IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2024] (19 August 2024)
SCA CR 04/2024
(Arising in CO 62/2023)

In the Matter Between

KENETH MARENGO **Appellant**

(rep. by Mr. France Bonté)

And

THE REPUBLIC **Respondent**
(rep. by Ms. Luthina Monthy)

Neutral Citation	*Marengo v R (*SCA CR 04/2024) [2024] (19 August 2024) (Arising in CO 62/2023)
Before:	Fernando President, Twomey-Woods and André JJA.
Summary:	murder, attempted murder, unspecified inconsistencies, effect of unchallenged confession on appeal, statement of personal opinion on facts by trial judge – life sentence and unqualified additional sentence for attempted murder
Heard:	5 August 2024
Delivered:	19 August 2024

ORDER

The convictions and sentences are upheld.

JUDGMENT

DR. M. TWOMEY-WOODS JA

(Fernando President and André JA concurring)

Background

[1] On 28 May 2023, in the early hours of the morning, 78-year-old Hans-Josef Hackl and his 68-year-old girlfriend, Alfiya Pozhidaeva, were assaulted in the villa they occupied at

the Castello Hotel, Anse Kerlans, Praslin. Mr. Hackl died as a result of his injuries, whilst Ms. Pozhidaeva suffered life-threatening injuries.

[2] As a result of their investigation, on 3rd July 2023, the police arrested Kenneth Marengo as he waited at a bus stop at Grand Anse, Praslin. He was subsequently charged with the murder of Mr. Hackl and the attempted murder of Ms Pozhidaeva.

[3] It was the prosecution's case that Mr Marengo had broken into the villa of the deceased and his girlfriend with the intention to steal and, on being surprised by the occupants, first assaulted and stabbed Ms Pozhidaeva, who though injured, was able to run to the guardhouse and raise the alarm. In her absence, Mr Marengo assaulted, stabbed and strangled Mr Hackl, whose lifeless body was discovered by the hotel's security guard.

[4] Mr. Marengo did not adopt any clear defence. He gave a retracted confession in which he admitted going to the villa to steal and attack the two occupants. He did not give evidence at the trial.

[5] The jury, in a unanimous verdict, found him guilty of both counts. The learned trial judge sentenced him to life imprisonment for the first count and 25 years imprisonment for the second count.

[6] Mr. Marengo has appealed to this court against his convictions and the sentences.

The grounds of appeal of Keneth Marengo

[7] Mr. Marengo has put up the following two grounds of appeal:

(1). Appeal against conviction:

The learned judge Vidot erred in his summing up on the following basis:

wrongly appreciating and putting the relevant law and facts with respect to the burden of proof cast on the prosecution in this matter on count 1. It follows on that basis that the learned judge failed to properly consider:

firstly, the defence of the convict that there was another person or persons on the scene of crime on the fatal night of the alleged murder of the victim Hans-Joseph Hackl and the attempted murder of Alfiya Pozhidaeva, hence rendering the summing up in that regard amiss crucial facts of the case and infringing on the rights to a fair trial and presumption of innocence of the convict in the trial process; and

secondly, the defence submission of a series of contradictory and uncorroborated evidence on record leading to reasonable doubts in evidence in favour of the convict thus further clouding the minds of the jury as to the real estate of evidence on record infringing on the rights to a fair trial and presumption of innocence of the convict in the trial process.

(2) Appeal against sentence

(i) The learned judge Vidot failed to apply his mind to the principle of appropriate sentencing in this case in that the sentences ought to have been made to run concurrently or both counts one and two rather than consecutively.

(ii) the learned judge Vidot failed to consider the most appropriate sentence to be meted out against the convict on the second count in this case in complete disregard to the principles of appropriate sentencing thus rendering the sentence is imposed as harsh and excessive in all the circumstances of this case.

We now consider each of Mr. Marengo's grounds of appeal.

The appeal against conviction

The appellant's submissions

[8] Mr. Bonté, learned Counsel for Mr. Marengo, has submitted in writing that the learned trial judge misdirected the jury in that he expressed his personal opinions, first on the possible defences available to the appellant and secondly regarding contradictory evidence. He further submits that the judge "brainwashed and clouded the reasoning of the jury" regarding their final deliberations on the facts of the trial. He has vaguely referred to

pages 1012 to 1076 (64 pages) of the summing up without pinpointing or highlighting the misdirections he complains of.

[9] Mr. Bonté also contends that the learned trial judge's commenting on the various defences advanced by Mr. Marengo and giving his personal opinion amounted to taking over the burden placed on the jury and furnishing them with an answer before they were given the opportunity to deliberate on the facts in an independent and impartial manner.

[10] He further submits that the judge adopted the same approach when addressing the contradictory evidence in the case. However, Mr Bonté does not specify the contradictory evidence on which the learned trial judge misdirected the jury.

