

**The Republic v Marengo & Ors
(2004) SLR 116**

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Ruling on submission of no case to answer delivered on 6 April 2004 by:

PERERA J: In this case, the First to Seventh Accused were originally charged with 5 counts, but subsequent to the Prosecution withdrawing counts 2, 3 and 5, they presently stand charged with Counts 1 and 4. Count 1 relates to unlawful possession of turtle meat and Count 4 with the killing of a protected bird. The 8th Accused stands charged with Count 6, namely for possession of turtle meat.

At the end of the Prosecution case, Learned Counsel appearing for all the eight Accused made separate submissions of no case to answer in respect of their respective Accused.

The Practice Note, reported in (1962) 1 AER 448, as followed in *R v Stiven* (1971) SLR 137 provides that a submission of no case to answer may properly be made and upheld in two situations.

- (a) When there has been no evidence to prove an essential element in the alleged offence
- (b) When the evidence adduced by the Prosecution has been so discredited as a result of cross examination or is so manifestly unreliable, that no reasonable tribunal could safely convict upon it.

The note further goes on to direct that that –

Apart from these two situations, a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on evidence so far laid before it, there is a case to answer.

Hence the primary consideration at this stage of the case is to consider whether the Prosecution, has established a prima facie case against the accused persons, sufficiently to require them to make a defence. It is therefore purely an objective consideration, and a step in the procedure. In the case of *Treffle Finesse v R* the Seychelles Court of Appeal followed the 2nd guideline provided in the case of *R v Galbraith* that-

- 2(a) Where the Judge comes to the conclusion that the Prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
- (c) Where, however, the Prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts there is evidence upon which could properly come to the conclusion that the Defendant is guilty, then the Judge should allow the matter to be tried by the jury.

The Prosecution evidence against the Accused consists of: (1) a statement made by them to the Police under caution, which this Court after holding *voire dire* admitted them in evidence on the basis that they were made voluntarily; (2) evidence of Mr. Selby Remy, the Expert who testified regarding exhibits of turtle meat and bird meat produced in the case; (3) two witnesses, who testified regarding the presence of some of the Accused in the case at Providence, where the boat carrying the alleged turtle meat and bird meat, was moored on 30 of January 2003; (4) Evidence of Police Officers engaged in the investigation.

The Evidence of the Expert

Learned Counsel for the First Accused, with the other Counsel agreeing submitted that the evidence of Mr. Selby Remy, the Expert witness for the Prosecution was imprecise and should not be acted upon in deciding whether there is a case to answer as, he was unable to satisfactorily establish that the exhibits produced in the case were turtle meat, and that the birds alleged to have been killed were of a protected species. Mr Remy testified that there were three types of "Boobies" in Seychelles, the masked booby, the red-footed booby, and the brown booby, but he stated that although he was certain that the meat seen by him in the gunny bags belonged to the "Booby" family, he could not state as to which of the three species they belonged, as they were cleaned, cut and salted. The Second and the Seventh Accused referred to the meat as that of birds called "Fou". Mr Remy stated that a "Booby" is also a "Fou". Adrian Skerrett in his book *Birds of Seychelles* gives the creole name of the masked Booby as "Fou Zenero", that of the red footed Booby as "Fou Bef or Fou Rozali" and the brown Booby as "Fou Crispen". As regards turtle meat as well Mr Remy stated that the meat was undoubtedly that of a green turtle which had only one claw flipper. This was

observed on inspection of the exhibits at Providence and confirmed in the IUCN/SSC Marie Turtle Specialist Group Plan "Research And Management Techniques For The Conservation of the Hawaiian Monk Seal". See also *Treffe Finesse* (supra):

Whether his evidence (that of an Expert) was reliable was a matter for the trial Court to determine on a submission that there was evidence which if accepted would support a conviction. At that stage of the proceedings, it was not to accept or reject evidence.

I am satisfied that the evidence of Mr. Remy without further support would support a conviction in the case.

Before I examine the other relevant evidence, I propose to consider the admissions of a co-Accused, upon which a substantial part of the Prosecution case is based. It is a fundamental evidential Rule that an admission by one Accused in the absence of another Accused was *not evidence* against that other Accused. This does not mean that the same Act committed by one Accused should be considered as not having been committed by the other. I propose to consider the admission can be *proved only against the maker and not against*

However, two recognised exceptions to this Rule are –

- (1) Where the co-Accused by his words or conduct accepts the truth of the statement, so as to make all or part of it a confession statement of his own.
- (2) In the case of conspiracy or any crime which, according to the case for the Prosecution, was committed in pursuance of a conspiracy; statements or acts of one conspirator in the execution or furtherance of the common design are admissible in evidence against any other party to the conspiracy provided that there is some other evidence of the common design.

