

**The Republic v Marengo & Ors  
(2003) SLR 14**

Ronny GOVINDEN for the Republic  
Danny LUCAS for the First Accused  
Alexia ANTAO for the Second, Third and Eighth Accused  
Pesi PARDIWALLA for the Fourth Accused  
Frank ALLY for the Fifth and Sixth Accused  
ROMESH SUNDARAM for the Seventh Accused

**Order delivered on 10 February 2003 by:**

**PERERA ACJ:** Eight persons have been produced before Court charged with offences contrary to the Regulations made under the Wild Animals and Birds Protection Act. While the First to Seventh Accused, are charged on 6 counts offences involving killing of turtles and protected birds, possession of turtle or and conspiracy to commit a misdemeanour, the Eighth Accused alone is charged with the offence of unlawful possession of turtle meat. The particulars in the charge deal that the First to Seventh Accused had in their possession 1141 kg of turtle meat which constitutes the flesh of about 50 turtles, and 36.42 kg of bird meat, and the Eighth Accused had 58 kg of turtle meat. All the accused who have been duly served the charges have through their respective counsel obtained leave of this Court for to plead to these charges.

**Particulars of offence are as follows:**

The Prosecution has filed a motion pursuant to Section 179 of Criminal Procedure Code to remand the eight Accused “pending the full determination of the case”. The grounds relied on are as follows.

1. There are 8 persons charged in this case. If enlarged bail there is a real possibility that the trial would be unduly delayed a result of non-appearance of at least one of them on any subsequent date that this case is adjourned to.
2. That any delay may prejudice the case, as the exhibits are of a perishable nature.
3. That the case is of a serious nature with a likely high financial penalty and thus there is a fear of the accused interfering with the complainant and eye witnesses for the Republic and absconding if enlarged bail.

It must initially be stated that the eight persons before the Court are not “suspects” but persons charged with offences, and hence are “accused”. Accordingly, the circumstances set out in Section 101(1) of the Criminal Procedure Code (Amendment)

Act no. 15 of 1995 do not apply to them as they apply only to suspects before being charged. Article 18(7) of the Constitution which was relied on by all the defence counsel in the case in their submissions specifically apply only to "suspects". Article 18 of the Constitution guarantees the right to liberty and security of the person, subject to limitations. This right protects a person from arbitrary arrest and detention. Once a person is charged Article 19 provides that he has a right to a fair hearing. One such right, as contained in Sub Article (2) (a) is that he is considered innocent until proven otherwise, or has pleaded guilty. Although Mr Pardiwalla Learned Counsel for the Fourth Accused found uniqueness in this provision of the Constitution and submitted that the Constitution has declared that an Accused person "is innocent" until proven guilty, I fail to see any distinction in other Constitutions where this Fundamental Right is stated as a presumption of innocence. The two terms are facultative in the sense of stating that the burden of establishing a charge against a person is always with the Prosecution. However, Article 19(10)(b) contains a derogation to the declaration of innocence in Sub Article 2(a) which provides that it would not be inconsistent or a contravention of that right where a law "imposes upon any person charged with an offence the burden of proving particular facts or (declaring) that the proof of certain facts shall be *prima facie* proof of the offence or of any element thereof. The "reverse burden" provision contained in Section 14(d) of the Misuse of Drugs Act, was considered a permitted derogation by the Constitutional Court in the case of *Philip Imbuni v Republic* (Const Case 8 of 2001). Hence, with respect, there is no uniqueness in Article 19(2)(a).

Once a person has been charged with an offence, he becomes entitled to the right to a fair hearing which involves the rights specified in Subarticle (2) thereof. Procedurally, the remanding in custody pending trial or releasing him on bail falls within the discretion of Court by virtue of Section 179 of the Criminal Procedure Code. Hence the grounds urged by the Prosecution in the present case have to be considered on their merits before this discretion is exercised.

