

# **REPORTS OF INTERNATIONAL ARBITRAL AWARDS**

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## **RECUEIL DES SENTENCES ARBITRALES**

**Gust Adams (United States) v. Panama**

21 June 1933

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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.

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#### GUST ADAMS (UNITED STATES) *v.* PANAMA

(June 21, 1933. Pages 304-306.)

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PROTECTION OF ALIENS: ILL TREATMENT BY POLICE, PROSECUTION, PUNISHMENT OF OFFENDER.—EVIDENCE: CLAIMANT'S AFFIDAVIT, PREVIOUS STATE-

MENTS, INHERENT PROBABILITIES. Ill treatment and alleged robbery of alien on or before May 1, 1921, by policeman whose request for money was refused. Sentence to dismissal of policeman and 30 days' imprisonment by disciplinary Court for breach of police discipline and regulations. Order of June 10, 1921, to enforce sentence. Sending of policeman to criminal Court on June 23, 1921, "detention" in and about police station, institution of criminal proceedings, discontinued on September 27, 1921. *Held* that claim for robbery should be dismissed as unproven: conflicting statements made by claimant shortly after occurrence and in affidavit of October 27, 1931, concerning money he had when attacked, inherent probabilities. *Held* also that policeman not adequately punished and Panama liable. Damages allowed.

*Cross-references:* Annual Digest, 1933-1934, pp. 246-247; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación del Norteamericano Gust Adams, Registro No. 8. (Publicación Oficial, Panamá 1934.)

*Bibliography:* Hunt, Report, p. 309, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), pp. 67-68; Borchard, "The United States-Panama Claims Arbitration", Am J. Int. Law, vol. 29 (1935), pp. 101, 102; Friede, "*Die Entscheidungen . . .*", Z.a.ö.R.u.V., Band V (1935), p. 462; Annual Digest, 1933-1934, p. 247.

The amount of \$7,500, with interest, is claimed by Gust Adams, a citizen of the United States, as compensation for injuries inflicted upon him, and money taken from him, by a Panaman policeman. There is a substantial agreement on the following facts: on or before May 1, 1921, in the course of a journey from Panama City to Boquete, Adams stopped at a bar in the town of David. He found two policemen there and asked them where he could get a horse to continue his journey. They promised to help him, he bought them drinks, and they departed. While he was looking over his money for a small bill to make payment, a third policeman, Manuel Iriarte, asked him for a few pesos. Adams refused, and Iriarte struck him on the forehead with a police club, inflicting an ugly wound and making him unconscious.

As to the request for money, the refusal and the delivery of the blow, Adams and Iriarte are in substantial agreement. As to the other details of the episode they differ, Adams in his affidavit of October 27, 1931, says:

"... another policeman approached me, grabbed my arm and demanded that I give him five dollars. I started to jerk my arm away and remonstrate with him when he dealt me a severe blow on the head with his club and I fell back in my chair unconscious".

Adams' affidavit also says, "When I was able to check up my money I found that the policeman had robbed me of \$12". The statement which the claimant made shortly after the occurrence, and which was on June 1, 1921, forwarded by the American Minister at Panama City to the Panaman Minister of Foreign Affairs *ad interim*, is not before the Commission, nor has the evidence rendered by Adams in the Panaman investigation been produced, but there is an indication in the record that Adams at the time varied in his statements as to the amount of which he was robbed. This evidence of robbery is worthless unless Adams knew with certainty how much money he had when he was attacked. The variation of his own estimates as well as the inherent probabilities cast doubt on this. The Commission dismisses the claim of robbery as unproven.

Iriarte, in a statement made to the police authorities, claims that he had been drinking with Adams before the request for money, that he asked for a loan only, that his request was repulsed with insults and an attack by butting, and

that his own blow was intended to land on Adams' shoulder but hit his head by accident. The Commission disbelieves the story of butting and the accidental nature of the blow, and finds that there was a request for money, that it was refused, perhaps in offensive terms, and that following the refusal, and perhaps in anger at the words used, Iriarte intentionally struck Adams on the head with his club, wounding him and rendering him unconscious.

Iriarte was tried by a police disciplinary court in Panama City on the charge of wounding Adams with his stick because of Adams' refusal to lend him money. He was found guilty and was sentenced to dismissal from the police force and 30 days' imprisonment, not for the crime committed, but for the breach of police discipline and regulations. On June 10, 1921, this sentence was ordered to be enforced. On June 23, 1921, Iriarte was sent to David by the police chief, to be held at the disposal of the municipal judge of that district, for criminal proceedings. After some investigations, the exact facts regarding which are in dispute, the criminal proceedings were, on September 27, 1921, discontinued provisionally. They have never been reopened. After being sent to David and during the investigations there, Iriarte was "detained" in and about the police station at the disposal of the judge for a maximum of 10 weeks.