Before the Accused were called upon to plead, the defence raised a preliminary objection to Counts 2 and 5 of the original charge which contained charges of conspiracy to commit the substantive offences contained in counts 1 and 4, on the ground that those counts were improper, unfair and undesirable as they added nothing to the substantive counts. Allsop CJ in a Ruling dated 12 March 2003 upheld that objection partly, and held that although counts 2 and 5 could not be laid as substantive counts, they could be laid as alternative counts and ordered accordingly. However before the pleas were taken, the Prosecution withdrew counts 2 and 5. Hence the 2nd exception cannot be applied in the present case. But could the 1st exception apply? The statements of the seven Accused, which have been held to be voluntary statements have therefore to be considered individually, as evidence, to the extent of their own

court. This view is consistent with the position under the Title "Hawaiian Monk Seal Turtles" at page 26.

It was not a "no case". It would support a conviction if the trial Judge

would support a conviction

the law relating to the Prosecution case is based on an admission or one against that other person should be considered as not having been committed by the other.

incrimination, but not as evidence against the other co-accused who have themselves, by words or conduct accepted the truth of the

statements.

At this stage of the case, the Court is concerned only with the evidence adduced to maintain the charges. Hence an independent consideration of the individual statements for the purpose of the first exception set out above need not be made. However the statements made by the First, Second, Fourth, Fifth and Seventh Accused, taken as against themselves, contain admissions that each one of them went to sea on a fishing expedition on 11th January 2003, and returned on 30th January 2003. There is evidence that the Police Officers found the First and Second Accused in the hold where gunny bags identified as containing turtle meat and bird meat, were stored. The statements also contained admissions that they had knowledge that the gunny bags contained salted turtle meat. It was contended by the defence that the retracted statements would not be relied upon. The retracted statements, which on a *voire dire* were found to be those of the First, Second, Fourth, Fifth and Seventh Accused, were admitted without objections and the statement of the Third Accused was challenged only on the ground that there was non-compliance with the Rules. As regards corroboration required in a retracted confession, the Court in Appeal, in the case of *Pool v R* 1974 SCAR 88 held that each case must be considered on its own circumstances, but that in general the need to take into account other evidence will arise in *retracted* confessions, while in the case of a *reputed* confession, it will depend entirely on the circumstances whether corroboration is required. The Court in Appeal held that the statements would be regarded as

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In the case of *R v Jose Pillay* (Criminal Side 8 of 1986) (unreported) the Court found no corroboration in a retracted confession. However considering the case of *Pool v R* (supra) as a Rule of prudence stated –

1) Seaton CJ found that in the case of *Pool v R*

But, while bearing all this in mind, the Court is of the opinion that in the circumstances of the case, that the statement is true and should be acted upon. I have come to that conclusion after careful consideration of the evidence and of seeing the demeanour of the witnesses. The Court in Appeal held that the statements would be regarded as

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In this respect, Seaton CJ approved the dicta in the East African Court of Appeal case of *Tuwamoi v. Uganda* (1967) E.A. 84, wherein that Court stated *inter alia* that-

..... corroboration is not necessary in law, and the Court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot, but be true.

The established Rules regarding a retracted confession are –

- (1) A confession is not to be regarded as involuntary merely because it

is retracted.

(2) As against the maker of the confession, the retracted confession may form the basis of a conviction if it is believed to be true and voluntarily made.

(3) As against the Co-Accused, both prudence and common sense require the Court not to rely on a retracted confession without independent corroborative evidence to confirm the confession. The corroboration should not confirm the general story of the alleged crime, but must also confirm the details of the crime with it. (*Law of Evidence* - Ratnalal and Thakore 4th Edition, para 88).

