Republic v Simeon
(2003) SLR 186

Anthony FERNANDO for the Republic
Bernard GEORGES for the Accused

Ruling delivered on 3 July 2003 by:

JUDDOO J: By the instant motion the Applicant seeks a decl n to the effect that "the institution of proceedings against the Applicant under S 192 of the Penal Code:

(a) amounts to the Applicant being tried again, on same facts, for an offence for which he had been acquitted, and

(b) contravenes and the continuation of the said edings is likely to contravene Section 115 of the Criminal Proced Code as read with Article 19 and 19(5) of the Seychelles Charter ndamental Human Rights and Freedoms.

On 13 October 2000 the Applicant was charged with two cour murder contrary to Section 1 93 of the Penal Code. Following his trial, the Jur rned a unanimous verdict "not guilty of murder, guilty of manslaughter" on each c The Applicant was convicted of manslaughter on both counts and sentenced to urrent terms of 15 years imprisonment. Following the Applicant's appeal aga his conviction and sentence, *F Simeon v R*, CA 7 of 2001, the Seychelles Court to al found that:

> a serious miscarriage of justice has occurred and that onviction for manslaughter on both counts is unsafe and unsatisfact nd should be set aside...

In addition the Court of Appeal determined that:

> a re-hearing of the case is called for in the interests o ess and the integrity of the criminal Justice system, especially since merits of the appellant's defence of non-insane automatism was not p rly dealt with during the trial process.

In pursuance of the above determination, the following order wa de:

(1) The appeal against the conviction for manslaught both counts is allowed and the said conviction is accordingly set aside. Consequently, the sentence falls away;

(2) There shall be a re-hearing on the two counts of manslaughter and

> for the avoidance of doubt the appellant shall remain in custody pending his trial.

It is common ground that subsequent to the above-quoted judgment delivered by the Seychelles Court of Appeal, in April 2002, the Learned Attorney-General swore to an information charging the Applicant with two counts of manslaughter contrary to Section 192 of the Penal Code.

On 21 May 2002, on behalf of the Applicant, a petition was filed before the Constitutional Court of Seychelles seeking, inter-alia, under paragraph 3 of its prayer:

> a declaration that the institution of proceedings against him (the Applicant) under Section 192 of the Penal Code contravened, and the continuation of the said proceedings was likely to contravene Article 19 and 19(5) of the Seychelles Charter of Fundamental Human Rights and Freedoms.

In the examination of the said petition the Constitutional Court found that "prayer 3 based on Article 19(5) is a plea that my case be taken before the trial Court".

Being dissatisfied and aggrieved by the above decision, the Applicant filed an appeal before the Seychelles Court of Appeal, seeking, inter alia:

> 3. Having but partly considered the arguments placed before it in respect of the declaration sought under prayer 3 of the petition, the Constitutional Court erred in not making a specific finding to the effect that the institution of proceedings against the appellant under Section 192 of the Penal Code contravened, and he continuation of proceedings was likely to contravene Article 19 generally and specifically Article 19(5) of the Seychelles Charter of Fundamental Human Rights and Freedoms.

In its judgment, delivered on 9 April 2003, (*F Simeon v A-G* CA 26 of 2002) the Seychelles Court of Appeal stated:

> We re-iterate what we stated to Counsel of the appellant in Open Court, namely that the decision of the Seychelles Court of Appeal (Criminal Appeal no 7 of 2001) dealt eventually with two fundamental issues:
>
> (1) the whole trial process became flawed on account of the refusal of the trial Court to refuse the motion of the defence to adduce expert evidence on the question of non-insane automatism; and
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> (2) the trial Court misdirected itself on the issue of diminished responsibility, So that certain grounds of appeal, including the two grounds relied upon by the appellant in this case, became "unnecessary" for consideration, With regard to the third ground of

> appeal, we have again to observe that the appellant is once more questioning an order relating to fresh trial made by the Seychelles Court of Appeal..... The appellant cannot question this order of the Seychelles Court of Appeal made under Article 19(5) of the Constitution.....