The respondent's submissions

[11] In response, Mrs. Luthina Monthy, State Counsel for the Republic, has submitted that Mr. Marengo's grounds of appeal lack clarity and are somewhat contradictory. To illustrate the point, she highlights the contradiction in Mr. Marengo's submissions, that "the judge failed in addressing the jury as to his personal opinions firstly on the possible defences available to the appellant and the series of contradictory evidence on record" but then goes on to state that "the judge made it a must each time an available defence was explained to the jury to later give his personal opinion on the matter and then leaving it to the jury."

[12] Mrs. Monthy submits that, be that as it may, on several occasions during the trial and during the summing up, the judge reminded the jury of their role in the proceedings. She points out that in paragraphs [4] and [5] of the summing up, the judge stated that the jury was the sole judge of fact and that as judge of fact, their function was to examine and evaluate the factual evidence in the case and that they must base their findings only on the testimonies and exhibits that had been brought by the witnesses before the court.

[13] Further, after summarising the facts, the learned trial judge reminded the jury that some facts might be more important than others and that it was up to them to decide what facts to accept and what verdict to return.

[14] In terms of stating his own opinion on the evidence, Mrs. Monthy submits that after doing so, the learned trial judge reminded the jury on several occasions (namely in paragraphs 65, 89, 146, and 187 of the summing up) that they did not have to agree with him. He also reiterated that his role was not to influence the jury or favour either side.

The applicable law

[15] In terms of the province of the judge in jury trials, section 265 of the Criminal Procedure Code provides:

> *"1) The judge shall decide—*
> *(a) all questions of law arising in the course of the trial and especially all questions as to the relevance of facts, the admissibility of evidence and the propriety of questions to witnesses asked or proposed by the parties or their counsel and, in his discretion, preventing the production of irrelevant or inadmissible evidence, whether objected to by a party or not;*
>
> *(b) the meaning and construction of all documents given in evidence at the trial;*
>
> *(c) all matters of fact necessary to be proved in order to enable evidence of particulars matters to be given;*
>
> *(d) whether any question which arises is for himself or for the jury.*
>
> *(2) The Judge may, whenever he thinks proper in the course of the summing up, express to the jury his own opinion on any question of fact, or of mixed law and fact, relevant to the proceedings."* [Emphasis added]

[16] Section 265(2) of the Code clearly permits a trial judge to express his opinion on matters of fact. The qualifications are that this must be done with propriety and be relevant to the proceedings. The basis for this rule is the constitutional guarantee of fair trials. In this regard, Mrs. Monthy has referred us to the case of *Parekh v The Republic and Anor* (CP 5 of 2021) [2022] SCCC 2 (26 April 2022), in which Fernando PCA, had recourse to English and Jamaican authorities to explain what might be regarded as a reasonable expression of a trial judge's views.

[17] In the cases of *R v Nelson* (1997) Crim. L. R. 234, *Uriah Brown v The Queen* [2005] UKPC 18, and *Adrian Forrester v R*, SC Criminal Appeal NO 42/2016, [2020] JMCA Crim 39, the view is expressed that a trial judge is perfectly entitled to comment on the evidence and give his assessments on the difficulties or deficiencies apparent in the case as long as he reiterates that the jury are the final arbiters of fact and that they do not have to accept his views.

Applying the law to the facts of this case

[18] It is trite that the trial judge in a jury trial has the responsibility for managing and presenting the facts. The judge has an obligation to assist the jury in their deliberations by providing an overview of the relevant evidence. This is distinct from the closing speeches made by the advocates. The judge has a duty to collate and set out the relevant evidence in a way that helps the jury make their determinations. This is to mitigate the possibility (most often the probability) of distortion by Counsel on each side. Even in extreme cases where there is much negative comment from the judge, appellate courts have refused to set aside the jury's verdict. The case of *Farooqi and Others* [2014] 1 Cr App R 8 illustrates such circumstances. In that case, the summation highlighted the defence counsel's failure and incompetence, describing the counsel's submissions as "hopeless", yet the Court of Appeal held that Farooqi's defence "was fairly before, but unsurprisingly rejected by the jury" (paragraph 121).

[19] However, as earlier pointed out, a trial judge's comments to the jury must be made with 'clarity, impartiality and without exaggeration' (*R v Berrada* [1990] 91 Cr App R 131).

[20] In *R v Evans* (1990) 91 Cr App R 173, the Court of Appeal also held that a judge was entitled to draw attention to discrepancies in the defendant's case - "[p]roviding the matters with which he deals are matters which have been given in evidence, it is open to him to comment upon them."

[21] In the present case, we have scrutinised the learned trial judge's summing up in the light of these authorities and the provisions of section 265(2) of the Criminal Procedure Code. In

this regard, we cannot find any merit in Mr. Bonte's submissions. We are particularly concerned with his statement that the learned trial judge "brainwashed and clouded the reasoning of the jury" without any reference to the offending part of the summing up. The use of inappropriate or unprofessional language by Counsel in court proceedings can undermine the dignity and decorum of the courtroom, reflecting poorly on the judiciary as a whole. Counsel who resort to inflammatory rhetoric or personal attacks rather than focusing on the merits of the case risk damaging public confidence in the impartiality and fairness of the judicial system. It also reflects poorly on Counsel's competence and professionalism.

