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IN THE SEYCHELLES COURT OF APPEAL

T. FINESSE

Appellant

v/s

THE REPUBLIC

Respondent

CR. APP. NO. 1 of 1988.

Mr J. Renaud, counsel for the appellant.

Mr A. Derjacques, counsel for the respondent.

JUDGMENT:

The appellant was charged before the Magistrate's Court on two counts of burglary and stealing contrary to section 289(a) and section 260 respectively of the Penal Code. On the 3rd September 1987, the appellant was convicted on both counts by the Senior Magistrate who sentenced him to three years' imprisonment.

The appellant appealed to the Supreme Court against his conviction and sentence. On the 4th April 1988 the Chief Justice (who had heard the appeal) dismissed it in its entirety. The appellant has therefore appealed to this Court against the appellate judgement of the Chief Justice.

The sole ground of appeal is that 'the learned Chief Justice erred in law in finding that the learned Senior Magistrate was correct in not granting an adjournment in order that the appellant would be represented by counsel'.

This ground of appeal is based on section 164 of the Criminal Procedure Code Book which reads as follows:-

"Any person accused of an offence before any criminal Court or against whom proceedings are instituted under this Book in any such court, may of right be defended by an advocate".

There can be no doubt that section 164 of the Criminal Procedure Code either confers upon an accused person a legal right to be defended by an advocate or acknowledges the existence of such a legal right. The issue is not whether the right exists, but whether the right is an absolute or a qualified right in relation to the Court's discretion to grant or refuse adjournments. If it is an absolute right, no court can properly refuse an adjournment under any circumstance, if the effect of the

refusal will be to deny an accused person of his right to be defended by an advocate. If it is a qualified right, a court can properly refuse an adjournment if the circumstances of the case justify the refusal as well as any consequential denial of the exercise by an accused person of his legal right to be defended by an advocate.

This issue recently arose in *Robinson v/s The Queen* (1985) 2AER 594. There the Judicial Committee of the Privy Council were required to consider the court's discretion to refuse adjournments and to reconcile that discretion with the right in Jamaica of an accused person to be defended by a legal representative of his choice. In Jamaica, the right is not merely a statutory or codal right but is a constitutional right conferred by section 20 (6) of the Constitution of Jamaica which provides as follows:-

"Every person who is charged with a criminal offence(c) shall be permitted to defend himself in person or by a legal representative of his choice.....".

Delivering the majority opinion of the Board, Lord Roskil (speaking for himself and Lords Keith and Templeman) said at page 600:

"In their Lordships' view the judge's exercise of his discretion, which the counsel for the appellant rightly conceded to exist, can only be faulted if the constitutional provisions make it necessary for the judge, whatever the circumstances, always to grant an adjournment so as to ensure that no one who wishes legal representation is without such representation. Their Lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse".

Although Lords Scarman and Edmund-Davies dissented from the majority opinion, they too impliedly conceded that the right to legal representation is a qualified right. They said (at page 603):

"The constitutional question in the appeal is whether the trial judge by refusing an adjournment to enable the appellant after the withdrawal of his counsel to make arrangements for his defence by other counsel failed to permit him to be defended by a legal representative of his own choice. If the judge did so fail, he contravened the Constitution

unless it can be shown that an adjournment would have prejudiced the public interest".

In the opinion of Lords Scarman and Edmund-Davies, it was in the public interest that a person charged with a capital offence should be given "a proper opportunity of defending himself". And it would appear that the circumstance that the offence with which Robinson was charged^{was} a capital offence was the circumstance which weighed most heavily with the dissenting law Lords. This is evident from the following passage of the joint dissenting opinion (at page 604):

"In our view it must be clearly recognised that in the normal routine of the administration of justice in ordinary times (which was the setting of this trial) it is a serious error of law to hold that a man accused of a capital offence can be denied the option of defence by a legal representative of his own choosing. There can in ordinary times be no greater prejudice to the public interest in the administration of criminal justice than such a denial".

