

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VERSUS

ELVIS ESTICO

ACCUSED

Criminal Side No 51 of 2006

Mr. R. Govinden for the Republic

Mr. B. Hoareau for the Accused

RULING

Gaswaga, J

The Accused stands charged with murder contrary to **Section 193 of the Penal Code, Cap 158** and during the trial, but in the absence of the jury (**See Section 256 Criminal Procedure Code, Cap 54**), Mr. Hoareau applied to call a witness, Mrs Jean- Baptista Denise (Pw5) to testify for the defence. The said witness has already been summoned by Court on the 21/02/2008 and given evidence for the prosecution in the same trial. She was also thoroughly cross examined by Mr Hoareau. Mr. Govinden objects to the application and contends that this is nothing but recalling a witness which could only be done with leave of Court and in very rare circumstances.

In his further submission Mr Hoareau said that since there is no monopoly enjoyed by a party over witnesses he should be permitted to call Mrs Denise but this time as a defence witness. He also cited **S. 252 of Criminal Procedure Code, Cap 54 and Art 19 of the Constitution**. Mr Govinden cited **S. 126 of the Criminal Procedure Code, Cap 54** which reads as follows:-

“Any Court may at any stage of any inquiry, trial or other proceeding

under this Code summon or call any person as a witness, or examine any person in attendance though not summoned as a witness or call and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate, shall have the right to cross-examine any such person, and the Court shall adjourn the case for such time (if any) as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as witness."

Generally our law expressly sanctions the procedure to have a witness who has already given evidence recalled to give additional evidence. This could either be on the Court's own motion, or on the application of the prosecution or defence. In case of the latter two situations, the application by the prosecution should be before the close of its case except in unusual and exceptional circumstances when the defence has already opened or closed its case. On the other hand it remains open for the defence to apply for recall of a witness at any stage of the trial before it closes its case. A very important factor to note here is that the grant or refusal of such application is entirely of discretion of the Judge. However, while exercising such judicial discretion the Court must consider the purpose such a recall would serve, the stage at which the trial has reached and whether the evidence of that particular witness would be essential to the just decision of the case and

would not prejudice the accused. But the Court must be very quick to detect applications for recall of a witness which are no more than an attempt in any way to abuse the process of the Court. See also 'Taylor on Evidence', 1920 Edition, Volume II, paragraph 1477 and R v. Ahmed Bin, (1949) K.L.R. 23(2) 128 (Kenya).

Indeed no party can claim ownership in a witness. It cannot be said however that the accused has not enjoyed his rights under Art 19 (2) (e) with regard to the said witness. The provision allows a party to call, examine and cross-examine witnesses in a trial. It stands to reason that when Mrs Denise was placed on the stand to testify for the prosecution and the defence thereafter invited to cross-examine her the requirements of Art 19 were satisfied. It is all about a party being permitted to extract the relevant information it needs for its case from the witness on the stand whether by way of examination-in-chief or cross examination. Counsel should always be ready for this exercise whenever they get to Court and before the witness is discharged. When Mr. Hoareau stated that "no further questions my lord" it meant that he had finished eliciting all the relevant evidence or information he needed for his case from Mrs Denise.

From the foregoing, it cannot be said that the words "*any person who is in attendance may be called*" in **Section 252(2) of the Criminal Procedure Code, Cap 54** lend themselves to or include witnesses who have already testified in that trial, like Mrs Jean-Baptista Denise. Her evidence is already on record and I do not see anything useful or essential or new that she is coming to add or testify about in the case.

Accordingly the application is rejected.

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D. GASWAGA

JUDGE

Dated this 27th day of February 2008