Considering ground 1, it was submitted by Counsel for the defence that the averment that there was a "real possibility" of at least one of the eight Accused being absent in Court on a trial date and consequently the trial being unduly delayed, was speculative, and was therefore not a valid ground. It is the experience of Court that either the Accused or their Counsel fail to appear on trial dates for various justifiable reasons which are beyond their control. However where an accused person absconds and it is proved that there is no immediate prospect of arresting him. Section 133(1) of the Criminal Procedure Code provides for the taking of evidence in his absence. Article 19(2) (i) of the Constitution also provides that a person charged with an offence:

shall, except with the person's own consent, not be tried in the person's absence unless the person's conduct renders the continuance of the proceedings in the person's presence impracticable and the Court has ordered the person to be removed and the trial proceeds in the person's absence.

Further the delay caused by the absence of one or two accused, when several accused

are being tried, should not affect the right of those present to be tried within a reasonable time. Hence I agree with Learned Counsel for the defence that this is not a valid ground in seeking a remand order until the final disposal of the case.

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In the second ground, the prosecution avers that the exhibits are of a perishable nature, and hence any delay would prejudice the case. I consider this ground as an argument in favour of an expedited trial rather than an argument in favour of remanding the accused persons. More than 10 years ago, the Criminal Procedure Code provides that any property seized and detained until the conclusion of the case "reasonable care for its preservation". If an appeal is made upon conviction, such property shall be restored to the person from whom it was taken, unless the Court sees fit and is authorised or required by law to do otherwise. In the present case, whether the accused are convicted or acquitted, the turtle meat and bird meat which will be exhibited would be liable to be destroyed. Distribution of such meat would be contrary to the nature and purpose of the Wildlife Protection Act. In any event, the Prosecution has disclosed in its affidavit that the meat is salted. Hence it would be the duty of the Court to take "reasonable care" for its preservation, as required by Section 98 of the Criminal Procedure Code. Ground 2 is again an argument in favour of an expedited trial rather than a ground to remand the accused persons. I do not find merit in that ground.

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Ground 3 has three elements, namely:

1. The case is of a serious nature with a likely high financial penalty.
2. Consequently there is a fear of the Accused interfering with the virtual complainant and other prosecution witnesses.
3. There is also the fear that if released on bail, they would abscond.

I have already dealt with the 3<sup>rd</sup> element and stated that Section 133(1) of the Criminal Procedure Code provides for such an eventuality.

As regards the 1<sup>st</sup> element, Learned Counsel for defence vehemently objected to the offence being categorised as "serious". They submitted that in terms of the definitions in Section 5 of the Penal Code, a misdemeanor is an offence which is punishable with imprisonment for less than three years. The maximum custodial sentence that is permitted for the present offences is 2 years, and hence it is a misdemeanor. However the offence carried a minimum fine of R5000 and a maximum of R500,000. The charge discloses that the First to Seventh Accused are being charged for slaughtering about 50 turtles and about 40 protected birds. Learned Senior State Counsel, has in his affidavit stated that "the case is of a serious nature", and not that the "offence is serious". He was undoubtedly aware that a misdemeanor could not be categorised under serious



witnesses, nor that they would abscond.

I have carefully considered the submissions for the prosecution as well as for the defence. Although the case is of a serious nature, I cannot find any other ground that could not be regulated by strict bail conditions to assuage the apprehensions of the prosecution.

Accordingly, acting under Section 179 of the Criminal Procedure Code I grant bail to the First to Eighth Accused on the following conditions:

1. That they each enter into a recognisance in the form of a bond for R25,000 with two sureties.
2. That they surrender their passports or other travel documents to the Registrar of this Court forthwith.
3. The Director of Immigration to be informed that no passport or travel document should be issued to the eight accused, without a further order of this Court.
4. That the eight Accused report to the Police Station nearest to their place of residence every Monday and Friday at 9 a.m. They shall not leave Mahe to any outer or inner Island without the sanction of Court.
5. That they do not either directly or indirectly interfere with, the virtual Complainant or any other prosecution witness, nor engage in any activity that would affect the course of justice.
6. That they do not abscond, and that they will attend Court punctually on each and every day the case is adjourned either for mention or trial.

The breach of any one of these conditions by any of the Accused would make him liable to be remanded till the final determination of the case.

**Record: Criminal Side No 11 of 2003**