

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** M. Twomey (J.A) , J. Msoffe (J.A), B. Renaud (J. A)

## **Criminal Appeal SCA 14/2015**

**(Appeal from Supreme Court Decision 85/2013)**

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**Narajan Alphonse**

Appellant

Versus

**The Republic**

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Heard: 31 July 2017

Counsel: Mr. Nichol Gabriel for Appellant

Mr. Jayaraj Chinasamy for Respondent

Delivered: 11 August 2017

## **JUDGMENT**

M. Twomey (J.A)

- [1] The Appellant stood trial for murder under section 193 punishable under section 194 of the Penal Code before a judge and a jury in which a verdict of guilty was returned against him. He was sentenced to life imprisonment. He has appealed against the verdict.
- [2] The deceased in this case, Rita Alphonse, was the wife of the Appellant. Her badly decomposed naked body containing at least twenty-seven laceration and incision wounds together with dislocation of her right eye, fracture of her skull and her cervical spine was discovered in a marsh at Anse Boileau, a short distance from her home on 7 December 2013. The pathologist Marija Zlatkovic who carried out the post mortem concluded that the death of the Deceased was as result of fractures to the skull, cervical

spine and multiple external injuries. She also stated that those injuries were caused by a sharp object used with great force and in her opinion perhaps an axe.

- [3] Tania Alphonse testified that she lived at St. Louis with her boyfriend and baby and that she had met her mother, (the murder victim), in the morning on 3 December 2013 and had given her the baby for minding as she had an interview that day. After the interview, she had taken the bus to Anse Boileau to visit her parents, had lunch with her mother but all the while her mother and father (the Appellant) were arguing. When she left the family home at 4 pm they were still arguing. She was ironing her clothes at 5.20 pm at St. Louis when her grandfather called to say that the Appellant had come to his house together with her baby and that both were covered in blood.
- [4] Her grandfather, Mr. Albert Mondon, the father of the deceased confirmed her evidence about the arrival of the Appellant at his house with her baby and both being covered in blood. He testified that the Appellant had stated that they had been attacked by two men and that they had taken the Deceased away. This was also confirmed by his wife, Julicia Mondon and son Bryan Mondon who said that the Appellant had told him that he had been attacked with an axe. He had noticed a cut on the Appellant but there was no blood from the wound although there was a lot of blood on him.
- [5] The prosecution adduced further evidence that on 3 December 2013 at around 7 pm, Anse Boileau Police Station received a report from Tania Alphonse of these facts above.
- [6] Lance Corporal Marie, had subsequently met Tania Alphonse and had proceeded with her to her parents' home at 8.40 pm and after checking the house and seen blood on the floor and the walls inside the house had preserved the scene. He had also met the Appellant who had blood on both his hands. He had stated that he had been injured and was advised to go to hospital. Sergeant Dogley of the CID who had also gone to the house testified that there was blood like substances in various parts of the house and that it looked like attempts had been made to wash away the blood. The same observations were made by Sub Inspector Barra who had also gone to the crime scene but who also noticed drag marks on the beach.

- [7] The officers of the Scientific Support and Crime Records Bureau (SSRB), namely Sub Inspector Aubrey Quatre and Sergeant Agathine visited the scene of the crime on the 4 and 5 December 2013 and noticed and photographed drag marks from the house to the beach across the road and a bandage on the ground that had a red substance similar to blood. On the veranda of the house there was a red substance which appeared to be blood; a pole next to the house also had a red substance on it similar to blood as did a white box, floor mat and a bucket containing clothes. Inside the house there was water mixed with blood on the living room floor; in the bathtub were clothes, a jug, plastic bag and more red substances resembling blood together with water. The corridor to the bedroom and toilet also a substance resembling blood and water. They collected a bloodied glove on a blood stained wall outside the house. There were blood like substances on the wall inside the house, on clothes on the sofa, on a baby's crib and, on a plate in the kitchen. Tests carried out proved that the blood like substances were indeed blood.
- [8] The Appellant's other two children also gave evidence. Seventeen year old Jean-Paul Alphonse had been at the house at around 5 pm and had noticed that his father was drunk and his parents arguing. As he could not stand the noise he had left to go and play football in the field in the village. At around 6 pm he got a phone call from his sister Tania who told him that some people had come to the house and attacked his father. He had cycled home and saw his father having a wash outside near the veranda. He was naked and had blood all over his body. He was spraying water on the veranda as there was blood there too. He had gone into the bedroom and noticed a lot of blood there. When he came out his father was spraying water in the living room. His father told him that some people had attacked him and they had taken his mother and had left in the direction of the beach. He saw only a small cut on his father's hand and found it strange as there was so much blood in the house. He had on previous occasions seen his father beat up his mother and at least 25 times had witnessed her hiding from him. The police came on several occasions to intervene.
- [9] Twelve year old Hervé Alphonse also testified that his parents were arguing on the 3 December when he got home from school. His father had been threatening his mother

