

SUPREME COURT OF SEYCHELLES

Not Reportable
[2019] SCSC 533
CO 60/2018

In the matter between

THE REPUBLIC
(rep. by Mr. Chinnasamy)

Republic

and

TONY VIDOT
(rep. by Mr. Camille)

1st Accused

KIERA MARIA
(rep. by Mr. Camille)

2nd Accused

Before: Twomey CJ
Heard: 27th June 2019
Delivered: 27th June 2019

RULING

TWOMEY CJ

[1] Learned Counsel for the prosecution, Mr. Chinnasamy has applied to the Court to recall a prosecution witness, namely Neil Suzette, to give evidence again, specifically to identify a bag produced to this court. He has relied on section 126 of the Criminal Procedure Code and has submitted that no new evidence is being presented in the matter but that the witness is only being recalled to identify an exhibit.

[2] Learned Counsel for the defence, Mr. Camille has opposed the application on the ground that this would be a second bite at the cherry by the prosecution for an oversight by an experienced prosecutor, a Principal State Counsel. He has further submitted that although the recalling of a witness is at the discretion of the trial judge, on the authority of *R v*

Sullivan 16 Cr. App. R.121, recalling a witness who has already given evidence merely for the purpose of giving evidence again is highly irregular.

- [3] It is also his submission that any evidence adduced by the prosecution can be excluded if at the discretion of the judge its prejudicial effect outweighs its probative value. He relied on the authority of *R v Sang* [1979] 2 All ER 1222.
- [4] I must point out that Neil Suzette gave extensive evidence in this case and was vigorously cross-examined. He testified that he had travelled with the First Accused to Abu Dhabi and had returned on the same flight to Seychelles with him. At one point on the journey back, the First Accused gave him a white bag with green designs and asked him to put it in his backpack and to give the bag to Dominic Laure on arrival. He testified that he did hand over the bag as requested.
- [5] At that point of the trial the white bag with green designs had been admitted as an item only. The witness was not asked to identify it. Later, the white bag was identified by the forensic analyst who handled it and examined it. At this stage, the bag was admitted as exhibit P4. It is the identification of this bag by Neil Suzette, which is presently sought by the prosecution.
- [6] With regard to the recalling of witnesses, section 126 of the Criminal Procedure Code provides:

“Any court may 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 summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate, shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any person as a witness.”

[7] In *R v Assary* (19 of 2009) [2010] SCSC 43 (28 February 2010) Burhan J explained the purport of the above provision. He stated:

“It is apparent that this section creates two situations. The first gives the court a discretionary power even ex mera motu 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.”

[8] Burhan J added however, that the case of *Wirtz v The Republic* 1985 SLR 62, cautioned that the recalling of a witness under section 126 of the Criminal Procedure Code should be prudently exercised.

[9] In *Assary*, the defence had sought to recall a witness for the prosecution in the midst of the defence case. This was refused by the trial judge on the basis that the evidence sought from the witness was regarding the fact that he had a case of dishonesty pending against him and this was a fact already admitted by the prosecution.

[10] In *R v Estico* (51 of 2006) [2008] SCSC 67 (26 February 2008), in an application by the defence to recall a prosecution witness after the defence had had the opportunity to cross examine him, the trial judge in refusing the application held that generally the law expressly sanctioned the procedure to have a witness who had already given evidence

recalled to give additional evidence. The court added that the judicial discretion to allow such evidence had to be exercised by considering:

“...the purpose such a recall would serve, the stage at which the trial has reached and whether the evidence of that particular witness would be essential to the just decision of the case and would not prejudice the accused. But the Court must be very quick to detect applications for recall of a witness which are no more than an attempt in any way to abuse the process of the Court.”

- [11] In *R v Zialor* [2015] SCSC 2, the trial judge allowed the defence to recall a prosecution witness for the purpose of producing the statements or statement of the victim on the ground that to do so was in interests of justice in order to arrive at a just decision and to ensure that no prejudice is caused against the accused.
- [12] The English case of *Sullivan* (supra) adds little to the discussion as that concerned a case where permission to recall a prosecution witness was allowed as result of an assertion in defence counsel’s closing speech.
- [13] The present application has to be examined with the principles enunciated in the above-mentioned authorities in mind. I have in keeping with the provisions of section 126 of the Criminal Procedure Code to balance the prejudice that might be caused to the accused with the necessity to arrive at a just decision in this case.
- [14] Recalling the witness in this case to identify an exhibit in my view, is in the interest of justice and would help the court in arriving at a just decision. This is not prejudicial to the accused, and is not a ‘second-bite’ at the cherry as submitted by Mr. Camille because the witness has already testified regarding this exhibit. In the circumstances, I allow the witness, Neil Suzette to be recalled.

Signed, dated and delivered at Ile du Port on the 27th June 2019

Twomey CJ