IN THE SEYCHELLES COURT OF APPEAL

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

CriminalAppeal SCA20/2013

(Appeal from Supreme Court Decision 81/2008)

Ronny Lalande Appellant

Versus

The Republic Respondent

Heard: 09 December 2015

Counsel: Mr. Anthony Derjacques for the Appellants

Mr. Hemanth Kumar for the Respondent

Delivered: 17 December 2015

JUDGMENT

M. Twomey (J.A)

[1] This is an appeal against the decision of the Honourable Judge Gaswaga delivered on 5 April 2013.

[2] The Appellant was charged with two counts of sexual assault offences against a child aged six years old at the time of the alleged offence and the trial began on 29th July 2010. On the 17th of February 2013, the prosecution closed its case and Counsel for the Appellant informed the court that he would be making a submission of no case to answer. The presiding trial judge, Hon. Judge Gaswaga allowed the parties time to make written submissions on the no case to answer.

[3] On the 31 May 2012 counsel for the prosecution indicated to court that part of the record of proceedings was missing from the court file. The missing proceedings were

erroneously identified as the testimony of the complainant. The case was adjourned to 8th June 2012 in order to establish whether it was possible to retrieve or reconstruct the record of proceedings that was missing, during which point it was discovered that the missing proceedings related to the evidence of a police officer who took the original complaint.

[4] The attempts to reconstruct the record were unsuccessful and on 5th April 2013 Judge Gaswaga delivered an order stating:

> "It is now clear that some evidence (proceedings) in this case has been irretrievably lost and in these circumstances it is only just and fair that the case is not decided on the basis of an incomplete record.
> Accordingly, the case is hereby returned to the registry to start afresh. "

[5] It is worth noting that the proceedings which were reported missing have since been found as they were in the Court of Appeal bundle. However, for the purposes of this judgment we will accept that the Learned Judge was informed that the evidence was irretrievably lost as this was supported by an investigation performed by the registry and by an incident report from a court reporter.

[6] This appeal is against that ruling of Judge Gaswaga. Both the Appellant and the Respondent are aggrieved by the ruling to hold the trial afresh. The Appellant is requesting that this Court grant an order quashing the order for a fresh trial and replace that order with an order discharging the Appellant. In its cross-appeal, the Respondent is requesting that this Court quash the order for a fresh trial and direct the Supreme Court to progress the case by making an order on the application of no case to answer.

[7] The Appellants' grounds for appeal are that:

"*1. The Judge erred in law and principle in failing to deliver a ruling on a no case to answer when both the Counsels for the accused and the Republic submitted their address in writing on a motion of a no case to answer.*

2. The Judge erred in failing [sic] that the record of proceedings was incomplete in

that the only evidence not on record was not required, neither essential, nor material, in order for a ruling on the motion of no case to answer. The evidence not on file was of the investigating officer who was not a witness of the alleged offence, and was purely administrative in nature.

3. *The Judge erred in law in ordering a fresh trial as the prerogative and decision to commence or not a new trial lies with the Attorney General.*
4. *The Judge erred in law in failing to realize and apply the concept of the separation of powers. Essentially saying that the decision for a new trial lies with and rests with the Attorney General."*

[8] Furthermore, Counsel submitted that the order for a fresh trial violated the fair trial rights of the Appellant in that:

"a. The first trial had commenced in 2008 and the accused has already been through 5 years of criminal proceedings;

b. The complainant had been 6 years old and will therefore be 11 or 12 years of age and the legal implications have changed;

c. The medical gynaecologist who deponed has left the Republic of Seychelles;

d. The Registry of the Supreme Court was negligent as the custodian of the evidence and proceedings and as such must not be allowed to prejudice the interests of the Appellant."

[9] The Respondent, on the other hand, filed a notice of cross-appeal requesting that the order of the learned trial judge be varied. The Respondent is requesting this Court to direct the Supreme Court to proceed the matter by delivering the ruling in the no case to answer. Respondent's grounds for the cross appeal are that the Judge erred in law in sending the case file to the Supreme Court to start a fresh trial as:

"a. The trial judge could have delivered a ruling based on the available proceedings and his own notes;

b. The evidence of prosecution witness for which court recorded proceedings are

not available is not material for the purposes of a ruling on a submission of no case to answer and the court recorded proceedings in respect of material witnesses were available to the Trial Court;

c. The prosecution was in a position to prepare written arguments based on the proceeding received from the Supreme Court registry. The judge kept the matter pending for 9 months, and ordered a fresh trial when he was leaving the jurisdiction which is not fair and proper;

d. The decision is not consonant with the principles of proper administration of Justice and does not do justice for the victim having regard to her age, the trauma that she has lived and has to go through again for the purpose of a fresh Trial.

e. The Learned judge ignored all the above said facts and circumstances and ordered a fresh trial which in this case amounts to a miscarriage and abuse of justice."

[10] During the trial the Respondent led six witnesses, including the testimony of the complainant child, the gynaecologist who examined the child, the social worker who took the complaint, the police officer who registered the complaint and the aunt who reported the incident.

[11] The salient issues for this Court to decide are as follows:

a. Whether the Hon Judge Gaswaga was correct to decline to decide on the no case to answer upon discovering that part of the evidence was missing from the court file?

b. If the Judge was correct in declining to decide on the no case to answer, was he correct in ordering a fresh trial?

c. What is the most appropriate remedy for this Court to grant in the circumstances.