stating that he would kill her if she did not give him money. He had left and had gone to his friend's house to play. When he got home he noticed the lights of the house were on but not those in the living room. He looked for his mother everywhere but could not find her. There was blood and water everywhere as if someone had been trying to clean the blood. He had then run to the clinic as he done that previously when his father had beaten up his mother. He stated that his father had beaten his mother up often and threatened to kill her. He asked the nurse to call his mother and then when she could not be reached he had told her to call his sister to come and collect him. When his sister collected him they passed the house in the car and saw their father with blood on him. He denied any knowledge of a man called Allen Tirant with whom his mother had been having a relationship although it was put to him that in his statement he had mentioned the fact that his mother had a relationship with Allen who came to the house during the time his father was in prison for assaulting his mother.

**[10]** Allen Tirant admitted having a relationship with the victim whom he had met in September 2013. He had fallen in love with her and had stayed with her for two months while her husband was in jail. She had phoned him on the 1 December 2013 and he had overheard her husband swearing at her and threatening her. He had told her to complain to the police who had intervened and placed him in the cell at Anse Boileau for the night. On the 2 December she had come to his house and slept there with him. She had gone home the next day and she had phoned him on the 3 December and had told him about her problems with the Appellant and that she would get a divorce. She had called again at around 4 or 5 pm and he could hear the Appellant swearing at her and asking her for the phone and then the phone went dead. He tried to call her at least ten times but there was no response.

**[11]** Sergeant Nicole Legaie confirmed that in the Occurrence Book at Anse Boileau Police station an entry had been made indicating that the Appellant had spent the night in jail on 1 December after Rita Alphonse had come to the clinic at 22.41 in only a bra and pants requesting assistance as her husband was threatening to assault her. After his arrest the Appellant was detained in a cell. At around 23.17, he was found hitting himself and his body against the wall to injure himself. He injured the small finger on

his left hand and was taken to the clinic for treatment. He was released the next day and warned not to fight with his wife.

- [12] Louise Alphonse, the Appellant's sister said that he came to her house at around 2 am during the night of 3 December and said he was having a problem with his wife and wanted to bath and get a change of clothes. She refused to let him in and asked him to leave.
- [13] A forensic analyst from Mauritius, Vedwentee Ujoodha stated that she had identified numerous items brought to her by the Seychellois police. Some of these items yielded a mixture of the DNA profile of the Appellant and that of a female person. No confirmation of the identity of the female person could be done as the control samples retrieved from the Deceased namely two incisors could not provide DNA.
- [14] The Appellant did not testify, exercised his right to remain silent and not to call any witnesses.
- [15] The jury returned a unanimous verdict of guilty. Against this conviction the Appellant has appealed.

### **The appeal**

- [16] He has put up the following grounds of appeal:
  - 1. The learned trial judge erred, in law and in fact, by relying on insufficient evidence to convict the Appellant. By doing so, he did not put to the jury sufficiently or at all the case for the Appellant.
  - 2. The learned trial judge failed to direct the jury on the law regarding oral confessions after he had admitted the evidence of one Tania Alphonse and one Inspector Marie.
  - 3. The learned trial judge failed to appreciate and fully analyse the DNA evidence given by the expert witness which was favourable to the Appellant.

4. The learned trial judge failed to address the jury sufficiently on the fact that the Appellant could not have been at the scene of the crime at the time given by the police.

