IN THE SEYCHELLES COURT OF APPEAL

JEAN-BAPTISTE SERRET APPELLANT

Versus

THE REPUBLIC RESPONDENT

Criminal Appeal No: 14 of 1995

Mr P. Boulle for the appellant
Mr ~~F. Elizabeth~~ A Fernando for the respondent

JUDGMENT OF THE COURT

The Appellant was charged with the offence of murder in breach of Section 193 of the Penal Code. It was averred that he had on 7 May 1995 murdered Joseph Benson Ernesta.

The case was heard by Amerasinghe J, and a Jury. State Counsel for the Prosecution in his opening address, indicated that an eye witness would be called for the Prosecution but the witnesses who were called did not live up to the expectations of the Prosecution. As a result the only material evidence adduced by the Prosecution at the end of its case was that the victim had died of a stabbed wound and the unsworn statement of the Appellant to the effect that it was he who had stabbed the victim but in circumstances which would amount to self-defence.

Mr Boulle for the defence submitted that the Appellant had no case to answer and that the case should not be allowed to go to the Jury. The trial Judge, with the consent of Mr Boulle, heard the submissions of Counsel for both the Defence and the Prosecution on the issue of no case to answer in the presence of the Jury.

Mr Boulle in his submissions that there was no case to answer stated that the only evidence which had been adduced by the prosecution to connect the Appellant with the offence was his own statement which indicated that the Appellant acted in circumstances amounting to self-defence. In his reply, State Counsel stated, inter alia, that "there is evidence that when the accused stabbed the deceased there was no necessity for the accused to continue to stab the deceased because the deceased collapsed, he fell down the road ..."

Mr Boulle took objection to that statement of State Counsel and he said "No evidence, my Lord. This must not be said before the Jury. That is very, very dangerous, not one iota of evidence. My learned friend must be very careful, the Jury is here."

The trial judge did not consider it necessary, notwithstanding the observations made by Mr Boulle, to invite the Jury to withdraw but merely requested State Counsel to "rephrase the statement."

The trial Judge rejected the submission of no case to answer. The Appellant then made a statement from the dock in which he stated that he had to defend himself as he had told the police. Counsel then addressed the Jury and after the summing up the Jury returned a verdict of guilty. The Appellant was then sentenced to undergo life imprisonment.

He has now appealed against conviction and sentence. The Memorandum of Appeal filed on behalf of the Appellant is very comprehensive and sets out various grounds which, for purposes of this judgment, may briefly be summarized as follows -

(a) the trial Judge erred in his ruling that there was no case to answer;

(b) there were misdirections to the Jury;

(c) the trial Judge failed to direct the Jury on some key issues; and

(d) some of the directions to the Jury were inadequate.

At the outset of the hearing of this appeal, we invited State Counsel to address us on the issue as to whether the presence of the Jury when the issue of No Case to Answer was debated did constitute an irregularity amounting to a miscarriage of justice. State Counsel very fairly conceded that it was open to this Court to hold that there had been a miscarriage of justice but that the Court should not acquit the Appellant.

This view of Counsel is misconceived. If we were to find that there had been a miscarriage of justice we would have no option but to quash the conviction and it would not be proper for this Court to speculate on the decision of the Attorney-General whether or not to institute new proceedings or on the decision of the Supreme Court or this Court on a plea of "autrefois acquit".

We however decided to hear Counsel on the merits. Mr Boulle reiterated his submission that there was no case to answer and drew attention to the fact that the only evidence which could be relied upon to hold that there was a prima facie case against the Appellant was the statement the Appellant had made to the police but that the contents of the statement were insufficient to infer guilt. State Counsel in his reply submitted that the statement contained an admission that it was the Appellant who stabbed Benson Ernesta but the issues regarding the defence of self-defence had to be decided upon by the Jury.

The Supreme Court has had occasion to pronounce itself in respect of the considerations which apply at the stage of a submission that an accused has no case to answer. The Court said:

> "The considerations which apply at that stage are purely objective and the trial Court is not asked to weigh the evidence. At that stage it is only necessary for it to find that a reasonable tribunal might convict."
> (Vide Green v. R (1972) S.L.R 55.)

It is therefore essential to determine what evidence there was on record at the time the submission was made (whether such evidence was credible or not) to establish the various matters which the prosecution had to prove namely -

(a) the fact of death - which was not in dispute;

(b) that the appellant committed the act which caused the death - this is admitted by the ~~Appellant~~ in his statement.

(c) that the Appellant had the intention to cause death or that he had the knowledge that the act causing death would probably cause the death of or grievous harm to some person;

(d) the defence invoked by the appellant being one of self-defence, that what the accused did was not by way of self-defence (i.e negativing the self-defence).

