IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A), A.Fernando (J.A), J. Msoffe (J.A)**]**

CriminalAppeal SCA02/2015

(Appeal from Supreme Court DecisionCR 78/2014)

Francis Azemia Appellant

Versus

The Republic Respondent

Heard: 10 December 2015

Counsel: Mr. Nichol Gabriel for the Appellant

Mr. David Esparon for the Respondent

Delivered: 17 December 2015

JUDGMENT

A. Fernando (J.A)

1. The Appellant appeals against the Ruling of the Supreme Court of 30th January 2015 that he "can be tried again for the offence of murder as charged".

2. He has raised the following grounds of appeal:

    1) "The learned Judge erred, in law and in fact by ruling that the Appellant falls under the exception to the rule against double jeopardy.
    2) The learned Judge erred in ruling that the Appellant did not have a defence of "autrefois acquit" thus contravening the Appellants right to a fair hearing under article 19(5) of the Seychelles Charter of Fundamental Human Rights and Freedoms.
    3) The learned Judge erred, in law and in fact in finding that the judgement of the Seychelles Court of Appeal dated 12th December 2014 specifically ordered the Attorney General to initiate a trial of the Appellant for murder.

4) The learned Judge erred, in law and in fact in failing to find that the Affidavit in support of the notice of motion dated 22nd of December had specifically referred to a retrial of the Appellant in the absence of any specific order for retrial by the Seychelles Court of Appeal"; and

had sought by way of relief "to quash the ruling of the Learned Judge and release the Appellant from custody."

3. The Supreme Court in its Ruling, which is sought to be challenged before us had stated:

"[27] In this case, I am satisfied that the Attorney-General did not determine on his own initiative to have the accused retried for the same offence he had already been tried for. Had this been the case, the accused would have had a complete defence which would have been a bar to a new trial. The Attorney General acted under the order of the Court of Appeal to exercise his powers under Article 76(4) (a) of the Constitution and he exercised it by initiating the trial of the accused for murder. In addition, it is noted that under rule 31(5) of the Court of Appeal Rules the Court of Appeal has the power to "make such other order in the matter as to it may seem just."
[28] Consequently, I find that the accused falls under the exception to the rule against double jeopardy and therefore his defence of "autrefois acquit" fails. I therefore rule that the accused can be tried again for the offence of murder as charged."

4. The relevant part of the Court of Appeal judgment, Criminal Appeal SCA 14 of 2012, referred to at ground three of appeal, is to the effect:

"In the circumstances we are left with no option but to quash the conviction and the sentence of the Appellant. However in view of the circumstances of this case and in exercise of our powers under rule 31(5) of The Seychelles Court of Appeal Rules we order that the Appellant be kept in custody and produced before the Supreme Court at the conclusion of 15 days leaving it to the discretion of the Attorney General to take action which he deems appropriate under article 76(4)(a) of the Constitution."

5. The rule on "autrefois acquit" is to be found in article 19(5) of the Constitution, which states:

"A person who shows that the person has been tried by a competent court for an offence and either convicted or acquitted shall not be tried again for that offence or

for any other offence of which the person could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."(emphasis added by us)

6. The relevant part of rule 31(5) of the Seychelles Court of Appeal Rules 2005, states:

"In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a retrial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised....." (emphasis added by us).

7. The relevant parts of article 76 of the Constitution states:

"(4)(a) The Attorney-General..... shall have power, in any case in which the Attorney-General considers it desirable so to do to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person.....
(8) ....for the purposes of this article, any appeal from any judgment in any criminal proceedings before any court.....shall be deemed to be part of those proceedings.
(10) In the exercise of the powers vested in the Attorney-General by clause (4), the Attorney General shall not be subject to the direction or control of any other person or authority." (emphasis added by us).

8. In explaining the circumstances for quashing the conviction and the sentence of the Appellant, referred to at paragraph 3 above, the Court of Appeal had stated: "We cannot condone the brutality of this crime, however at the same time we cannot hold the facts of this case against the need to ensure that due process has been carried out and that the case has been conducted properly in our courts."

9. In giving its reasons for quashing the conviction the Court of Appeal had stated: "The Learned Trial Judge in his Summing Up to the Jury had rehearsed at length, going to almost two A4 pages,(pages 26 to 28 of the Summing Up) the evidence of Sub Inspector Aubrey Quatre of the Scientific Support and Crime Research Bureau who testified on behalf of the Prosecution on DNA evidence". Having gone at length in his summing up on the blood and penile swabs taken from the Appellant and the blood samples and vaginal swabs taken from the deceased the

Learned Trial Judge had then called upon the Jury to disregard the entirety of that evidence as the DNA expert had failed to testify at the trial. The Court of Appeal had gone on to state: "In view of this evidence it would have been humanly impossible and amount to mental gymnastics for any Jury to disassociate from their minds the possible connection between that evidence and the DNA evidence as referred to in the opening remarks of the prosecutor, namely that the DNA analysis done by the Analyst on the DNA profile generated from the deceased and what was taken from the Appellant clearly supports the Prosecution case. Further the reason given by the Learned trial Judge to disregard the DNA evidence in his Summing Up is only because the "DNA analyst failed to appear and give evidence in this case". It is unlikely that a Jury would disregard a very important item of evidence on which the Prosecutor and Judge had laid so much stress upon until the final stages of the Summing Up, merely because of a technical reason as to admissibility of such evidence."