The Commission has taken into account the fact that Iriarte was dismissed from the force, imprisoned in Panama City for at least 13 days, and detained in David for 10 weeks, and that he may have acted in anger provoked by offensive words. But for a uniformed and armed police officer to demand money of a traveler and fell him with a club when he refuses the demand is a serious matter. The Commission feels that the offender was not adequately punished and that from this arises international liability.

The Commission is not concerned with the formal correctness or incorrectness of the criminal proceedings. As this Commission has said in the case of Denham (Registry No. 6):

"... liability for failure to punish adequately crimes against aliens is not based upon discrimination in favor of the individual offender or upon any breach of the local laws. The international obligation is clearly established and each country has the power of so arranging its interior jurisprudence as to give that obligation effect".

The Commission finds it unnecessary here to pass upon the question of whether a state is liable for the wrongful act of a police officer irrespective of failure to punish, or of whether the rule regarding liability for the acts of police applies in a case like this where the officer being on duty and in uniform does an act clearly outside of his duty and inconsistent with his duty to protect.

The Commission finds that the Government of Panama is obligated to pay to the Government of the United States, on behalf of Gust Adams, \$500, without interest.

#### *Dissenting Opinion of Panamanian Commissioner*

It is a proven fact that between the claimant, Gust Adams, an American citizen, and Manuel Iriarte, a former member of the national police, an incident occurred in a saloon in the city of David, Province of Chiriqui, Republic of Panama. As a result of that incident Adams received a wound on the forehead which it has been shown was inflicted by Iriarte. Adams charged that Iriarte had robbed him of a certain amount of money, availing himself of a moment during which he was unconscious as a result of the blow which the latter dealt him with his club and which caused the wound referred to. It has not been possible to clarify the circumstances surrounding the dispute, as it appears

that the participants were completely alone when it occurred. The charge of robbery has been excluded as unfounded by the majority of the Commission, who holds it has been discredited by contradictions in the testimony of the claimant himself.

Regarding the wound which the latter sustained, the majority considers that Iriarte was not properly punished and that for this reason the Republic of Panama has incurred international liability.

The undersigned regrets that he cannot share this opinion because, pursuant to the evidence in this claim, Iriarte was severely punished for the offense he committed, which was a matter of exclusively police character. According to the communication addressed to Iriarte by the captain of the police section of David under date of May 4, 1921, there were drawn against the former charges of violation of the rules and orders of the corps and of having used his club to inflict a wound on the head of the American, Gust Adams. The *Consejo de Calificación y Disciplina* of the National Police Corps held the charges to be fully substantiated and recommended that Iriarte be dismissed from the corps as being unworthy of belonging thereto and he was sentenced to 30 days of incarceration. The sentence was confirmed by the inspector general on June 10.

It is evident that the officials of the police corps who handled this matter considered that the penalties to which Iriarte was subjected constituted adequate punishment for the offense committed.

Nethertheless, in view of Adams' overtures before the police authorities and through the American Legation in Panama, Iriarte was sent to the city of David under arrest and placed at the disposal of the judge of that district on June 23, with the object that the said functionary should initiate the corresponding *sumario* for ascertaining whether, in addition to the violations of an exclusively police character for which he had already been tried and punished with all severity, the former was criminally liable, in view of the possibility that the wound sustained by Adams might have been more serious or that the charge of robbery of some amount of money might be proved.

The proceedings carried out by the judge at David were fruitless and, under the laws of criminal procedure, on September 29 he decreed the provisional discontinuance (*sobreseimiento*) of the case because of lack of evidence for bringing the accused to trial. The corresponding court order sets forth the steps taken and the legal bases for the order. This decision of the judge left open the door to any subsequent investigation under the second section of article 2138 of the Judicial Code which reads:

"Provisional discontinuance (*sobreseimiento*) does not close the process. At any time that new evidence is filed the investigation can be continued against the beneficiaries of such discontinuance (*sobreseimiento*)."

From the evidence which the Commission has before it, it is not proved that through negligence on the part of the judge at David or of any other authority a greater penalty was not assessed against Iriarte and therefore it is not possible to impute international liability to Panama as a result.

The claim of the United States of America on behalf of Gust Adams should be disallowed.

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