Taking the above into account, the issue raised under the first limb of the motion is what is commonly known as the plea of "*autrefois acquit*'. The burden of proving "*autrefois acquit*" is on the Defendant vide *DPP v Joomun* (1983) MR 63. Learned Counsel for the Applicant referred this Court to the case of *Connelly v DPP* [1964] AC 1254, which in establishing out the scope of the plea "autrefois acquit", at common law, directed that a person may not be tried for a crime in respect of which he could in some previous indictment have been lawfully convicted as a statutory or common law alternative to the offence for which the Defendant was convicted or acquitted. It is undeniable that the common law principle, as set out under the plea of *"autrefois it",* has to take into account the statutory powers provided to a higher Court in its late jurisdiction. In that respect, it is pertinent to observe that ever in Archbold, *Cri Pleading Evidence and Practice*, (43 ed) at paragraph 4 - 480, the author spells o at the common law principle set out in *DPP v Connelly,* supra, is subject to the exp proviso which at the bottom of the said paragraph reads as follows:

> The powers of the Court of Appeal (Criminal Division) u the Criminal Appeal Act 1968 S 3 (power to substitute convict f alternative offence) and S 7 (power to order new trial) should b ticed in this context.....

In the local context, by virtue of Section 324 (1) of the Crimi rocedure Code, as amended by Act 14 of 1998, any person convicted, other tha a plea of guilty, is entitled to appeal against his sentence and conviction on a tr ld by the Supreme Court. Where this is the case, Rule 41(1) of the Court of App ules 1978, as read with Article 120(4) of the Constitution, provides that the Seychel ourt of Appeal:

> may thereupon confirm, reverse or vary the decision of rial Court, or may order a re-trial or may remit the matter with the op of the Court thereon to the trial Court, or may make such order in atter as to it may seem just, and may by such order exercise any po hich the trial Court might have exercised.....

The exercise of the appellate powers should be within the co of Article 19(5) of the Constitution which provides that a person who has been tri a competent Court for an offence and either convicted or acquitted, shall not be trie in:

> for that offence or any other offence of which the per ould have been convicted at the trial save upon the order of a Supe ourt in the course of appeal.....proceedings relating to the convictio cquittal.

On behalf of the Applicant it is contended that the Applicant having been "acquitted" of the offence of murder under Section 193 of the Penal Code also stands acquitted of the offence of manslaughter at common law following *Connelly v DPP*, supra, and could not be re-tried for that offence.

Firstly, it is trite law that at common law on an indictment for murder, a person may be convicted of manslaughter, vide: *Mac Kelly's case* (1611) 9 CO Rep 61*, R v Greenwood* (1857) 7 Cox CC 404. An examination of the verdict delivered by the Jury disclose that they unanimously found the Applicant "not guilty of murder but guilty for manslaughter." They did not qualify their verdict further to state that they had found the Applicant guilty of manslaughter "by virtue of diminished responsibility" although this may be presumed to be so given the summing up of the Learned trial Judge. However, it is also of record that the conviction entered by the trial Court reads as follows:

> The accused was charged with the offence of murder on two counts. The jury unanimously convicted him of the offence of manslaughter contrary to Section 192 and punishable under Section 195 of the Penal Code on each Count.

By contrast a conviction for manslaughter by virtue of diminished responsibility proceeds under S 196A of the Penal Code and the sentence is delivered under Section 196A (3) of the said Code under which provision the trial Court is additionally empowered to order that the convict be detained during the President's pleasure. Accordingly, on the face of the record, the Applicant was convicted of manslaughter "contrary to Section 192" of the Penal Code. Having been so "convicted" it can hardly be said, without more, that the Applicant was "acquitted" thereof. On this ground alone the plea of "autrefois acquit" would fail.

I shall additionally consider the matter if one were to presume from the Learned Trial Judge's summing up that the Applicant had been found "not guilty of murder but guilty of manslaughter by virtue of diminished responsibility" and the convictions entered by the trial Court amounted to convictions under Section 196 A of the Penal Code. Article 19(5) of the Constitution provides that a person tried 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". It is submitted on behalf of the Applicant that the appeal proceedings related to the conviction of the Applicant for manslaughter by virtue of diminished responsibility and that the Applicant could not be tried again for manslaughter, simpliciter, under Article 19(5) of the Constitution. What is relevant for the operation of Article 19(5) is that the appeal proceedings pertained to an indictment for the offence of two counts of murder on which indictment the Applicant could have at common law been convicted of the lesser offence of manslaughter on each count. In F. Simeon v. R CA 7 of 2001 the Seychelles Court of Appeal mad order in the course of appeal proceedings that for the Applicant to be tried a on two counts of manslaughter. The said order could not relate to mans ter by diminished responsibility for the Appellate Court found that "both sides ag nat, in the event of

the Court allowing the appeal, a re-trial for manslaughter only r e ordered....." Had the Appellate Court intended the Applicant to be retried for n r and for which he could have, successfully or not, raised the issue of diminished nsibility in order to reduce the charge of murder to manslaughter it would have ssly said so. In *F Simeon v R* CA 26 of 2002, the Seychelles Court of Appeal hel the order for fresh trial was one made under Article 19(5) of the Constitution. Ac ngly, I find that the instant proceedings is in pursuance of the order made by a Sup Court in the course of appeal proceedings and the plea of "autrefois acquit" cannot ed.

