

IN THE SUPREME COURT OF SEYCHELLES

REPUBLIC
VS
LIVETTE ASSARY

Criminal side no: 19 of
2009

Ms. Aglae for the Republic

Mrs. Amesbury for the Accused

RULING**Burhan, J**

Learned counsel for the defence prior to closing her case, made an application that the prosecution witness Nelson Larue be recalled as a witness for the defence.

Learned counsel based her application solely on the grounds that during the course of the trial, it was discovered purely by accident that Nelson Larue was a co-accused in case no CR 45/2005 with other ex-employees of SPTC for the offence of dishonesty.

Learned counsel further urged court that as the said information was not available at the time witness Nelson Larue testified, it was of vital importance to the defence, that he be recalled to be examined in regards to his

character and credibility. Learned counsel further submitted that during the course of trial, the defence had indicated to court that it reserved its right to recall this witness.

Learned counsel for the prosecution, objected to the application on the grounds that this was not a valid ground for the witness Nelson Larue to be recalled and stated further in her submissions that the prosecution does not seek to deny the fact that he is being prosecuted in the said case. The prosecution further submitted that the credibility of witness Nelson Larue would have been vital only if he had been convicted for the said offence.

It would be pertinent at this stage to set out the background facts relevant to this application.

Nelson Larue who was called by the prosecution as a witness was formerly charged as the 2nd accused in this case. On the 11th of August 2009 an amended charge was filed by the prosecution in which the charges against Nelson Larue were withdrawn and he was made a witness for the prosecution. Nelson Larue testified before court and learned counsel for the defence cross examined him at great length. On concluding her cross examination, learned counsel for the prosecution concluded his re-examination of the said witness. It is apparent when one considers the submissions made on behalf of the defence

that learned counsel now wishes to recall the said witness, not on the grounds that she had not concluded her cross examination of this witness, but on the grounds that new information has emerged, pertaining to the fact that this witness was a co-accused in a charge of dishonesty, which information was not available at the time of cross examination.

On considering the submissions of both counsel, the fact that this witness is a co-accused in the said case of dishonesty is admitted by the prosecution in their submissions. Hence no purpose will be served by recalling this witness. As rightly pointed out by learned counsel for the prosecution, the credibility of this witness would have been of importance if he had been convicted of the said offence of dishonesty but until then for all purposes, he is presumed to be innocent a presumption enshrined in Article 19(2) (a) of the Constitution of the Republic of Seychelles. Learned counsel has been given ample opportunity during her cross examination to test the veracity and the credibility of this witness in respect of the evidence given by him in this case. An opportunity cannot be provided for her to test his credibility in respect of the pending case of dishonesty, as it is the duty of the prosecution to prove the said charge against him in that case. Considering the admission of the prosecution in respect of the pending case against the witness, it would

suffice if the defence were to file a copy of the entire charge sheet together with the particulars of the offence in CR 45/2005 which would be considered at the time of judgment.

With regard to the law pertaining to this application, Section 126 of the Criminal Procedure Code Cap 54 reads as follows;

“Any court may (emphasis added) 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 recall and re examine any person already examined and the court shall (emphasis added) summon and examine or recall and re-examine such person if his evidence appears to it essential to the just decision of this case.”

It is apparent that this section creates two situations. The first gives the court a discretionary power even *ex mere mottu* to summon or call any person as a witness or examine any person in attendance though not summoned as a witness or recall or re examine any person already examined. In the exercise of its discretionary powers it has been held in the case of ***R v Hoareau 1974 SLR 46*** that the English Authorities may be used as a guide and

the discretionary power should be exercised judicially and reasonably and not in a way in which injustice would result. Furthermore it should be limited to something which has arisen which no human ingenuity could foresee.

The second casts a mandatory duty on court to summon and examine or recall and re-examine such witness if his evidence appears to court to be essential to the just decision of the case. What is of paramount importance is that the court be satisfied that the evidence to be led by the recalling of the witness is essential, in order to arrive at a just decision in the case. However in the case of ***Wirtz v The Republic 1985 SLR 62***, it was held that recalling of a witness under section 126 of the Criminal Procedure Code should be cautiously exercised.

“Where the evidence of a prosecution witness is interposed in the midst of the defence case, a fundamental breach has been occasioned such as would make the whole trial a nullity.”

In this instant case the defence seeks to recall a witness for the prosecution in the midst of the defence case. Considering the background facts of this case, the fact that the witness was formerly an accomplice and the fact that learned counsel for the prosecution and the defence have concluded with this witness, court sees no necessity to use its discretionary powers and recall the said

witness. The fact that the said witness is an accused in a pending case of dishonesty, does not make it a mandatory duty for court to recall this witness, as this fact has been admitted by the prosecution. Furthermore as this fact has been admitted, this court is satisfied that the filing of the charge sheet by the counsel for the accused, containing the particulars of the offence and the names of the accused in Criminal case No 45 Of 2005 in which the witness has been charged with dishonesty, would suffice for this court to arrive at a just decision, as contemplated by section 126 of the Criminal Procedure Code.

Based on the above, this court is satisfied that no prejudice would be caused to the accused in disallowing the application by the defence to recall the said witness. The application of learned counsel for the accused is therefore declined.

M. BURHAN

JUDGE

Dated this 1st day of March 2010