

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO25/2016

[2017] SCSC 11

THE REPUBLIC

versus

IMAM BAKSH TARANI

First Accused

HATTAM MOTHASHIMINA

Second Accused

HOSSEIN BAZDAR

Third Accused

Heard: 16th and 17th of January 2017

Counsel: Mr. David Esparon, Principal State Counsel for the Republic
Mr. Clifford Andre Attorney at Law for the accused

Delivered: 18th January 2017.

RULING

Burhan J

[1] This is a ruling in respect of a *voire dire* held regarding the admissibility of the statement of the 1st accused Imam Baksh Tarani recorded by the officers of the NDEA (National Drug Enforcement Agency). Learned counsel for the accused objected to the production

of the said statement as an exhibit, on the grounds that the statement was not admissible as it was not a voluntary statement given by the accused. The main grounds urged by learned counsel were:

a) That despite being aware that the 1st accused was represented by learned counsel Mr. Andre, the statement had been recorded by the officers of the NDEA without informing learned counsel, thereby violating his constitutional rights to a lawyer.

b) The statement had been recorded in the English language and the accused made to sign despite him not understanding its contents.

[2] It is trite law that the burden is on the prosecution to prove beyond reasonable doubt that the said statement had been given voluntarily.

[3] NDEA agent Mr. Labiche giving evidence on behalf of the prosecution at the *voire dire* stated that the said statement was recorded by him on the 28th of April 2016 at 14.32 hrs. Prior to recording the statement, the accused had been cautioned and his constitutional rights explained to him. Mr. Labiche stated the interpreter Mr. Zaphet Eichel who had been got down by the UNODC for purposes of translating English to Farsi (Persian language) had translated the caution, constitutional rights and the questions put to the accused by him to Farsi for the 1st accused to understand and thereafter translated the replies given by the accused in the Farsi language to English and the interpreter Mr. Zaphet Eichel had personally, in his own handwriting, written down in English what the accused had said after translating from Farsi to English.

[4] Mr. Labiche in his evidence mentioned the details of the caution and constitutional rights read over to the accused. He stated the accused elected to give a statement voluntarily. After recording the statement, Mr. Zaphet Eichel had read it over to the accused in the Farsi language and invited the accused to make any corrections, additions and alterations in the statement. He had not done so but signed the statement. Agent Labiche categorically stated that no threat, promise or inducement was made to the accused either before during or after the recording of the statement. The accused was informed of his right to a lawyer but the accused had not asked for his lawyer Mr. Andre but volunteered to give the statement.

- [5] Mr. Zaphet Eichel an interpreter brought in by the UNODC, corroborated the evidence given by agent Labiche. He stated that he had personally written down the answers given by the accused in a narrative form in the English language as that was the language the NDEA agents understood. He specifically stated under oath, he had written exactly what the accused had stated and also corroborated the fact that the accused right to a lawyer had been explained to him but he had remained silent and not requested for his lawyer Mr. Andre. Thereafter the prosecution closed its case, informing court that Mr. Brendon Burke who was present at the time of the statement being recorded had left the jurisdiction.
- [6] Thereafter the accused gave evidence under oath. He stated that the NDEA officers had boarded the ship and assaulted him and another. Thereafter all eleven accused were brought to Seychelles and produced in court. At the time Mr. Clifford Andre Attorney at Law had appeared for them. Thereafter on the 28th of April they had been taken to the NDEA to have their statements taken. He did not allege that any threat, promise or inducement was made to him at the time his statement was recorded. However, he denied that the right to remain silent and his right to a lawyer were explained to him by the interpreter. He also denied that the interpreter had after recording the statement, read over and explained the statement to him but admitted as the interpreter was writing it down in English, he had explained each sentence he was writing to him.
- [7] Having considered the evidence led at the voire dire in its entirety, I find the evidence of agent Labiche stands corroborated on all material aspects by the evidence of the interpreter Mr. Eichel. It is apparent from their evidence that the accused was informed in the language he understood of his right to a lawyer but not requested for his lawyer Mr. Clifford Andre, though he was given an opportunity to do so. In such a situation where the accused having a lawyer and having been informed of his right to have a lawyer, does not make a request for his lawyer to be present and volunteers to make a statement in his absence, the agents of the NDEA cannot be faulted for proceeding to record the statement in the absence of the lawyer, even though the agents of the NDEA may have been aware a lawyer had appeared for the accused in court. What the NDEA are obliged and compelled to do under the Constitution, is to explain the right of the accused to have a lawyer at the time the statement is being recorded and his right to remain silent and

administer the caution. The choice or final decision of having his lawyer present or to give a statement and revoke the right to remain silent, is in the hands of the accused.

