IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VS.

1. **GARRY PAYET**

JEAN PAUL QUILINDO

Criminal Side No. 67 of 2007

.....

Mr. Esparon together with

Mr Durup for the Republic

Mrs. Amesbury for the 1st Accused

Mr. Elizabeth for the 2nd Accused

Both accused persons – present

9 Members of Jury - present

RULING

Gaswaga, J

This is an application emanating from an earlier order made by this Court in a ***voir dire*** conducted as a result of

objections lodged by Mr Elizabeth challenging the voluntariness of a confession made by the Second Accused, Mr Jean Paul Quilindo. In its brief ruling of 30th June 2009, and after hearing evidence from two prosecution witnesses and one defence witness (A2), the court found the statement to have been made voluntarily and therefore admissible but, subject to the prosecution and defence editing same since Counsel for Mr Payet (A1) had intimated that A2's confession statement contained material which incriminated her client (A1) and was therefore prejudicial to A1's case.

Indeed the position of the law as stated in the case of ***G. Pool vs. R. (1974) SLR*** is that

> "*there is no reason why a court should not accept and act upon admission made by an accused as against himself, though rejecting as untrue the part of the statement sought to implicate other persons*".

Further, the Judge is duty bound to impress upon the Jury that the confession cannot be used against the co-accused. See ***R vs. Gunewardene [1951] 2 KB 600, CCA***. The purpose here is to obviously protect the interest of the

implicated co-defendant by the most explicit directions.

However, the situation at hand is a very unique one, as according to the defence Counsel, each accused person's confession statement mildly incriminates the author while at the same time heavily incriminating the co-accused. It is now submitted by the defence Counsel, Mrs Amesbury, contrary to Mr Esparon's contention, that the contents of the said statement are so intertwined that editing it, by way of deleting what incriminates the co-accused and leaving what incriminates the author alone, is practically impossible.

Indeed I am aware of the likely dangers in this as was observed in ***R vs. Silcott [1987] Crim. L.R 765, CC*** that

> *"such an exercise would require mental gymnastics of Olympic standards for the Jury to approach their task without prejudice".*

Adriene Keane in **The Modern Law of Evidence** at p.355 like other authors whose work I have read suggests a number of solutions. The obvious one is to order separate trials for the accused. This may not be possible now as it is a heavy burden on the available resources in terms of

logistics. The time, human resource – bearing in mind the hardships encountered while empanelling a Jury from members of our small population, same witnesses, 70 in number will have to appear twice etc.

Another is to edit the statement. This has already failed.

It cannot be said that Counsel for the prosecution may agree not to read those parts of the confession statement which implicate a co-accused but have no real bearing on the case against its author because the contents are inseparable. The above author further states that if the reference to the co-accused is exculpatory of the maker of the statement, as is to some extent in this case, the prosecution is entitled to have the statement read out in its entirety; or if its prejudicial effect outweighs its probative value the Judge to order for the total exclusion of the statement.

Lord Goddard CJ observed in **Gunewardene (Supra),** in a passage approved by the Privy Council in **Lobban v. R [1995] 2 ALL ER 602 at p. 612**

> *"it not infrequently happens that a prisoner, in making a statement, though admitting his guilt up*

> *to a certain extent, puts greater blame upon the co-prisoner, or is asserting that certain of his actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the crime. In such a case that prisoner would have a right to have the whole statement read and could complain if the prosecution picked out certain passages and left out others…"*

Keane (Supra) goes on to illustrate two exceptional situations when a confession may be admitted not only as evidence against its maker but also as evidence against a co-accused implicated there by. The first one is not applicable since the co-accused has not, either by his words or conduct, accepted the truth of the statement so as to make all or part of it a confession statement of his own. In fact his Counsel objected to the admission into Court of that statement for the very reason.

The second exception applies in the case of conspiracy:

> *"statements (or acts) of one conspirator which the*

> *jury is satisfied were said (or done) in the execution or furtherance of the common design are admissible in evidence against another conspirator, even though he was not present at the time, to prove the nature and scope of the conspiracy, provided that there is some independent evidence to show the existence of the conspiracy and that the other conspirator was a party to it".*

It will be recalled that the two defendants face a charge of conspiracy to commit the offence of murder contrary to Section 381 and 193 as indicated in Count II. This case falls squarely within the second exception. The case is still on and evidence still being adduced. Moreover, in **R vs. Governor of Pentonville Prison, Exparte Osman, [1989] 3. ALL ER 701, QBD at p.731,** it was held that

> *"It remains to note that it does not matter in what order the evidence of the statements (or acts) of the conspirator and the 'independent evidence' is adduced".*

In addition to this both accused are charged on Count I with murder under Section 193 of the Penal Code, Cap 158 read together with Section 23 thereof, which provision carries the

connotation of **common intention** where two or more people are engaged in **a common enterprise**. Therefore the acts and declarations of one in pursuance of the common purpose are admissible again another.

I have once again reconsidered the submissions of Counsel on both sides on the matter. I took note of the fact that the statement was voluntarily made by the second accused and is admissible. As gathered from the submissions of Mrs Amesbury, A1 gave three statements which are also of the same nature as the one being discussed now thus; lightly incriminating the author but shifting the blame and largely incriminating A2. Bearing in mind the rights of the accused persons, the effects of such confessions on their case if admitted and, the duty of the Court to protect their interests generally, it is my conviction that given these unique circumstances, and if I am to exercise my discretion diligently, the whole statement should be read out to the Jury. The material content is so interwoven as to be inseparable. It stands or falls together and any attempt to edit the confession, as submitted by the defence counsel, would seriously alter its sense and meaning yet in my view its probative value outweighs its prejudicial effect.

I so order.

D. GASWAGA

JUDGE

Dated this 1st day of July 2009