10. The reasons for the exercise of the powers of the Court of Appeal under rule 31(5) of The Seychelles Court of Appeal Rules and making "order that the Appellant be kept in custody and produced before the Supreme Court at the conclusion of 15 days leaving it to the discretion of the Attorney General to take action which he deems appropriate under article 76(4)(a) of the Constitution," is to be found on a reading of the Court of Appeal judgment, which had at length dealt with the evidence led before the Trial Court. It is clear that prosecution had led evidence to show that blood, hair samples and vaginal swabs had been taken from the deceased. It also shows swabs from red substances found on the body of the Appellant and urethral swabs from his penis had been taken. Further fibre and hair samples had been lifted from the trousers the Appellant had been wearing. All these samples had been handed over by PW Sub Inspector Quatre of the Seychelles Pollice, to Dr. Mohapotra of India for purposes of examination and DNA analysis. Although Dr. Mohapotra's Report had been marked as an item through PW SI Quatre the prosecution had not been able to produce the DNA Report of Dr. Mohapotra due to the inability of Dr. Mohapotra to attend Court as a result of him being tied up with some court cases in India and despite an adjournment of 9 days being granted to the prosecution in the course of the trial. When the case came up for hearing after the adjournment the prosecuting Counsel had decided to go ahead with the case without the DNA evidence as he had intimated to the Court that Dr. Mohapotra will not be able to attend court for another two weeks.

11. The Court of Appeal had stated in its judgment and which we quote:

> "We are in a difficulty to understand why the Prosecuting Counsel failed to seek a further adjournment by another two weeks, having already lead evidence of the taking of samples for DNA profiling and because it had been the position of the Prosecution all throughout that the DNA evidence supported the case for the prosecution." The Prosecutor in his opening remarks had stated: "The DNA analysis done by the Analyst at the request of the Police on the DNA profile generated from the source of the exhibits which were taken from the scene, and also which were taken from victim Jeannette Nourrice and also which were taken from the accused Francis Azemia clearly supports the Prosecution case." And again:
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> "It is to be noted that according to the evidence of PW Eddie Vel the man who mercilessly kicked the deceased had at a certain stage got on top of her and made some movements as if he was having sexual intercourse with her. According to the police evidence when they arrived at the scene the deceased clothing had been pulled up to her waist and she was without any underwear. Photographs 14, 15 and 21 taken at the scene of crime and produced as exhibits confirm this. The post mortem examination that had been produced reveals that that there was bruising in the vaginal wall and cervix and superficial lacerations in the rectum. Further the evidence revealed that vaginal swabs from the deceased and penile swabs from the Appellant had been taken and sent for DNA analysis and the DNA Profiling Report had been marked as an item at the trial."

12. This was one of those cases where the Court was in a difficulty in balancing the interests of the accused vis-a vis the interests of the public at large. The Court of Appeal had stated as referred to earlier: "We cannot condone the brutality of this crime, however at the same time we cannot hold the facts of this case against the need to ensure that due process has been carried out and that the case has been conducted properly in our courts." The Court of Appeal at the time when the appeal was heard was obviously not in a position to know whether it would be possible for the Attorney-General to obtain the attendance of Dr. Mohapotra to lead his evidence pertaining to his DNA Report. It is for that reason that the Court had stated "We order that the Appellant be kept in custody and produced before the Supreme Court at the conclusion of 15 days leaving it to the discretion of the Attorney General to take action which he deems appropriate under article 76(4)(a) of the Constitution." The Court of Appeal bearing in mind the powers of the Attorney-General under article 76 of the Constitution, as referred to at paragraph 7

above, certainly would not make an order which the Attorney-General may not be able to carry out.

13. We are of the view that the re-trial of the Appellant had been in accordance with the judgment of the Court of Appeal dated 12th December 2014 and in the exercise of the powers of the Attorney-General under article 76 of the Constitution and does not in any way contravene article 19(5) of the Constitution, referred to at paragraph 5 above.

14. We therefore dismiss the appeal.

A. Fernando (J.A)

I concur:. **…….** S. Domah (J.A)

I concur:. **…….** J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on17 December 2015