

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO69/2017

[2018] SCSC 866

THE REPUBLIC

versus

AHMED AHMED& ORS
Accused

Heard: 28 September 2018
Counsel: Mr David Esparon, Deputy Attorney General for the Republic
Mr Rajasundaram for the accused
Delivered: 28 September 2018

RULING

R. Govinden, J

- [1] Every person charged with a criminal offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial Court established by law. This is the dictate of Article 19(1) of our Constitution.
- [2] The person charged in the context of Article 19(1) can be a Seychellois national or a non Seychellois national as this Article does not discriminate on the ground of the nationality

of the accused. Irrespective of the national origin of the accused, the long arm of the right to fair hearing reaches out and protects him or her.

- [3] The person charged, in the context of Article 19(1) can be a person charged of any criminal offences known to our law, from a mere contravention to one of the highest felonies in the land. Article 19(1) does not make any distinction based on the nature of or the seriousness of the offences charged. The long arm of the right to fair hearing reaches out and embraces the accused irrespective of the offences charged. They have to be given a right to a fair hearing. This constitutional protection will apply even if the accused is charged with crimes based on universal prescriptive jurisdictions or quasi universal jurisdictions such as the offences of piracy charged under Section 65 of the Penal Code.
- [4] A basic tenet of the right to a fair hearing is the fact that the Prosecution has to lead the evidence of witnesses that have not been coached. The witness testimonies must be original; untampered; balanced and free of malice and prejudiced. The hearing will be manifestly unfair if witnesses of the Prosecution are coaxed into embellishing, modifying or altering their testimonies in order to suit the needs of and the charges preferred by the Prosecution.
- [5] Though coaching is not permitted, arrangement to familiarise witnesses with the layout of the Court; advising them on the sequence of events in which the witness could give evidence and a balanced appraisal of the different responsibilities of the various participants are acceptable. Such arrangements prevents the witness from being disadvantaged through ignorance of the procedure or taken by surprise at the way trial works and assist the witness to give his or her best at the trial. Part of this familiarisation process would also include Counsel advising witnesses on the basic requirements for giving evidence, for example, the fact that he or she need to listen to and answer questions asked to speak clearly; to follow the directions of the Court and to avoid repetitions and irrelevancies.
- [6] It is also permitted to give guidance to expert witnesses and witnesses of a technical nature on giving comprehensive evidence of a specialist kind and resisting the pressure to go further into technical details that would not be relevant to the determination of the case and that would unnecessary complicate the facts of the case.

- [7] There is also the general rule that witnesses can see their witness statements prior to a trial. Although it is desirable, this is not always essential. However, this practice has to be done without any collusion with the Prosecution as to what should or should not be contained in the witness statements. The only purpose of giving to the witness his or her witness statement prior to the trial is for the former to refresh his or her memory. This should be done without any prompting or interference by the Prosecution that would affect the witness desire to give an honest fair and accurate account of what he or she had experienced to the Court.
- [8] The English Court of Appeal in R v Momodou, [2005] 2 Cr App R6, has succinctly and clearly supported such a position.
- [9] Moreover, it is trite law that “*a trial is not a scripted process*” People v/s Hammond (1994) 22 Cal App P 1611 – 1624 and that effort by the Prosecution to programme a witness’s testimony by script or like ends is the foundation for the denial of confrontation “*with the testimony in the record showing that the Prosecution witness was coached, we cannot hold that the defendant has had a fair and impartial trial*”. People v/s Garrett. (1938) 27 Cal App P 249 -252.
- [10] In this case during the course of the Prosecution case an affidavit was produced to me in chambers as the trial judge, it was sworn by Lieutenant Commander Verity Marie Fane-Bailey of the Royal Navy and of the European Union Headquarters, NorthWood Headquarters, Sandy Lane, Northwood, HA6 3HP, United Kingdom. This was done on the 21st of September 2018. The deponent has averred to the following ;
1. *I am qualified criminal barrister in England and Wales and an Officer and lawyer with the British Royal Navy. I am currently assigned to the European Union Naval Force (EUNAVFOR) counter-piracy operation ATALANTA, in the capacity of Legal Advisor to the operation and have since August 2016. As part of that role, I travelled to the Seychelles on Sunday 16 September 2018 in order to observe the trial of six (6) suspected pirates that EU NAVFOR interdicted in November 2017 and to support the five (5) Italian Navy and one (1) Djiboutian Navy witnesses that had been summoned for the trial.*