[8] It is the contention of the accused that this was never done but the independent evidence of the translator from the UNODC clearly indicates that the said rights were explained. Rather than rely solely on the evidence of the NDEA who stand to gain if the statement is admitted or the uncorroborated evidence of the accused who stands to gain by stating the rights were not put to him, I would rely on the evidence of the independent interpreter which though subject to cross examination was cogent and uncontradictory in nature. I therefore reject the accused contention that his constitutional rights, namely his right to have a lawyer present or his right to remain silent were not put to him at the time his statement was being recorded. Further the accused stated he found it difficult to understand what was being said by the interpreter as he had an Afghani accent but this was never put or suggested to the interpreter Mr. Zaphet Eichel by his learned counsel at the time he was cross examined.

[9] Learned counsel next contended that the statement of the accused should have been recorded in Farsi by the interpreter and not English. What court has to decide is whether the evidence of the interpreter is acceptable in regard to whether he translated accurately what was being said by the accused. In other words what the accused said was accurately recorded. The interpreter's evidence on this issue was unshakable. He specifically and definitely stated he had written down in English what the accused had said in Farsi. The fact that he had written it down personally leaves even less room for error. He further stated the English statement recorded by him was thereafter read over and explained to the accused by him and the accused was invited to make any change but he had not done so and signed the statement which shows the accuracy of his interpretation. Though evidence has been subject to rigorous cross examination his evidence on these issues stood firm. Further in this instant case the accused himself accepts the fact that after writing each statement in English, the interpreter translated each statement he had written to Farsi. Further the interpreter had subsequently himself made a Farsi translation of the statement and handed it over to the NDEA. In the light of all these precautions taken by the interpreter, it is the view of this court that no prejudice had been caused to the

accused by the statement being written down by the interpreter in English. Neither has the voluntariness of the statement been affected in any way.

[10] It appears that the prosecution is relying on the signed statement given by the accused, written by the interpreter after contemporaneous translation into English. The evidence as stated earlier also reveals that the interpreter had subsequently made available a Farsi copy of the statement prepared by him. It appears learned counsel also wishes to repudiate certain parts of the statement. All these matter will be dealt with as and when they arise as the trial progresses. The mere fact that there was a contradiction in regard to whether it was agent Labiche or the interpreter who indicated where the accused should sign, is not a serious or material contradiction that goes to the root of the prosecution case for the witnesses to be disbelieved on this ground alone.

[11] It is apparent from the evidence before court that the NDEA agents were recording the statements of all the 11 accused in the presence of the Farsi interpreter Mr. Japhet Eichel got down by the UNODC which would be the usual procedure in any criminal case. The 1st accused admits not only was his statement recorded but the statements of all the other accused too were recorded. Therefore there is no sinister purpose in getting the 1st accused away from the others to record his statement as suggested by learned counsel. It is apparent from the evidence and the manner in which events took place that the 1st accused had by then decided it was time for him to make a clean breast of matters to the officers of the NDEA, in the absence of his lawyer which would be beneficial to the innocent accused. Subsequently however it appears on several accused being released as borne out by the record, he now wishes to change his stance and retract his statement under caution by saying he was assaulted and his rights not explained to him. I therefore reject the aforementioned contentions of the accused.

[12] For the aforementioned reasons and as no material contradictions are observed in the evidence of the prosecution witnesses which has been tested by cross examination, I proceed to accept the evidence of the prosecution and am satisfied on the evidence before court that the prosecution has proved beyond reasonable doubt that the statement of the accused had been given voluntarily. I therefore hold that the statement is admissible as evidence in the case.

Signed, dated and delivered at Ile du Port on

M Burhan
Judge of the Supreme Court