### **Grounds 1 and 3**

- [17] Let us state from the outset that this ground of appeal is unusually worded. It is trite that it is the jury and not a judge who finds an accused person guilty in a murder trial in Seychelles. Hence a judge cannot be accused of relying on insufficient evidence to convict. That limb of the ground of appeal therefore is without merit and fails entirely.
- [18] Insofar as the grounds complain of insufficiency of evidence being put to the jury, we were in the skeletons heads of argument directed to the fact that the DNA evidence given by the expert witness which was favourable to the Appellant was not brought to the attention of the jury nor was the evidence of intoxication.
- [19] We are unable to agree. Although it is correct that the DNA evidence of the victim could not be confirmed from the two incisors sent for examination to the forensics analyst it is not disputed that the body recovered and the subject of the Appellant's trial was his wife Rita Alphonse. What was contended at the trial was the fact that the Appellant did not commit the crime. By contrast to the DNA evidence relating to the victim, there was ample evidence of the Appellant's DNA at the scene of the crime including on part of a bloodied t- shirt recovered inside the house (Exhibits 23 and 24) and the sample on the galvanised pipe ( Exhibit 43A) and other items recovered in the house and outside the house. The trial judge in his summing up directed the jury at length on the findings of the forensic analyst. In this respect he cannot be faulted.
- [20] Similarly we find no error on the part of the trial judge in respect of Counsel's contention that he did not address them on the fact that a finding of intoxication on the part of the Appellant could reduce the charge of murder to manslaughter. We are satisfied that he correctly summarised the law generally relating to intoxication in murder charges. He stated that a drunken intent is still an intent and that it was for the jury to decide whether the Appellant had committed the murder due to intoxication. If

the murder was due to intoxication and the accused did not know that such act was wrong or did not know that he was doing or was temporarily insane then they could convict him of manslaughter. We are not of the view that he could have said much else.

[21] Having outlined the evidence adduced above, we are also not of the view that the quantity and quality of the circumstantial adduced was in any way insufficient as submitted by the Appellant. The Appellant has not been able to show that combination of all the circumstances as summed up by the judge to the jury was not capable of producing a conviction beyond reasonable doubt. There is any case more than circumstantial evidence as will become plain below.

[22] These grounds are dismissed.

### **Ground 2**

[23] This ground concerns an out of court admission by the Appellant to his daughter Tania Alphonse in the presence of Police Superintendent Christelle Marie and overheard by the latter in which he explained where he had had disposed of the body of the victim. Evidence was adduced and not contested, that the Appellant had asked to see his daughter. She was brought to him at the CID Headquarters by Superintendent Marie and she remained in the room when Ms. Alphonse asked him where her mother was. He indicated that he had dumped her body to which he had attached rocks at the Fos Pas (a partial break in the coral reef) near Cap Sainte Marie.

[24] Counsel's contention is that such an admission was hearsay or if treated as a confession would have necessitated a *voir dire* to establish the voluntariness of the confession. It must be noted that there was neither a retraction nor a repudiation of the admission by the Appellant.

[25] The trial judge allowed the adduction of the admission on the basis that it was made to his daughter and not a person in authority which would have necessitated the court establishing the voluntariness of the statement.

[26] Learned Counsel for the Respondent submits that such admissions are not only exceptions to the hearsay rule but also do not necessitate *voir dire*s to attest their voluntariness.

[27] It may be opportune at this juncture to address the issue of hearsay and admissions generally. Sir Rupert Cross defined the rule against hearsay, which definition was accepted and stated by Lord Havers in the House of Lords case of *R v Sharp* [1988] 1 WLR 7 as:

*“an assertion other than one made by a person while giving oral evidence in the proceedings [which] is inadmissible as evidence of any fact asserted.”*

[28] In layman’s terms, if the original person does not himself state the words in court and someone else is called to testify as to the words stated by the original person, then it should not be allowed in the court room. The hearsay rule is a rule of admissibility and a rule of exclusion, excluding hearsay from forming part of the court record.

[29] Protections are provided both constitutionally and statutorily for the maker of statement.

[30] The Seychellois Charter of Fundamental Human Rights and Freedoms contains in articles 18(3) the right to remain silent and 19(2) (g) the right not to be compelled to testify or confess guilt and implicitly the unenumerated right not to incriminate oneself in criminal trials.

[31] Section 129 of the Criminal Procedure Code does allow formal admissions made by the prosecutor or the accused person if such admissions may be given in oral evidence by the maker of the statement but such evidence is only against the maker of the statement.

[32] Common law and statute have however provided exceptions to hearsay. Evidence contained in admissions and confessions may in certain circumstances be admitted in evidence against the maker of the statement to prove the truth of the facts they contain.