It was submitted by the Prosecution that, as for corroboration, the statements of the First, Second, Fourth, to Seventh Accused contain admissible evidence. The presence of turtle and bird meat on the boat in which they departed on 29 January 2003 and returned on 30 January 2003, the presence of turtle and bird traps like implements that could have been used to capture and kill turtles and birds, and independent oral evidence regarding their presence at Providence where the boat was moored. Such evidence prima facie implicates these Accused in the possession of turtle meat contained in count 1.

statements of the First, Second, Fourth, to Seventh Accused as regards the trip to sea on 29 January 2003 and Harpoon-turtle and birds, and where the boat was moored with the offence of possession of turtle meat.

In this respect, the statement of the Third Accused contains a contradiction with the statement made by the other Accused. Although the First, Second, Fourth, to Seventh Accused implicated him as one of those on that party, the statement of the Third Accused, that would not be evidence against him as he does not apply against him. In his statement he stated that around 9 a.m. he went to Robert Souris' place at Providence to work. The Third Accused also stated that he saw him by the roadside near Souris' place. The Fourth Accused also stated that he saw him with the Fourth Accused on 30 January 2003. While the Fourth Accused came from the boat, the Third Accused also stated that he saw him with the Fourth Accused on 30 January 2003. Joliff Juliette who was also working with Souris, saw both the Third and Fourth Accused about the same time. Only the Fourth Accused spoke with Souris. The Fourth Accused then left towards the road, with the Fourth Accused carrying a gunny bag on his shoulder. There is therefore only circumstantial evidence of the Third Accused's presence in the area where the boat was moored. In the absence of independent evidence of conspiracy or of common intention, such evidence alone would not be sufficient to call upon the Third Accused to present a defence to a charge of possession of turtle meat under count 1. Accordingly I find that he has no case to answer under count 1.

the denial of the trip to sea on 29 January 2003, Fifth, Sixth and Seventh Accused trip, and in fact as against the 1st exception on the 31st January 2003, fibre glass. The 8th Accused also stated that he saw him by the roadside near Souris' place. Robert Souris, the boat builder saw him with the Fourth Accused on 30 January 2003 around 6.30 p.m. The Third Accused was not with him. The Fourth Accused at Providence saw both the Third and Fourth Accused Both the Third and Fourth Accused at Providence carrying a gunny bag on his shoulder. There is therefore only circumstantial evidence regarding his presence in the area where the boat was moored. In the absence of independent evidence of conspiracy or of common intention, such evidence alone would not be sufficient to call upon the Third Accused to present a defence to a charge of possession of turtle meat under count 1.

As regards the 8th Accused, he stated in his statement under count 1 that he undertook to transport "salted fish" for the Fourth Accused. He went on 29 January 2003 to Providence and returned to the shore. He told the Police Officers that there were people in the boat. He claimed that it was then that he noticed a gunny bag in his pick-up. A Police Officer told him that the bag contained turtle meat.

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Mrs Antao, Learned Counsel for the 8th Accused contended that possession involved both the mens rea and actus reus, and that the 8th Accused had neither. However, testifying on oath at the voire dire, the 8th Accused stated that he told the Police Officers that the "gunny bag belonged to the fishermen". In his statement he had admitted agreeing with one of the Accused to transport "salted fish". Hence he had knowledge about the gunny bag in his pick up. But was he in possession, in the sense of knowing the contents which was in his custody and control? In the case of *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, it was held inter alia that-

A person who accepted possession of a Parcel, normally accepted possession of the contents, but that inference could be disproved or shaken by evidence that although a person was in possession of a Parcel, he was completely mistaken as to its contents and would not have accepted possession had he known what kind of thing the contents were. A mistake as to the quality of the contents, however, did not negative possession. If the Accused knew that the contents were drugs or tablets, he was in possession of them, though he was mistaken as to their qualities. Again if, though unaware of the contents, he did not open them at the first opportunity to ascertain what they were, the proper inference was that he was accepting possession of them. (It would be otherwise if a person had no right to open the Parcel). Again if a person suspected that there was anything wrong about the contents when he received the Parcel, the proper inference was that he was accepting possession of the contents by not immediately verifying them.

The Privy Council in the Jamaican case of *DPP v Brooks* [1974] AC 862, stated:

In the ordinary use of the word "possession" one has in one's possession whatever is to one's own knowledge, physically in one's custody or under one's physical control. This is what was intended to be prohibited in the case of dangerous drugs..... These technical doctrines of the civil law about possession are irrelevant to this field of Criminal Law.

