

IN THE SUPREME COURT OF SEYCHELLES**THE REPUBLIC****VERSUS****DANZI (PTY) LTD**

Rep by Zita Monnaie

RESPONDENTRevision Side No 7 of2007

Ms. H. Carolus for the Republic

Respondent present

JUDGMENT**Perera J**

This case comes up for revision at the instance of this Court, pursuant to Section 328 of the Criminal Procedure Code.

The defendant before the Magistrates' Court was prosecuted by the Commissioner of Taxes under Section 89 of the Business Tax Act for failing to furnish a return of all income derived by the Company during the year ended 31st December 2003. The penalty for this offence as prescribed in Section 139(1) is a fine of not less than Rs1000 and not more than Rs5000.

On 3rd March 2006, the defendant appeared before the Senior Magistrate in person and the constitutional right to retain Counsel was explained to her. The case was fixed for hearing on 25th May 2006, on which day she was absent and

unrepresented. The hearing was thereupon adjourned to 10th August 2006 when she was absent once more. However upon notice being served, she appeared on 2nd November 2006, when the case was fixed for hearing on 11th April 2007. On that day she was absent once more, and on the application of the Prosecution, exparte hearing was fixed for 24th May 2007, with notice to her. There is a copy of that notice on record, but without proof of service. In any event as the defendant was absent, the Learned Senior Magistrate proceeded with the exparte hearing, and reserved judgment for 30th May 2007. The Learned Magistrate, on being satisfied with the oral and documentary evidence produced by the Prosecution, convicted the defendant in absentia, and proceeded to impose a fine of Rs5000, or three months imprisonment in default. He immediately proceeded to make the following order –

“Warrant of commitment to imprisonment to be issued against the accused/defendant. The defendant has a right to set aside the exparte judgment or sentence”.

The instant revision has been initiated to determine the correctness, legality or propriety of that conviction and sentence in the absence of the defendant. Learned State Counsel referred this Court to Article 19(2)(i) which provides that every 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 to proceed in the person’s absence*”. The Court was also referred to Section 169 of the Criminal Procedure Code, which provides that –

“Except as otherwise expressly provided, all evidence taken in any inquiry or trial under this code shall be taken in the presence of the Accused, or, when his personal attendance has been dispensed with, in the presence of the advocate”.

Section 180 provides an exception to Section 169 as follows-

“180(1)If at the time or place to which the hearing or further hearing shall be adjourned, the Accused person shall not appear before the Court which shall have made the order of adjournment, it shall be lawful for the Court, unless the Accused person is charged with felony, to proceed with the hearing or further hearing as if the Accused were present.....”.

(2) *If the Court convicts the Accused person in his absence, it may set aside such conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits*”.

The Learned Senior Magistrate was therefore entitled to make those orders pursuant to Section 180(1) of the Criminal Procedure Code. He was right in proceeding with the exparte hearing in those circumstances, and also convicting the defendant. The only error was the ordering of warrant of committing the defendant to imprisonment in absentia without giving notice, so that she may have had an opportunity to explain her absence. The latter order was both contradictory and inconsistent with Subsection (2).

Moreover, Section 141 of the Business Tax Act provides that –

“Upon conviction of any person for an offence under this Act, the Court may order him within a time specified in the order to do the act which he has failed or refused or neglected to do, and any person who does not duly comply with such an order shall be guilty of an offence and liable on conviction to a fine of not less than two thousand rupees and not more than ten thousand rupees and to imprisonment for twelve months”.

Section 162, provides that an order under Section 141 may be made orally or notice served on the defendant. Hence either under Section 180(2) of the Criminal Procedure Code or under Section 141 to the Business Tax Act, the defendant has to be given an opportunity either to explain the default in appearance, or to do the act which she had failed to do within a specified time.

Accordingly, acting in revision the order for issuing a warrant of committal for imprisonment is quashed. The record of proceedings is remitted back to the Magistrates' Court with a direction that the Learned Senior Magistrates gives the defendant an opportunity to explain her absence under Section 180(2) of the Criminal Procedure Code or to furnish the return within a specified time as envisaged in Section 141 of the act, before the conviction and sentence are executed.

Judgment entered accordingly.

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A. R. PERERA

JUDGE

Dated this 5th day of November 2007