Republic v Malbrook
(2008) SLR 36

Frank ALLY for the Republic
Antony DERJACQUES for the accused
Accused present

Ruling delivered on 22 June 1998 by:

PERERA J: The instant ruling concerns the validity of an accused being accompanied by the police to the alleged scene of the crime without informing his counsel. According to the proceedings in case no 241/98 of the Magistrates' Court, the accused was produced before the Magistrate on 24 March 1998 at 9.30 am.

At the trial before the Supreme Court L/C Maxime Payet testified that the accused volunteered to accompany him, Det Constable Chantal Prea and some other officers to the plantation where he pointed out the area where the cannabis plants had been planted. The prosecution seeks to produce an album of photographs containing 18 photographs. Photographs numbered 1-15 show a plantation which L/C Payet testified were cannabis plants cultivated by the accused. He further testified that those photographs had been taken before the plants were uprooted, while photographs numbered 16, 17 & 18 were taken thereafter on 24 March 1998.

The right to be defended by a lawyer of the accused person's choice is contained in article 19(2)(d) of the Constitution. That right provides that “every person who is charged with an offence…has a right to be defended before the court in person, or, at the person's own expense by a legal practitioner of the person’s own choice ....."

The accused was produced before the Magistrates' Court on 24 March 1998 for the first time upon an affidavit filed by L/C Maxime Payet, as a suspect. An application for remand for a period of 2 days was made under section 101(1) of the Criminal Procedure Code, inter alia, as investigations were not completed by that date. He was then a suspect and not an accused charged with an offence. Therefore during the period of remand, up to a maximum period of 7 days, the police officers are free to conduct their investigations. In the course of such investigations, the suspect, who has still not been formally charged, may make a statement or accompany the police officers to the scene of the crime without consulting his lawyer provided that he does so voluntarily. The burden of proving that those matters were done voluntarily remains with the prosecution.

In the instant matter, L/C Payet has testified that the accused, who was then a suspect, volunteered to accompany them. This must necessarily be tested on a voir dire in view of the objection raised. However, without deciding the constitutional implications, I rule that in order to provide the accused with a fair hearing, the photographs numbered 16, 17 and 18, taken on 24 March 1998 should be excluded from the album and that no

evidence should be adduced by the prosecution as regards the circumstances under which they were taken.

Record: Criminal Side No 4 of 1998