2. *On the morning of Tuesday 18th September 2018, when court was not sitting, I attended a meeting at National House where the Prosecutor (Mr David Esparon – Deputy Attorney General) met with the Italian and Djiboutian witnesses.*
3. *Also present in that meeting was Mr Esparon’s junior in the trial, who I believe is called Mr Joji John, Inspector Ivan Esparon of the digital forensics unit and two (2) Seychelles Police Officers, of whom one was a female called Lindy.*
4. *The aim of the meeting was Mr Esparon to meet with the Italian and Djiboutian witnesses so that he could clarify exactly who played which role in the interdiction and decide his witness order and also to explain to them the Court procedures.*
5. *During Mr Esparon’s questions to clarify the chain of continuity of the digital evidence, he asked the Italian exhibits officer, Lieutenant Gianluca Varese, if he had ‘verified’ all the images and video footage that had been passed to him. Lt Varese answered that he had not; he had only viewed his own video footage. To which Mr Esparon asked him whether he might say in Court that he did. This prompted an abrupt negative response not just from myself but also from those Italians who had understood Mr Esparon’s question. I said that Lt Varese would not say that, as he did not do it.*
6. *The meeting continued until we reached the subject of identity. Mr Esparon asked Lt Varese, who had boarded the suspects’ skiff, whether he would be able to identify it. At which point, Mr Esparon produced a pack of hard copy photographs (I believe that they had been taken by the Seychelles Police after the transfer exhibits from the Italian warship) and showed Lt Varese a photo of the skiff. From the other side of the table I could see that the vessel was on a trailer on some grass, therefore clearly not the photographs that the Italians had taken at sea. I said to Mr Esparon that the Italians could not be able to confirm that photographs as they did not take it.*
7. *Mr Esparon went on to point at the photo saying that he would have to ask the witness to identify the skiff in court and at this time he pointed to various marks on the side of the skiff and the colour (white with a light blue band) saying that they were important to remember. At this point I intervened firmly. I told Mr Esparon that he could not tell a witness what questions he was going to ask and could not tell them what answers they*

should give. I went on to say that he knew this was against the rule of law and not allowed. At this point Mr Esparon stopped his line of inquiry and moved on to letting the individuals view their digital evidence. I did not want to make a scene in front of Mr Joji John, but I felt that something had to be said.

8. Lt Varese then went with Inspector Esparon to view the video footage that he had been taken. In front of the witness Mr Esparon informed Inspector Esparon to take a note of the timings on the video when a red t shirt was seen. In fact Mr Esparon mentioned a red t shirt repeatedly in front of the witnesses. I am not sure how many of them understood the importance of this exhibit.
9. A short time after, the identification of the suspects was being discussed. I know that two of the Italians were looking at the police photograph pack, which contained photographs of the suspects taken. I do not recall if Mr Esparon had specifically handed it to them or whether it was just left in front of them as I had been speaking to another Italian at the time but the Italians had obviously realised that they would need to identify the suspects. I asked them whether they would be able to recognise the suspects without looking at the photographs. They said they would as they had spent three (3) days escorting them to the Seychelles and knew them well. At which point I told them not to look at the photos and told Mr Esparon that they would be able to identify the suspects without having to look at photographs now.
10. I am not an officer of the Court in the Seychelles and so am not obligated under this jurisdiction, but I am an officer of the Court in England and Wales and a representative of the European Union, which puts much weight in the human right to a fair trial. For this reason I felt morally obligated to raise my concerns, despite the potential consequences.
11. Having initially raised my concerns with my Chain of Command, it was agreed for me to bring this matter to the Chief Justice's mention, as the correct route in the Seychelles for such issues.

[11] The case of the prosecution is now closed. The Court has heard twelve witnesses for the Prosecution including four Italian Navy officers that effected the arrest of the accused

and three officers of the vessel M V Ever Dynamic, two being Chinese nationals and the other a South African national. The Court and Counsel have also proceeded to the locus at the SSCRB Complex at Bois des Rose Avenue where some evidence that could not be produced in Court were examined in order for the Court to view and assess the veracity of the witnesses evidence regarding those exhibits. At the close of the case of the Prosecution the Defence has now made a no case to answer submission. The submission is made in pursuance to s 183 of the Criminal Procedure Code.

[12] Prior to the making of the submission of no case to answer by the Learned Counsel for the Defence, I have given copies of the Affidavit of Ms Verity Marie Fane-Bailey to Mr Esparon and the Mr Rajasundaram. Defence Counsel, for them to make any submissions thereon, to the extent that they felt it was necessary and I have placed the original on the Court record of this Court as Exhibit A(1). Mr Rajasundaram submitted that he does not wish to make any submission on the content of the said affidavit.

[13] Learned Counsel for the Defence tendered to the court his written submissions in favour of a No case to answer submission. It is the submission of the Defence that the main threshold of no case to answer in the instant trial is that no prosecution witnesses has suitably or properly identified any of the accused individually at any time when they allegedly committed the offences on the high seas or at the time when they were brought on shores in Seychelles. The Defence further submitted that no arms or ammunitions were found in the possession of the accused and any evidence of attack or attempted attack on the part of the accused on the crew or vessel Gallerna III or that of the Vessel M V Ever Dynamic was equivocal and could easily be seen to be non-violent acts. The Defence submitted further that the only evidence of identification involved the colour of the shirt of two accused that were seen in a green and pink t-shirt both at the point of the alleged attack and that of the arrest.