I shall now consider paragraph (b)of the instant motion before t urt. The said motion repeats the claim brought before the Constitutional Cour ler paragraph 3 of the prayer to the petition) with the surplusage of Section 115 of riminal Procedure Code. In its judgment *F Simeon v AG* CA 26 of 200*2*, the Seycl Court of Appeal expressed serious concern against the attempt to:

> rehearse the same arguments or adduce further argume n a review of the merits of the decision of the Seychelles Court of A l which is, it should be underlined again, the highest Court, and nal Court of Appeal, of the lord.

Such a course of action it is observed would amount to "seri compromising the fundamental principle of finality of judgment of the Seychelle urt of Appeal". In conformity with the above, the order made by the Seychelles Court of Appeal for the Applicant to stand trial (by way of re-hearing) for the two counts of manslaughter cannot be challenged before this forum in view of the fact that the Applicant has specifically raised the issue before the Constitutional Court and the matter was fully and finally determined when the Seychelles Court of Appeal held that:

> The Appellant cannot question this order of the Seychelles Court of Appeal made under Article 19(5) of the Constitution of Seychelles.....In the light of the wording of Article 19(5) cited above, it cannot be seriously argued that this Court has no jurisdiction to order a new trial in the matter.

The remaining issue, therefore, will be an examination of the propriety, or otherwise, of the Learned Attorney General swearing to a fresh information on two counts of manslaughter.

It is certain that once a criminal charge has been preferred against an individual he is to be tried upon the information until a final verdict is reached by the Competent Court. The Competent Court is empowered to decide the matter unless the complaint is sooner withdrawn under Section 178 of the Criminal Procedure Code or a *nolle prosequi* is filed under Section 61 of the said Code.

Where, after hearing and determination by the Competent Court, the convicted party challenges the conviction and sentence of the trial Court by way of an appeal to the

highest Court the matter is to be conclusively determined by the decision of the Appellate Court. Accordingly, when the Appellate Court makes an order to the effect that there shall be a re-hearing, it can hardly be said that the proceedings against the person charged have been brought to a conclusion. The proceedings continue in compliance with the order from the Court of Appeal until it is brought to finality.

Learned Counsel on behalf of the Applicant has drawn attention to the case of *Bennett and Augustus John v R* (supra). Suffice it is to say that the powers and rules of the Appellate Court being largely statutory in nature it is to the local rules that one has to resort to in priority. Under Rule 44 of the Seychelles Court of Appeal Rules (1978), as read with Article 120(4) of the Constitution, it is provided as follows Article 120(4) Constitution:

> Subject to this Constitutional and any other law, the authority, jurisdiction and power of the Court of Appeal may be exercised as provided in the Rules of the Court of Appeal.

Rule 44 Seychelles Court of Appeal Rules (1978) unamended by S.I. 49 of 2000:

> (1) Whenever a criminal appeal or matter is decided, the judgment or order of the Court shall be embodied in a formal order by the Registrar and a sealed copy of such order shall be sent by the Registrar to the Registrar of the Supreme Court.....
>
> (2) The trial Court shall thereupon make such orders as are comfortable to the order of the Court and if the record shall be amended in accordance therewith.

In pursuance of Rule 44(2) of the Seychelles Court of Appeal Rules, I find no contradiction in the decision of the Learned Attorney General to swear in to two counts of manslaughter against the Applicant. Accordingly, I adopt the charges sworn to and amend the proceedings of the trial Court in pursuance thereof, and in conformity with the order made by the Appellate Court in case of *F Simeon v R* bearing case number CA 9 of 2001.

In the end result, I set aside the motion and order that the re-hearing of the Applicant of the two charges of manslaughter under Section 192 of the Penal Code as sworn in, adopted and made part of the proceedings, is to proceed on the merits.

Record: Criminal Side No 9 of 2002