[33] In the context of criminal proceedings, Coldrey J in the Australian case of *Hazim v The Queen* (1993) 69 A Crim R 371, 380 explains the difference between confessions and admissions as:



*“the former involve admissions of actual guilt of the crime, whereas the latter relate to key facts which tend to prove the guilt of the accused of such crime.”*

- [34] Msoffe JA in both *Lawrence v R* (unreported) SCAA (2015) 25 and *Roble v R* (2015)SCAA 24 explained that:

*“A confession is generally described as an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law. On the other hand an admission is referred to as a statement or conduct adverse to the person from whom it emanates.*

- [35] Common law historically found that confessions made to the police or other persons in authority were inadmissible. Gradually the rule developed to make confessions to persons in authority admissible if certain conditions were met, namely that such confessions were voluntary in the sense that they was not obtained through fear, of prejudice or hope or advantage exercised or held out by a person in authority or oppression (see *Ibrahim v. The King* [1914] A.C. 599 (P.C.), *Callis v Gunn* [1964] 1 QB 495 and *R v Prager* [1972] 1 WLR 260.
- [36] Voluntariness if raised was tested through a *voir dire* in the absence of the jury with the prosecution having to prove beyond reasonable doubt that the confession was voluntary (*R v Thompson* [1893] 2 QB 12). Even then, the trial judge retains the discretion to exclude the confession if its prejudicial effect outweighed its probative value, that it was obtained by improper or unfair means or that it breached the Judges Rules (*R v Sang* [1980] AC 402, *R v May* (1952) 36 Cr. App R 91).
- [37] All these common law rules were codified in the English Police and Evidence Act 1984 and was replicated by similar Acts in other common law countries. Seychelles has no such Act relating to confessions and admissions but the common law principles crystallised by statutes in other common law countries remain in force. Section 12 of the Evidence Act makes it clear that the English law of evidence for the time being shall prevail in Seychelles.

[38] As stated above, confessions are clearly distinct from admissions made to ordinary citizens, who are those not in authority over the accused person. Extra curial admissions by accused persons to ordinary citizens are and were not subject to the same limitations or conditions imposed on confessions and continue to be an exception to hearsay.

[39] As such they are regarded as informal admissions and are statements that are, or may turn out to be, adverse to the case of the person who makes it and are generally admissible to prove the truth of the facts they contain. The common law justification for the reception of such admissions was expressed in the 19<sup>th</sup> century Parke B in *Slatterie v Pooley* (1840) 6 M & W 664, 151 ER 579, that:

*"what a party himself admits to be true may reasonably be presumed to be so".*

[40] Hence an admission made to but not induced by a person in authority is admissible (See *R v Gibbons* (1823) 1 C. & P. 97, *R v Tyler and Finch* (1823) 1. C & P. 129; *R v Godinho* (1922) 7 Cr.R. 12.

[41] Recently in the case of *Regina v Hayter* [2005] UKHL 6, Lord Steyn reiterated the law as to confessions and admissions as follows:

*"A voluntary out of court confession or admission against interest made by a defendant is an exception to the hearsay rule and is admissible against him. That was so under the common law. That is also the effect of section 76 of the Police and Criminal Evidence Act 1984. (Given the wide definition of confession in section 82(1) of PACE I will simply refer to confessions.) A confession is, however, generally inadmissible against any other person implicated in the confession. The rationale of the rule was stated in Digest of the Law of Evidence, 12th ed (1936), by Sir James Fitzjames Stephen as follows, at p 36:*

*'A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only.' (My emphasis)"*

[42] In the Canadian case of *R v Hodgson* [1998] 2 S.C.R. 449, a clear distinction is drawn between the need for a *voir dire* in confessions and in cases of admissions. The decisive element appears to be that where the statement is made to a person in authority and the voluntariness of the statement is in issue, the judge must exercise his discretion in both deciding whether or not the person was in fact a person in authority and whether or not to hold a *voir dire*.