The opinions expressed in Robinson's case are therefore consonant with all the authorities cited by counsel in this appeal. The opinions are particularly in harmony with this court's decision in *Moise and Jacques v/s The Republic (S.C.A.R. 1965 - 1976, 122)* and the decision of the learned Chief Justice in *Andre v/s The Republic Criminal Appeal Number 39 of 1986*. In *Moise & Jacques v/s The Republic*, Sir Alastair Forbes said (at page 128):

"We are far from saying that in a criminal case an accused person must never suffer for the default of his advocate, but he must clearly be given every reasonable facility to defend himself, and this includes every reasonable facility to be represented by counsel".

It may therefore now be categorically stated that the right to legal representation is a qualified right in the sense that it is not enforceable against the interests of justice. Accordingly, the court has a discretion to refuse an adjournment in the interests of justice notwithstanding the fact that the effect of the refusal will be to deny an accused person the exercise of his legal right to be defended by an advocate of his choice. The discretion must however be exercised judicially or in the interests of justice. This means that

the court must weigh the public interests against the interests of the accused. The weights of these respective interests would of course depend on the weights of the circumstances which surround them.

What then are the relevant circumstances in this case and what weight (if any) do they lend to the respective interests of the accused and the public?

Counsel for the appellant submitted that the complainant should not have been allowed to testify at the trial after the appellant had indicated that he wished to brief a lawyer and after the Senior Magistrate had refused an adjournment for this purpose. According to counsel, this was a fit case for the invocation of section 127 of the Criminal Procedure Code whereunder a person may make a written statement which may be produced in evidence at the trial. Unfortunately, counsel was unable to show how this alternative procedure was more favourable to an accused person than testimony at the trial where the court has an opportunity to observe the demeanour of the witness and to assess his credibility.

Counsel for the appellant also submitted that on the first day of the trial, when the complainant testified and when the appellant did not have the benefit of representation by an advocate, the Senior Magistrate should have given assistance to the appellant either by explaining to him the consequences of his refusal or failure to cross-examine the complainant or by cross-examining the complainant himself. Frankly, we fail to understand how any such assistance by a court can be a substitute for representation by an advocate fully instructed in the defence. The Senior Magistrate found as a fact that after the appellant was formally charged and before the commencement of the trial, the appellant did not indicate a desire or intention to retain an advocate to represent him. This we consider to be an important fact or circumstance which reduced the weight of the right to legal representation in this case.

It is in the public interest that a person who is suspected of having committed a serious crime (evidence of which is available) should be prosecuted and brought to justice and that the legal rights of citizens and the machinery of the law should not appear to have been used to frustrate the production of such evidence in a Court of Justice.

The appellant's application was for a transfer of the case to Mahe. The application was made on a Friday and at 5.30 p.m. In answer to questions from this court, opposing counsel expressed conflicting opinions as to whether it was reasonably practicable to accede to the request and to continue the trial at Mahe before the departure of the complainant. In the absence of evidence as to the practicability or otherwise of the requested transfer, we cannot evaluate this factor as a relevant circumstance in this case.

This appeal is in effect an appeal against the exercise by the Senior Magistrate of his discretion to grant or refuse an adjournment or transfer of a case. In G.V.G. (1985) 2 AER 225 at page 228, the House of Lords quoted with approval the following statement of the law expressed by Asquith L.J. in Bellenden v/s Satterthwaite (1948) 1A.E.R. at page 345 :

" We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere".

In the light of the circumstances of this present case and the public interests which were in jeopardy therein, it cannot rightly be said that the Senior Magistrate's refusal to grant the adjournment or transfer exceeded "the generous ambit within which reasonable disagreement is possible" or was "in fact, plainly wrong that an appellate body is entitled to interfere".

For these reasons, this appeal is dismissed.

H. GOBURDHUN <i>H. Goburdhun</i>	(Justice of Appeal)
C. D'ARIFAT <i>C. d'Arifat</i>	(Justice of Appeal)
V. FLOISSAC <i>[Signature]</i>	(Justice of Appeal)

Dated this 21st day of October, 1988.