Lord Pearce in *Warner* (supra) stated that -

One must therefore, attempt from the apparent intention of the Act itself to reach a construction of the word "possession" which is not so narrow as to stultify the practical efficacy of the Act or so broad that it creates absurdity or injustice.

In the present case, the Accused stand charged with offences under the Wild Animals and Bird Protection Act which has been enacted in the pursuit of legitimate social policy and Environment objectives to maintain the rhythm and harmony in the natural world. In this respect, the legislation has a similar public policy objective as legislation enacted to control the misuse of dangerous drugs.

Environment Protection Legislation is largely marine ecosystem oriented. In this respect the "precautionary principle" is one of the essential features of sustainable development. This principle means that the State and other statutory authorities must anticipate, prevent and attack the causes of environment degradation. The protection of wild animals and birds is one field in this system. Environment and wildlife protection offences are based on strict liability. The principle is to punish the event and not the intent.

In *R v Waller* (1991) Cr. L. Review 381, the Accused was given a box by a friend for safekeeping. He removed a plastic bag from that box without examining it. The next day, the Police seized the bag and found a sawn - off shotgun with cartridges. The Accused stated that he did not know what the bag contained but thought there might be a crowbar inside. He was charged with possessing a firearm. The Court took into consideration the public policy involved in the Act and construed the offence as an absolute one, where the state of mind was irrelevant. Accordingly it was held that the Prosecution need not prove that the Accused knew what was in the bag.

In the present case, the statement of the 8th Accused contains an admission that he went on board the boat and saw people there. Although he stated that one of the Accused told him to transport salted fish, when the Police Officers questioned him, he told them that he did not know anything about the gunny bag in his pick up. There is evidence on record that the bag had a peculiar odour and that a greenish oily substance was oozing therefrom. Hence there was sufficient reason for the 8th Accused to suspect that what was in the bag was not salted fish. In these circumstances the evidence available against the 8th Accused is sufficient to call upon him to present a defence under count 6.

Accordingly I rule that the First, Second, Fourth, Fifth, Sixth and Seventh Defendants have a case to answer in respect of the offence charged under count 1, and the Eighth Accused under count 6.

Count 4 relates to the offence of killing a protected bird contrary to Regulation 4(1) of the Wild Birds Protection Regulations of 18th April 1966. In the particulars, it is alleged that the First to Seventh Accused unlawfully killed approximately 40 "Boobies", a protected bird.

In the case of *Robinson v. Everett & W F.C. Bonham & Sons* (1988) Cr. L. Rev. 699, the Court decided on the basis that where the Accused failed to establish on a balance of probabilities that a stuffed and mounted bird found in his possession was not killed by him, there was an inference of killing. In the present case however there is a specific charge of killing the birds.

The Prosecution, withdrew the charge under count 4 as against the Third, Fourth and Fifth Accused for lack of evidence of killing of the birds. As regards the other Accused, although the First Accused did not expressly admit to any killing of birds, he stated that he salted the birds brought by the Second Accused. There is therefore sufficient

evidence to call upon him to present a defence in respect of count 4.

The Second Accused stated "we killed about 50 birds (Fou)". Admittedly a "Booby" is a "Fou". The word "we" in the plural includes the singular. Hence there is an admission of killing by the Second Accused, and accordingly he has a case to answer on count 4.

The Sixth Accused in his statement stated that two others killed about 10 "Fou" birds, and salted them. He admitted to packing the salted turtle and bird meat in gunny bags. There is sufficient evidence adduced by the Prosecution to call upon him to present a defence under count 4.

The Seventh Accused in his statement, admitted going in search of birds. While two others killed the birds, he cleaned them and put them in a gunny bags. Then he stated "we killed about forty birds which we later salted on board the boat. There is therefore sufficient evidence to call upon him to present his defence to the charge in Count 4.

In summary therefore, I rule that the Prosecution has established a prima facie case against the following Accused persons in respect of the counts indicated below-

1 st Accused	counts 1 and 4
2 nd Accused	counts 1 and 4
4 th Accused	count 1 (count 4 withdrawn by the Prosecution).
5 th Accused	count 1 (count 4 withdrawn by the Prosecution)
6 th Accused	counts 1 and 4
7 th Accused	counts 1 and 4
8 th Accused	count 6.

Accordingly I call upon them to present their defences.

Pursuant to Section 184 of the Criminal Procedure Code, the Third Accused is acquitted on counts 1 and 4.

Record: Criminal Side No 11 of 2003