IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC
VS.
1. NELSON PAYET
DOMINIQUE DUGASSE
CHRISTOPHER D'UNIENVILLE

Criminal Side No. 20 of 2009

Mr. Esparon for the Republic
Mr Elizabeth for the 3rd Accused
Mr Hoareau for the 1st & 2nd Accused along with
Mr Gabriel
All Accused - Present

RULING

Burhan J

When this case was taken up for continuation of trial on the 28th of August 2009 learned counsel for the prosecution moved to amend the charges against the accused.

The objections of learned counsel to the application could be summarised as follows;

1) Since this was the 3rd amendment to the charges against the accused, if permitted it would cause injustice to the accused,

2) Their was a variance in the evidence led and the charge and therefore the amendment would result in an injustice to the accused,

3) That it was a violation to their constitutional rights to a fair hearing as,

a) The amended charge if permitted by court, would result in unnecessary delay thereby infringing the accused right to be tried within a reasonable time.

b) That the accused would not be given adequate facilities to prepare a defence to the charge.

Firstly although this has been termed the 3rd amendment by the defence it is pertinent that the back ground facts be analysed in this respect. It is to be noted that the first amendment was prior to evidence being led at the trial, in view of the change in circumstances, where the first accused mentioned in the original charge was made a witness for the prosecution. Thereafter as trial had not commenced it could not be said that any injustice had been caused to the accused. Further at that stage, an adjournment convenient to counsel was offered to the defence by court, to ensure that no prejudice was caused to any of the accused but learned counsel for the defence opted to proceed with the case.

The second amendment was not in respect of the statement of offence but in respect of the particulars of offence where the words “a preparation of the product” of Morphine were amended to “an esther” of Morphine. It is clear that this amendment was based on the evidence given by Dr Jakaria. However since trial commenced with the leading of evidence, these are the first amendments the prosecution has made in respect of the statement of offence contained in the charges. Hence it could not be said that, by continuously and unnecessarily seeking amendments to the charges, an

abuse of process has occurred, resulting in an injustice being caused to the accused. Furthermore the addition of the new charge count 4 in the alternative to count 3 has occurred prior to the close of the prosecution case, which is permitted by section 187 (2) (b) of the Criminal Procedure Code, subject to the proviso contained in section 187 (3) (b) and (c) which provides that in the interests of justice, the court may adjourn the trial for such period as may be necessary and the accused may be offered an opportunity to adduce additional evidence or to recall any witness for the purpose of further examination or cross examination.

Hence it follows, that as long as the aforementioned provisions as provided for by law are followed, the accused cannot seek to complain of not being provided with adequate time or facilities to prepare a defence or that their right to a fair hearing has been infringed, as all these procedures fall well within the precincts of the established law. Further the fact that there is a variance in the evidence led and the charge does not preclude the prosecution from amending the said charge. In fact one of the reasons for the exercise of power to permit amendments, as set out in the case of ***R v Johal and Ram 56 Cr. App.R 348,*** is when the indictment does not accord with the evidence at the trial.

Furthermore despite the number of witnesses at present totalling 7, being called by the prosecution, the lengthy cross examination and numerous objections taken and Rulings made, this court is satisfied, that considering the fact that the date of detection as referred to in the charge is the 30th of May 2009, the accused right to be tried within a reasonable time has in no way been infringed.

In the case of ***Soomery v R 1975 SLR 24*** Sauzier J held inter alia that:

The amendment of a charge is governed by section 183 (1) of the Criminal Procedure Code which is borrowed from section 5 (1) of the English Indictments Act 1915 and certain principles have been evolved by the courts in England.

In the case of ***R v Radley 58 Cr.App.R. 394,*** it was held that the trial court should give a fairly liberal meaning to the language of section 5(1) of the 1915 Act.

A charge may be defective either due to a patent defect that is when it is bad in form or bad on its face, as in the case of duplicity or misjoinder. In a summary trial the charge would be defective if it fails to allege an offence disclosed by the evidence or alternatively, if it alleges an offence not disclosed by evidence, such defects are termed latent defects. In the case of ***Soomery v R (supra) at 28*** it was held that court had power to cure these latent defects under section 183 (1) presently 187 (1) of the Criminal Procedure Code by addition of a new count under this section. The facts are similar to this instant case where the prosecution seeks to add a new count not separately but only as an alternative count. Therefore this court is of the opinion that no prejudice will be caused to the accused by permitting the prosecution to do so, provided the conditions set out in section 187 (3) (b) and (c) of the Criminal Procedure Code are complied with.

Furthermore it was submitted by learned counsel that considering the

special facts of this case where the main prosecution witness is in protective custody, that the said amendment if permitted would be prejudicial to the accused. However it is to be noted, that this witness has already deponed and would be recalled only at the insistence of defence counsel and for the purposes of cross examination only. Hence there is no merit in learned counsel's submission that prejudice would arise as a result of the amendments being permitted, as the prosecution is not permitted by law to recall any witness.

For the aforementioned reasons court is satisfied, that the application by the prosecution to amend the charges, is not an abuse of process nor would it cause any undue prejudice to any of the accused, which would result in an injustice to them. Therefore the application of the prosecution is granted.

M.N. BURHAN

JUDGE

Dated this 31st day of August, 2009.