

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VS.

ROY BEEHARRY (Accused)

Criminal Side No. 44 of 2008

Mr. Govinden for the Republic

Mr. Pardiwalla for the Accused

RULING

Gaswaga, J

This case involves charges of trafficking in illicit drugs which were withdrawn against the accused, now applicant and later reinstated. Section 65 (a) of the Criminal Procedure Code, Cap 54 reads as follows:

“65. In a trial before any court a public prosecutor may, with the consent of the court or on the instructions of the Attorney General, at any time before judgment is pronounced, withdraw from the prosecution of any person; and upon such withdrawal –

a. If it is made before he accused person is called upon to make his defence, he shall be discharged, but such discharge of an accused person shall not operate as a bar to subsequent proceeding against him on account of the same facts;”

Section 63(2) is also relevant:

“63.(2). The Attorney General by writing under his hand may appoint any advocate of the Supreme Court or person employed in public service, not being a police officer below the rank of sergeant of police to be a public prosecutor for the purpose of any case:.....”

Pursuant to Article 76(4)(a) and (5) and Section 60 of the Criminal Procedure Code, Cap 54 the Attorney General (or his subordinate officer(s)) has powers to institute criminal proceedings against any person alleged to have committed an offence. Vide the above legal provisions the prosecution can withdraw the said charges without giving any reason to the Court or to the accused. Subsequent proceedings could also be lodged against the accused basing on the same facts. There is no need for explanation when the Attorney General is exercising his discretionary powers whether to institute charges or not against a person. I shall go further and state that whether there is new evidence that has come to light or not it is all up to the Attorney General to exercise his powers reasonably and diligently. And where the Attorney General reinstates charges on account of new or further evidence it cannot be said that he should follow the procedure in the Court of Appeal to seek and obtain leave before adducing or relying on the same. That argument is untenable and I cannot allow a party to introduce or create restrictions in a procedure where there are none. With due respect that procedure cannot serve as an analogy. In the Court of Appeal situation the evidence has already been adduced and a judicial pronouncement basing on it made while in the present case the gate is still as wide as it can be to allow in all relevant evidence obtainable.

In his application the accused is moving the Court to stay or dismiss the charges on the ground that it is an abuse of process of Court. That there is no such new evidence as alleged in the affidavit that has been filed. It is too early and a bit risky for this Court to start analyzing the evidence in this case before the trial proper starts.

The case of **DPP vs. Humphrys (1977) A. C 1 of 46** took the view that;

“.....A judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of court and is oppressive and vexatious that the judge has to power to intervene.”

It was stated in **R. vs. Yuan Mei Investment (Prop) Ltd Criminal Side No. 24 of 1998** that;

“The staying of prosecution is a drastic encroachment on the prosecuting powers of the state, exercised through the Attorney General. Prosecution is stayed in exceptional circumstances not merely because serious prejudice may be caused to the accused, but also because if the trial were to continue, it would subvert the judicial process.”

I cannot see any existence of such exceptional circumstances nor any sound reason for this Court to employ its inherent powers to stay or dismiss the charge herein. The reasons and arguments advanced cannot be considered to amount to something unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding. The prosecution have neither manipulated nor misused the process of the Court so as to deprive the accused a protection provided by the law or to take an unfair advantage of a technicality not prejudiced him in the preparation or conduct of his defence.

When the first charge was withdrawn under Section 65 the accused was discharged. Further the complainant referred to under Section 178 of the Criminal Procedure Code, Cap 54 is not the Attorney General as submitted by Mr. Pardiwalla but a virtual complainant who, unlike the Attorney General, has to satisfy the court that

there are sufficient grounds for permitting him to withdraw his complaint. The accused will then be acquitted.

The accompanying affidavit does not conform to the requirements of the law. It has not been commissioned and must be rejected. Although it had the court seal/stamp it lacked the Registrar's signature. It's incurably defective just like the one in **Opportunity International vs. Krishnamart & Company** where the commissioner (Attorney-At-Law and Notary) duly signed as a notary but stamped it in her capacity as Attorney-At-Law.

Even the affidavit was to be accepted as evidence by this Court still the application was bound to fail.

D. GASWAGA

JUDGE

Dated this day of 18th July, 2008.