The only evidence to connect the appellant with the death of Benson Ernesta is contained in his statement the relevant part of which reads as follows -

> "When we arrived near at Sounan's place, I heard a voice of a man calling Lorna on the public road. I recognize the man who was in concubine with Lorna before on the road. Lorna said to him, I'm separated with you, why do you follow me?" He continued calling. There I went towards the road where that man was, he came on me and obstructed me. I saw him placing his hand under his shirt on the left, I saw him removing something from under his shirt. At that time I had

> arrived near him and I caught his hand which was having something in it. There we struggle, I took that thing which I recognize that it was a weapon, but I will not be able to identify. I was catching the handle of this weapon in my right hand and I stabbed him with. I do not know where I stabbed him. When I stab him he made a sound 'bou' like someone had hit another one with a punch.. There that man turned and went on the road. When I finished stabbing him, I removed the weapon and the weapon was still in my hand. After I stabbed him, I did not think that he would die, because I did not want to kill him. After that I stabbed him, I turned and returned back where Lorna and Sounan were."

It is clear that the Appellant while admitting that he had stabbed the victim also stated that it was in circumstances which would constitute self-defence. That part of his statement where he admitted that he dealt the blow which proved to be fatal cannot be excised from the exculpatory part. This Court has recently in the case of Brian Larue v. The Republic (Cr. App. No.3 of 1994) made a pronouncement on this issue in the following terms -

> "The admissions of the appellant were "qualified admissions." He admitted having pushed the victim but he said he did it in self-defence. Such an admission is not divisible. It must be taken as a whole. The part which is advantageous to the prosecution and disadvangeous to the maker of the statement cannot be excised and used to bolster the prosecution case."

On the other hand, there was no evidence, circumstantial or otherwise, to establish what the appellant did was not by way of self-defence. Nor can we draw the inference from the statement that the defence of self-defence has been negatived. We accordingly hold that the trial Judge was wrong in arriving at his conclusion that there was a case to answer.

We have already made reference to the irregularity in

allowing the Jury to be present during the debate on the issue whether there was a case to answer specially having regard to the fact that Counsel had condoned such irregularity. A similar situation arose in the case of Joan Olive Falconer - Atlee - a Court of Appeal decision delivered on 9th December 1993 in the course of which Roskill L.J. had this to say in respect of the presence of the Jury during a submission of no case to answer -

> "At the outset of the submission, which was properly made in the circumstances (whether it was to be successful or not) by Mr. Wheatley who was then appearing for the appellant, the learned judge said: "Mr. Wheatley, you and I have had experience of each other for some years. If you have a submission which is not infrequently made at this stage of the case, unless there is some particular aspect of the law which may be confusing to the jury to hear, I think it is better that the jury should know what is going on and that they should hear it. If you tell me that you want to raise a point which is purely law, then I will accept it from you" to which Mr. Wheatley repled "No; I do not want them to be excluded from anything in this case. It was purely legal." The Judge then said "If it is purely legal ..." and Mr. Wheatley interrupted and said "Like any question of law, it involves facts." Then Mr. Wheatley agreed that the jury should not go out and the ensuing submission took place in the presence of the jury.
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> This Court has said again and again that it is very undesirable that this should happen where there is a submission of no case to go to the jury either because the evidence for the Crown is suggested to be insufficient to justify leaving the case to the jury, or because, though there may be some evidence, it is so tenous that it would be unsafe to leave the case to the jury. It is most undesirable that that discussion should take place in the presence of the jury. Inevitably the judge may express a view on a

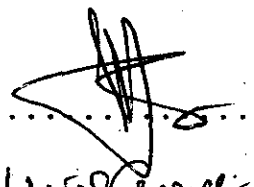
> matter of fact, which is within the province of the jury. The presence of the jury may hamper freedom of discussion between counsel and judge."

In the present case, although Mr Boulle had not objected to the presence of the Jury, he made specific reference to the danger of such presence when Counsel for the Prosecution made reference to facts which had not been adduced in evidence. The trial Judge should have asked the Jury to ignore that part of Counsel's submission and invite the Jury to withdraw. Instead, he merely invited Counsel to rephrase his statement. This constituted a serious irregularity as it is not possible to evaluate the prejudicial effect which the statement of Prosecution Counsel (based on facts which had not been established in evidence) could have had against the Appellant. He has thus been denied a fair hearing.

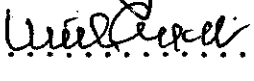
It has been assumed in certain quarters that submissions of no case to go to the Jury, in the presence of the Jury or otherwise is a discretionary matter for the Judge. The English Courts have opined that such a practice was undesirable. We are however of a different view. The right of an accused to a fair trial is a fundamental right enshrined in Article 19 of the Constitution and our Courts are bound to give effect to that constitutional requirement. This has recently been stressed by the Privy Council which held that an irregularity in the proceedings will vitiate a conviction. In that particular case the accused did not understand the English language but he was assisted by Counsel. A witness deponed in English but his evidence was not translated in a language which the accused understood. The Privy Council held that there was an irregularity he although he was represented by counsel, and quashed a convictions.

This appeal is allowed. The conviction of the Appellant is quashed on the grounds that there was no case to go to the

Jury and that there has been a miscarriage of justice. The sentence is set aside.



..... A. Silungwe (Justice of Appeal)



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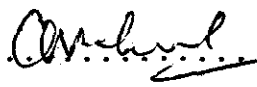

..... L.E. Venchard (Justice of Appeal

Dated this .19. October 1995.