

IN THE SUPREME COURT OF SEYCHELLES**THE REPUBLIC****VS.****1. ROGER EULENTIN (Accused)****KEVIN ZELIA (Accused)****Criminal Side No. 31 of 2005**

Mr. Esparon for the Republic

Mr. Hoareau for the 1st AccusedMrs. Antao for the 2nd Accused**RULING****Gaswaga, J**

The two accused herein have been jointly charged with the offence of Robbery with violence contrary to and punishable under Section 281 of the Penal Code read together with Section 23 of the Penal Code and are currently on remand under Section 179 of the Criminal Procedure Code Cap 54. When the case came up for hearing on 22/11/2006 only the first accused was produced and the State Counsel Mr. Esparon applied to Court under Article 19(2)(i) and Article (18)(12) of the Constitution to have the matter heard in the absence of the second accused. He also cited the authority of **R Vs Cliff Emmanuel and Richard Freminot Crim. Side No.83 of 2003.** Mrs. Antao appearing for the second accused objected to the application and submitted that Article 19(12) was not applicable since the accused was not at large and further that the police officers must depone an affidavit with regard to the whereabouts of the accused and not the State counsel

to give evidence from the Bar.

Under Article 19(2)(i) a trial in absentia is permissible only if the person has consented or if the Court finds that the person's conduct renders the continuance of the proceedings in the person's presence impracticable and it orders for his removal. With due respect to Mrs. Antao, in my view, Article 19(12) cannot be restricted to only those persons that are still at large. It reads “.....*a person who has, in accordance with law, been served with a summons **or other process** requiring the person to appear at the time and place appointed for the trial and who does not so appear shall be deemed to have consented....*” In the circumstances of the case of **Richard Freminot (supra)** I found the accused, who had been remanded under Section 179 (supra) with clear orders for his future appearance or production in Court and he escaped from such lawful custody while being conveyed to Court for the hearing of his case which he very well knew, to have consented to the trial taking place in his absence. This situation is dissimilar to the one at hand.

Evidence can also be taken in the absence of the accused pursuant to Section 133(1) of the Criminal Procedure Code “***if it is proved that an accused person has absconded and that there is no immediate prospect of arresting him...***” While attempting to satisfy these requirements Mr. Esparon led evidence of one of the police officers Police Constable Daniel Sinon that was at the time seated in Court. The following part of the record is pertinent;

“Q And where is Mr. Zelia?

A *He has absconded.*

Q *Since when?*

A *Two or three weeks.....*

Q *And on the day in question, you were instructed to go to Montagne Posee to pick the one that is absent?*

A *No.*

Q *So, you were not asked, you were not the one that went and so you have no personal knowledge of the circumstances of this escape? Therefore, what you are saying to this court, you have no knowledge of because you were not there?*

A *No.”*

With due respect to the learned State counsel the preconditions have not been fulfilled. For the police or prisons authorities to officially notify the Court on the escape of the second accused and the circumstances under which he escaped have filed no formal report or affidavit. The police officer's testimony clearly shows that he is not conversant with what happened to the second accused and generally the circumstances of his escape. He was not present during the escape, does not know the date of the incident and admittedly he was only told by another police officer. This leaves the Court to continue guessing as to whether the accused has indeed absconded and if so whether there is any immediate prospect of him being arrested. It should be observed that any application filed on such unproved and shaky grounds is inevitably bound to fail.

In fact Mrs. Antao's complaint on the matter carried merit. Judges are not angels to know what exactly happened outside Court or at the scene of crime, they entirely rely on the evidence and only that evidence presented before the Court

through the well-known and established formal channels. It is hoped that this humble opinion will in future offer some guidance to the manner in which criminal prosecutions are to be conducted.

In these circumstances, which are different from those in the **Richard Freminot case** where a police officer deposed to the unlawful escape of the accused and therefore proved his abscondment, I am unable to grant the application for a hearing in absentia in respect of the second accused unless proper procedures are adopted. The application is rejected.

D. GASWAGA

JUDGE

Dated this 23rd November, 2006.