[12] Section 183 of the Criminal Procedure Code (Cap 54) provides as follows:

"If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

[13] The leading case in this regard is *Green v R* (1972) SLR 54 wherein the court held that the motion of no case to answer should be upheld when the court determines that a reasonable jury properly directed would not convict and or an essential element of the offence is not proven.

[14] The trial court is required to consider the evidence placed before it by the prosecution to satisfy itself as to whether the prosecution has established a prima facie case at the close of its case.

[15] Our courts follow the precedent set by the United Kingdom courts in the case of *R v Galbraith* [1981] 73 Cr. App. R. 124 in which Lord Lane, Chief Justice held at P. 127:

"(1) If there is no evidence that the crime alleged has been committed by the accused person there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence

d. Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.

e. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability or, other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the accused person is guilty, then the judge should allow the matter to be tried by the jury…. There will of course, as always in this

branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[16] *Galbraith* has been followed by the courts in Seychelles in *R v Marengo* and ors (2004) SLR 116, in *R v Matombe (No. 1)* (2006) SLR 32 and in R v Hoareau SC Cr 79/2014.

[17] Clearly, in order to make this assessment the Judge must be able to assess all of the evidence put before it. It is unfortunate but it does sometimes happen that in cases where trials run over several years the judge is reliant on the accuracy of the court record in order to refresh his or her mind as to the evidence put before the court. Being able to reread the proceedings, the Judge is able to remember inferences and perceptions about the witness which may not be recorded in the judge's own notes. The proceedings are also very important because the Judge may have not caught each and every word during the trial, and the testimony may bolster or contradict another aspect of the evidence which the Judge did not realise during the hearing.

[18] Both the Appellant and the Respondent have submitted that the missing testimony in this case was not material or relevant, and that the Judge erred in refusing to make the ruling on the motion of no case to answer. We now have recovered the missing portion of the evidence, and can make an assessment of whether or not it is relevant, however the learned judge at the time of evaluating the evidence and making the assessment could not be certain whether the missing evidence held some relevant details or facts which might swing the balance on the evaluation of the motion of 'no case to answer'. When considering the action of the judge, we are hesitant to play the role of armchair critics with perfect 20/20 vision. When making this assessment of whether any evidence exists, the judge is required to consider *all* of the evidence which was put before it. We agree with the finding of Judge Gaswaga that where all of the evidence is not available it is only just and fair that the case is not decided on the basis of an incomplete record.

[19] Therefore, with regard to the first issue in this matter, we find in the affirmative that Judge Gaswaga was correct to choose to decline to make a decision on the motion of 'no

case to answer' due to the fact that the proceedings were incomplete and he would not have been able to fully assess the salient question.

[20] The second question, then, is whether the Judge was correct to order a fresh trial?

[21] The Supreme Court does not have the power to order a mistrial in a matter in which it sits as the court of first instance. This is clear from a reading of the provisions of the Criminal Procedure Code. The court's power under section 183 is to dismiss the case and acquit the accused where the prosecution has failed to raise a case to answer. Where the trial proceeds, the provisions of section 188 are activated and the court is required to record a conviction or an acquittal on each charge. A Supreme Court judge, sitting as the court of first instance may only order a trial de novo (or a new trial) under the provisions of section 133A (3)(b) which takes into account instances where the trial proceeded in the absence of the accused who is able to satisfy the court of bona fide reasons for being absent from the trial. This is not the case in the current matter.

[22] It is our view that the appropriate order in the circumstances where recordings of evidence were lost or missing would have been to recall the witness and take the evidence afresh.

[23] We accept the submission of the Appellant that it remains the prerogative of the Attorney General to decide whether or not to decide to institute proceedings against an accused and that this is not the role of the trial judge.

[24] The question now is one of remedy. This case has suffered tremendous delays to date.

[25] The Appellant has requested that we quash the order of Judge Gaswaga and discharge the appellant. The Respondent has requested that this Court return the case to the Supreme Court and order that it make an order on the motion for 'no case to answer'.

[26] We do not see either as an appropriate course of action. It is an established principle of our law that a Judge who did not hear the whole of the evidence in a matter is not competent to determine the case and pronounce judgment therein [*Vidot & Anor v Esparon & Anor*. SCA 19/1996]. The dictum of Abban CJ in *Philoe v. Biscornet* (Civil Appeal No. 26 of 1989: Unreported judgment delivered on 31st May 1990) adopted this approach as a prerequisite for justice stating that:

> "there cannot be a fair hearing unless those called upon to deliver judgment had taken part in hearing all the evidence in the case. In my view, this is a fundamental requirement of justice."

[27] Nor is it appropriate for this court order a retrial in this case. The basic principle is that it is for the prosecution, not the court, to decide whether a prosecution should be commenced and, if commenced, whether it should continue. The discretion for prosecutions by virtue of Article 76 (4) of the Constitution rests in the Attorney General alone. We cannot interfere in that discretion.

[28] There was no failure on either party's side in this case and no abuse of process. It was purely a system failure. In the circumstances we quash the decision by the trial judge ordering a new trial. We make no further order.

M. Twomey (J.A)

I concur:. **…….** S. Domah (J.A)

I concur:. **…….** A. Fernando (J.A)

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