1920, and his sentence was therefore perfectly legal. If that sentence can be characterized, by anything, it is by its leniency, since the judge applied only the minimum penalty of two years, further reduced by one fourth.

In the proceedings there is abundant proof that the act performed by Solomon was one of the many acts of intimidation that Chase and his employees carried out under protection of the military occupation, against numerous residents of the Districts of San Félix and San Lorenzo, in his determination to have himself recognized as owner of some lands to which he held no title of domain, acts among which may be cited the burning of dwellings of country people, admitted by Chase himself in his statement before the judge in the case and by Johnson himself in his affidavit.

The conclusion reached by the majority is also erroneous that, in the sentences handed down by the courts of first and second instance in the case conducted against Solomon, a strong popular feeling produced by the military occupation of the Province of Chiriquí unconsciously exerted an influence. In the proceedings there is proof that that occupation had ceased more than a year before the case against Solomon was brought to an end in Chiriquí. That "unconscious influence" is a mere assumption and not a proved fact. Two officials documents appearing in the proceedings, known to the United States Government and never refuted by that Government, refer to the fact that Solomon killed a person named Cruz Jiménez, whom he was pursuing when he was a soldier. The officers of the American troops stationed in Chiriquí stated to officials of the Panamanian Government that the act took place in Costa Rican territory and the Panamanian Government, trusting the word of honor of American military men, refrained from carrying the matter further. If any intention to persecute Solomon had existed on the part of the Panamanian

Government, because of the popular or national feeling on account of the occupation, it would have been easy for it to do so by means of a judicial investigation of that killing. On the other hand, not only the claimant Solomon but his associates Chase and Johnson have declared in their respective affidavits that "the atmosphere of the trial was friendly" and falsely attribute Solomon's sentence to influence of the executive branch on the judge of first instance. But it is to be noted concerning this point that the claimant Government has not proved or even claimed that such influence was exerted in the court of second instance.

The decision cites as an example of "hostile feeling" against Solomon the fact that the Governor of the Province of Chiriquí, when asked what the duties of the soldiers were, said that they were on a pleasure trip. As the decision is not sufficiently explicit on the point, the undesigned Commissioner considers it pertinent to call attention to the fact that the question put to the Governor referred to the American soldiers who *were in San Juan*. The Governor said (and there is no document or statement contradicting it) that the soldiers had given him to understand that they were in San Juan on a pleasure trip.

The writer cannot see how that assertion can be considered an act of hostility.

The affirmation that the charge against Solomon was changed is not correct. Solomon was indicted on one single charge: that of violating the chapter of the Penal Code that treats of illegal detentions. The investigation relative to the alleged wound of Villamonte is included under this charge, in virtue of the provisions of paragraph 3 of article 488 of the Penal Code. Likewise it is to be observed that in mentioning "the unexplained change of judges during the final proceedings" the decision commits a double error. Firstly, there was no change of judge, from the indictment to the passing of sentence, and secondly, because conclusions cannot be based on mere suspicions. There was a change of judge on the Chiriquí Circuit before the case against Solomon was started. If this change were due to an illegal and improper cause, it was the business of the claimant Government to submit positive proof of it, which it has not done. At any rate, there are references in the proceedings to publicly known facts, proving that the change of judge had nothing to do with the case brought against Solomon.

When the decision says that there was a *palpable injustice* in the sentencing and imprisonment of Solomon, a palpable error is committed. As the Mexican-American Commission said in the Chattin case, "an accused person can not be convicted unless the Judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal can never 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, that is: the legality and sufficiency of the evidence" *(Opinions of the Commission*, p. 436*)*.

Nor can any international responsibility against Panama be deduced, even granting that the Panamanian tribunals did commit an error in condemning Solomon, for the claimant was tried under all the guaranties allowed him by the law.

There is no denial of justice when there is a probable cause or sufficient reason for arresting and trying a person as responsible for an ordinary crime. Denial of justice consists essentially in depriving a person of the means needed for him to defend himself before the courts and that by being deprived of those means of defense he is made to suffer an unjust sentence. "Bad administration of justice alone", says Borchard, "is not enough to cause a government to intervene in behalf of a citizen who claims to have been unjustly treated by the courts in another country" *(Diplomatic Protection of Citizens Abroad*, p. 197).

"Not even a decision based on an erroneous interpretation of the law will permit it. There must be fraud, corruption and denial of legal opportunity to present the case" (Borchard, work cited, p. 332; Moore, *International Arbitrations*, pp. 2134 and 3497).

The decision against the claimant not only was just, but mild. But even if it had been unjust or severe, it is evident, as Borchard says, that "the State is not responsible for the mistakes or errors of its courts" and that "there is no international obligation of the State to see that the decisions of its courts are intrinsically just". It is not possible to admit that foreigners, under pretext of denial of justice, should enjoy the special privilege of having the sentences passed on them by the local tribunals subjected to review by an international tribunal, so that the latter may decide whether the judge's view of the law was correct or not. This proposition is sound, because while local judges may make mistakes, international judges are not exempt from error.

Because of what has been set forth, I consider that this claim should be rejected.