[43] *Hodgson* concerned a case where the admission was made by the accused person to members of the family of the complainant in a rape case. Paisley J was at pains however to point out that even in cases

*“where a statement of the accused is obtained by a person who is not a person in authority by means of degrading treatment such as violence or threats of violence, a clear direction should be given to the jury as to the dangers of relying upon it.”*

[44] L’Heureux-Dubé J was of the view that that was too far a step. In his view the reliability of such admissions remains a matter for the trier of fact. In the circumstances of the case he found that:

*“there was no realistic possibility that the complainant and her immediate family constituted persons in authority for purposes of the confessions rule, and therefore the trial judge had no duty to hold a voir dire.”*

[45] The rules for admissions were tested in Seychelles in the case of *Guy Roger Pool v R* SCAR (1974) 88. On appeal in that case, Sir Alastair Forbes P. admitted the evidence of a witness to whom an admission had been made by the appellant about the planting of a bomb. He however looked for corroboration of the witness given the fact that the witness had fallen out with the appellant’s family and may therefore have been motivated in giving evidence against the appellant.

[46] Applying the above principles to the present appeal we have no difficulty in finding that the trial judge did not err in refusing both the application to exclude the admission of the appellant to his daughter or in not holding a *voir dire* to test the voluntariness of the admission as clearly no fear or inducement could have been held out by the daughter

who both subjectively and objectively was clearly not a person in authority. We also cannot find any defects in his summing up to the jury in terms of the admissibility of admissions and confessions generally. He correctly distinguished the two and explained that voluntariness was not an issue as the Appellant's daughter was not a person in authority over him.

[47] For those reasons this ground of appeal has no merit.

#### ***Ground 4***

[48] Learned Counsel for the Appellant has also submitted that the learned trial judge failed to address the jury sufficiently on the fact that the Appellant could not have been at the scene of the crime at the time given by the police.

[49] It is his contention that the victim was still alive at 6 pm and that the trial judge did not direct the jury to the fact he could not have killed the victim and still have had the time to bring his daughter's baby to his father in law's house (Albert Mondon) at around the same time.

[50] On this issue, learned Counsel for the Respondent has submitted inter alia that the opportunity to commit the crime in the limited time submitted by the appellant was not raised at the trial. He also submits that there is evidence that the Appellant was last seen arguing with his wife at 4 pm on the fateful day.

[51] We find that no strict time-line for the murder was ever established. The trial judge told the jury that it was the evidence of Albert, Julicia and Bryan Mondon that the Appellant had told them that he had been attacked by two persons who had taken his wife away around 5.30 pm. He also stated that Allen Tirant had testified that he last spoke to the victim at 4.40 on the fateful day when the phone had been snatched from her and that he had heard the Appellant's voice before the phone call had been cut out.

[52] The trial judge in his summing up drew the attention of the jury to the contention of the Appellant that it would not have been possible in half an hour on or around 5 pm to kill the victim and dispose of her body. He also directly addressed other possibilities

including the killing at an earlier time, hiding the body in the pit in the kitchen and the disposal of the body given the fact that the first police officer only arrived at the scene at 8.40 p.m.

- [53] In the case of *Beauchamp v R* (unreported) [2014] SCC 37, we explained that in regards to the summing up on the facts, the trial's judge's only duty was as stated by Lord Hailsham in *R v Lawrence* (1981) 72 Cr App R 1, 5 as to include :

*“a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which a jury are entitled to draw from their particular conclusions about the primary facts.”*

- [54] Given the above we are therefore unable to agree with the Appellant that the trial judge failed in his duty in this respect.

- [55] For all the reasons above this appeal is dismissed in its entirety.

- [56] In concluding, we are duty bound to make the following point. It has come to our attention that the Appellant has been convicted before this case of another murder for which he was pardoned.

- [57] The facts of the present case are of a wanton, evil and brutal murder. The victim received twenty-seven laceration and incision wounds together with dislocation of her right eye, fracture of her skull and her cervical spine. She died at her husband's hands in her own home while her children played not far from the house. A defenceless woman had reported to the Family Tribunal, the police and Anse Boileau clinic of her fears of being killed. She had suffered broken limbs and assaults on many occasions. She had even indicated that if she was killed her body might be hidden in a pit built by the Appellant in the kitchen. She received no protection apart from the two months during which the Appellant was made to serve a prison sentence when he last assaulted her. This is an appalling reflection of our society. Given the appalling violence in this case, we are not of the view that this is a case in which a pardon should ever be considered. We therefore appeal to the Pardon Advisory Committee, to which a copy of this

judgment is now forwarded to take these facts on board when next considering pardons to be submitted to the President for the purpose of articles 60 and 61 of the Constitution.

M. Twomey (J.A)

**I concur:** .....

J. Msoffe (J.A)

**I concur:** .....

B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 August 2017