

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 64/2017

[2018] SCSC 1109

THE REPUBLIC

versus

FRANCIS BARREAU
Accused

Heard: 23rd November 2018
Counsel: Mr Chinnasamy, Principal State Counsel for the Republic
Mr Nichol Gabriel for the accused
Delivered: 7th December 2018

RULING

Govinden J

[1] The facts and submissions

In this case , after leading of the evidence for the prosecution and before formally closing its case, the Learned Principal State Counsel has filed a motion seeking leave of this court to amend the charges levelled against and pleaded to by the accused, this amendment is being done by way of substitution and addition of charges.

Initially the prosecution charged the accused with two counts, both counts relates to charges of unlawful possession of a controlled drug with intent to traffic contrary to section 9 (1) read with section 19(1) of the Misused of Drugs Act 2016. One count averring the possession of 61.52 grams of heroin, whilst the other 351.9 grams of cannabis material. Laure Dick being a person jointly charged with the accused in those two counts, had her charges withdrawn upon her being given a conditional offer to testify in favour of the Republic.

The trial has proceeded so far on the assumption that the controlled drugs were in possession of the accused. According to the prosecution motion, they have now realized that evidence shows that the two charges has to be read with section 20(3) of the Act as there were testimonies that the accused was found to be trafficking in a controlled drug by virtue of Laure Dick being found in possession of the controlled drugs with the knowledge and consent of Francis Barreau.

In the motion the Republic also aver that there was evidence that militate in favour of amending the original charge to include two additional counts for the offences of Conspiracy to commit the offence of trafficking in the said controlled drugs in pursuant to section 16 (1) of the Act together with Laure Dick.

The Republic moves for this amendment because they believe that evidence that came out during the trial will support the new charges. Mr Chinnasamy submitted that he is not going to call additional evidence if the amendment is granted.

It is the contention of the learned counsel for the Republic that the Defence would not be prejudiced as the accused had been so far been ably defended by counsel during the examination of witnesses and that the accused would have ample opportunity to recall and cross examined witnesses that he finds relevant for his defence.

On the other hand, the Defence strenuously objected to the amendment on the ground that it is coming very late in the procedure and that they have conducted their defence on the existing charges and as such, that they would be prejudiced.

[2] **The law**

Section 187 (1) of the Criminal Procedure Code provides that where it appears to the court that the charge is defective, the court may make such order for the amendment of the charge as the court think necessary to meet the circumstances of the case, unless having regards to the merits of the case the required amendments cannot be made without prejudice.

Section 187(2) (b) of the Code on the other hand states that an amendment for substitution or addition of new charge can only be made up to the close of the case for the prosecution.

The proviso to s187 (1) of the Code at clause (c) provides further that when leave to amend is given by the court in a case of substitution or addition of new charges the court shall ask the accused whether he wishes to adduce evidence or to recall any witnesses for further examination or cross examination and if he so wishes shall allow him to do so.

[3] **Findings**

It is my view that the Republic has no absolute right to amend its charges under section 187 of the Criminal procedure Code. Any amendment, whether because of a typographical error or as a result of variance between the charge and the evidence adduced can only be done, *“unless having regards to the merits of the case the required amendment cannot be made without prejudice”*. The facts of each case and any prejudice arising as a result of the amendment will therefore determine the outcome of the motion seeking leave to amend. The burden lies upon the Republic to establish that the amendment would not cause prejudice to the accused, the accused having nothing to disprove.

It is perfectly possible for the Republic to seek leave of the court to amend the charges as a result of variance between the evidence led and the charges before the court .Vide, *Republic vs Dominique Dugasse and or, CR 20/09*. However, such amendments would be granted depending on the merits of each case and the issue of prejudice to the Defence.

Given the merits of this case I am quite unable to state that the accused would not be prejudiced in his defence by the proposed amendment, this despite the existence of remedial measures under the proviso. All of the Republic’s witnesses have examined and

have been cross examined and the accused has taken his plea on the basis of the charges laid before me. Further, it appears that on this basis some aspect of the evidence has not been contested by the Defence. This might not been the case or might have been done differently had the new set of charges been before this court.

If I was to allow the amendment at this juncture. The prosecution would move to close its case after the amendments are made, as it has been said that it is not going to call further witnesses. Having done so I will be bound to put the accused to his rights under section 184 of the Criminal Procedure Code. I am mandated by article 19 (2) of the Constitution to do so. Once his rights would have been imparted to him the accused would be sovereign in the choosing and exercising any of those rights. The question of allowing the accused to recall witnesses for the Republic under s 187 of the Criminal Procedure Code would accordingly not arise and would be superfluous in this case. It is moreover to be noted that the accused has a constitutional right to remain silent under article 19(2) (a) of the constitution and if, after the close of the case of the prosecution, he decides to exercise this right in this case he would be severely prejudice as he would be unable to contest the new charges through cross examination of the prosecution witnesses .This is the conundrum that the very late proposal to amend the charge have led us to.

It is my view accordingly that the amendment to the indictment being sought by the Republic cannot be granted given its prejudicial nature. This case shall accordingly proceed on the charges pleaded to by the accused.

Signed, dated and delivered at Ile du Port on 7th December 2018

R Govinden , J
Judge of the Supreme Court