[14] Mr Esparon submitted in reply to the No case to answer submissions. He did not make any submissions on Ms Bailey's affidavit.

[15] With regards to the submissions of Mr Rajasundaram, Mr Esparon submitted that there is strong circumstantial evidence of identification of the accused which consisted of a continuous chain of identification from their observation by the Italian navy pilot to the time of their arrest. At any rate he submitted that the markings on the skiff and the identical clothing seen by all the witnesses of two occupants of the skiff are strong circumstantial evidence of identification. As far as the elements of attacks are concerned, the learned Deputy Attorney General submitted that the two witnesses from the MV Dynamic have testified of the accused firing rocket propelled grenades at their vessel, whilst the witnesses from the Gallerno III have testified of the aggressive actions on the part of the occupants of the skiff that had to be stopped by machine gun fire.

[16] It is trite law that in this jurisdiction that a submission of no case to answer would be upheld by the Court where ;

(a) There is no evidence to prove as essential element of the alleged offence or

(b) The evidence adduced by the Prosecution has been so discredited through cross examination or

(c) It is so manifestly unreliable that no reasonable tribunal could safely convict upon.

(d) If a submission is made that there is no case to answer, the Court should make a decision based on whether the evidence is such that a reasonable Court might convict the accused and not whether the Court, is compelled to do so, would at that stage convict or acquit the accused.

(e) When Court comes to the conclusion that the Prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon, it is the duty of the court, upon a submission being made, to stop the case.

(f) Where the Prosecution evidence is such that its strength or weaknesses depends on the view to be taken on the reliability of a witness or other matters within the province of the jury and where on the positive view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is giving them the judge should allow the matter to be tried by the jury.

(g) Before making a decision on a submission of no case to answer the judge must wait until the conclusion of the Prosecution's submission.

R v/s Lepere (1971 SLR 112, R v/s Steven (1971) SLR 137, R v/s Olsen (1973) SLR 188,

R v/s Marengo (2009) SLR 116, R v/s Matombe (2006) SLR 32.

- [17] The Court in considering the no case to answer submission is conscious of the fact and is concerned that an affidavit that is now placed on record of the Court containing facts that may affect the credibility of the trial so far. Given the fact that the credibility of the Prosecution case is a vital aspect for consideration in a no case to answer submission this court would scrutinise the content of Ms Bailey's Affidavit together with any other evidence in considering the credibility of the prosecution case. This court will have to determine whether or not this trial is so far so manifestly unreliable that no reasonable tribunal could safely convict on it. If the Court is to rule in favour of the accused on this ground then the case would stop here, without the need for me to look further into the other grounds raised in this no case to answer submissions.
- [18] Having scrutinised the affidavit of Ms Verity Marie Fane-Bailey and having heard counsel for the Republic submissions thereon, I find that the affidavit shows that the fairness and the credibility of the prosecution case has been affected. The Prosecution witnesses were coached by the Deputy Attorney General. The prosecution in its zeal to secure a prosecution against the accused has crossed the red line as to what should consist of the process of familiarisation and pre-trial preparations of witnesses. The coaxing and prompting of prosecution witnesses' potential evidence leaves this court in reasonable doubt as to whether or not the witnesses testimonies in court consist of them giving their personal experiences and accounts of what happened at the scene of the arrest or whether they were the result of what they had been informed by the prosecution during the pre-trial briefing.
- [19] It is to be noted that the witnesses who have been subject to interference consisted of witnesses of identification which makes them an essential cog in the prosecution case and hence the greater need for this court to act with caution.

- [20] I am left with reasonable doubts as to whether or not their identification evidence is correct. I am therefore of the view that the evidence laid before me is so manifestly unreliable that no reasonable tribunal could safely convict on it.
- [21] It is to be noted that the witnesses involved in the pre-trial briefing acted at all material times in a professional and courteous manner and I attach no liability to their conducts. They being in a foreign country no doubt felt obliged to follow what they felt to be the procedure and the law of the land and their behaviours hence cannot be impeached.
- [22] Having come to this finding I am of the view that there is no case to answer on the part of all of the six accused. I therefore dismiss the two counts of Attempt to commit an act of Piracy and Piracy of which they stand charged and acquit them accordingly. Having come to this decision I would not venture into the merits of the other grounds of no case to answer as raised by the learned defence counsel.

Signed, dated and delivered at Ile du Port on 28 September 2018

R Govinden , J
Judge of the Supreme Court