[22] We make a similar finding regarding Mr. Marengo's complaint about the learned trial judge's summation of the defences advanced by the appellant and the alleged misdirection based on contradictory and uncorroborated evidence. No details of these misdirections have been submitted, and having scrutinised the summing up, we cannot find any merit in the complaints in these grounds of appeal.

[23] We are also confused by these submissions, given the fact that Mr. Marengo advanced no clear defence at trial and confessed that he broke into the deceased's villa, stabbing both the deceased and his girlfriend and then strangling the deceased. It must be noted that there was no grounds for appeal regarding the retraction of the confession. This confession, therefore, remains unchallenged and negates any attempt by the Appellant to cast doubt on the identity of the perpetrator of the murder. One cannot seem to be saying in the same breath that "I did it" while at the same time contesting inconsistencies in who did the killing.

[24] These grounds of appeal, therefore, have no merit and are dismissed.

The appeal against sentence

The appellant's submissions

[25] In his written submissions of the appeal against the sentence, Mr Bonté for Mr. Marengo contends that "the applicable law on sentencing principles was wrongly appreciated and

applied by the learned trial judge in meting out the most appropriate sentence to the appellant."

[26] He supports these submissions by stating that the learned trial judge was so brief in the sentencing of the convict that he completely disregarded the principle of proportionality in not considering and ordering concurrent sentences or giving his reason to justify the sentence imposed for the second count of attempted murder.

[27] He further submits that the circumstances of the offences and the offender were not even considered. He also contends that the convict was not given an opportunity to mitigate the sentence.

The respondent's submissions

[28] Mrs. Monthy has conceded that the learned trial jduge did not indicate whether the sentences should run consecutively or concurrently.

[29] She has highlighted that in trials by juries, sections 272 and 143 of the Criminal Procedure Code, respectively, do not require a mitigating address from Counsel or that the trial judge write a judgement. That being the case, the judge need not state any reasoning for the sentence imposed.

[30] A sentence of 25 years for a count, which is to run consecutively or concurrently with a life sentence for another count, is, in any case, surplusage in that context.

Our decision

[31] No comparative authorities have been presented to this court for the submission that the sentences for the two offences are unduly harsh. In any case, as the sentence for murder is life imprisonment and similarly for attempted murder, a sentence of 25 years for the count of attempted murder cannot be seen to be unduly harsh or excessive. Although we reiterate that sentencing is the province of the judge (*Marengo v R* (SCA 29 of 2018) [2019] SCCA 28 (22 August 2019), *Poonoo v Attorney-General* [2011] SLR 424) and that not even the legislature can encroach on that discretionary power, the sentence for murder in this jurisdiction has statutorily and constantly in our jurisprudence been a life

sentence. We see no reason to depart from this established practice in the circumstances of the present case.

[32] With regard to the sentence of 25 years for the count of attempted murder, the fact that a sentence of life imprisonment was imposed for the first count of murder, it is immaterial whether the sentence of 25 imposed for the second count is consecutive or concurrent. In this jurisdiction, life means life. In *Pothin v R* (2006 - 2007) SCAR 235, this court remarked:

"The words life imprisonment" …should be given their ordinary and natural meaning… life imprisonment should mean life imprisonment."

[33] The only qualification to this statement would be the operation of the provisions of Article 60 of the Constitution, which bestows on the President the power to grant pardons. But that would be subsequent to the sentence imposed by the court.

[34] On a purely academic level, it may have been clearer for the learned trial judge to indicate that the sentences were to run concurrently. The rule is that sentences should be executed consecutively (*Vinda v R* (SCA 6 of 1995) [1995] SCCA 32 (19 October 1995) and that the Court, as an exception to this rule, may impose a concurrent sentence when the offences arise from the same criminal act or arise out of the same transactions (*Confait v R* (1979) SCAR 481, *Alcindor v R* (2007) SLR 32, *Laporte v R* (1980) SCAR 518, *Marzocchi v R* (1985) SLR 30. As the learned trial court did not indicate whether the sentences were to be executed consecutively or concurrently, these grounds of appeal, as canvassed, have no merit.

[35] In the circumstances of the case, the appeals against both conviction and sentence are dismissed.

Order

[36] We uphold the conviction and sentence of life imprisonment for the murder of Hans-Joseph Hackl and that of 25 years imprisonment for the attempted murder of Alfiya Pozhidaeva. To avoid doubt, these sentences are to run concurrently.

Signed, dated and delivered at Ile du Port on 19 August 2024.

_____

Dr. M. Twomey-Woods, JA.

I concur

_____

A. T. Fernando, President

I concur

_____

S. André, JA