SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC **1046**
CO04/2022

In the matter between

THE REPUBLIC
(rep. by Mr Powles)

and

MUKESH VALABHJI — **1st Accused**
(rep. by Mr Bonte)

LAURA VALABHJI — **2nd Accused**
(rep. by Mrs Aglae)

LESLIE BENOITON — **3rd Accused**
(rep. by Mr Hoareau)

LEOPOLD PAYET — **4th Accused**

FRANK MARIE — **5th Accused**

Neutral Citation: *Republic v Valabhji & ors* [CO04/22] [2022] SCSC **1046**
Before: Govinden CJ
Heard: 29 November 2022
Delivered: 30 November 2022

RULING

GOVINDEN CJ

The Accused no. (1) and no. (2) in this case has filed a motion dated the 21st November 2022 requesting this Court to adjourn the trial which has been set to commence from the 1st December this year. Their application are supported by an affidavit of the 2nd Accused person. For the

purpose of this ruling I shall refer to them as the 1st and 2nd applicants or collectively as the applicants. In the application the applicants have set a number of preconditions for the setting of new trial dates, in the event that the Court is mindful to adjourn the trial based on the strength of their application.

These preconditions are as follows:-

(a) Payment having been made to their lawyers and their lawyers having been sworn and granted a GOP.

(b) All disclosures having been made and their lawyers and themselves having been given the chance to review them.

(c) The recording system of the CCTV/NVR and LLP review report being made available and their lawyers and themselves having the chance to review them.

(d) Them having the chance to review

(i) The ballistic report.

(ii) The LLP review report.

(iii) The content of the storage device containing the "Anarchist Cookbook"; the report in respect of the review of digital forensic which procedure of the reviewing is only being set up now by the ACCS. Them having been invited to submit search terms and key words and to instruct qualified cyber security experts to attend the review.

(iv) Their lawyers and themselves being given adequate time to prepare their defence.

The affidavit in support ground the reasons for the application on two main points. First, because there are delays in the payments of their legal fees and second the non or lack of disclosure of prosecution disclosable materials. According to the deponent the prosecution have defaulted upon both matters in this case which has resulted to prejudice being caused, with the end result that the trial if it was to take place, being not in accordance with their right to have a counsel of their own

choice and to be given time and opportunities to prepare their defences as set out under the Constitution.

In their submissions learned counsel have further expended arguments in support of those grounds.

The Republic, through counsel, have replied to the application for postponement of the trial in their reply dated the 28th November 2022. In its reply it denied the application and argued that the Defence has been afforded sufficient time and facilities to instruct additional counsels and that they have not avail themselves of the time and opportunities in making sure that the issues raised are solved and that therefore the fault is that of the Defence and it is not of the Republic. However, in the alternative, it argues that if the Court is to grant an adjournment, such adjournment must be as short as possible to remedy such matters.

On the other hand counsel for the 3rd accused objected to the application. His principal contention being that his client is ready for trial and any postponement of it would only go to affect his right to be tried within a reasonable time from the date he was charged. The 5th accused has no objection to the application.

I have thoroughly given due consideration to the content of the application and that of the reply and the several submissions of all counsels, for and against the application

First of all, the Court has to raise a concern regarding the form of the application. The application is in the form of an ultimatum on the part of the two applicants. It places *sine qua non* conditions that need to be fulfil or otherwise in their own words "*a trial cannot be fixed*". This causes grave concern because it purports to take away from this Court its inherent powers of managing its case and it seems to me instead trying to place it in the hands of the two Applicants. This is something that the Court will not allow to happen as it is this Court that has the power and ability to decide if and when the trial is ready for trial and not that of the accused. If this judicial power was to be surrender to an accused person it is clear that a trial may not take place as it is, obviously, sometimes not in the interest of an accused for a trial to take place.

Moreover, it is abundantly clear that some of those preconditions set unilaterally by the Applicants may still not be fulfil and yet the trial may still take place. This being the issue of disclosure of prosecution materials. Reading the application it seems that the Applicants are saying that unless

and until the prosecution disclose all materials they referred to then the trial cannot take place. On this point as I have said before and I repeat it again, disclosure is a question of form, it is a process. It allows for the Defence to be given advance notice of materials that the prosecution is going to use at the trial or those that are useful to the Defence. This is done in fairness. The lack of disclosure therefore does not per se prevents the trial to take place. If the prosecution intentionally or unintentionally fails to disclose prosecution materials it does not void the trial per se. What will happen would be that the prosecution would not be able under certain circumstances to rely on the materials not disclosed at the trial and the time for dealing with this issue is at the time of admission or attempt to admit such materials at trial.

Another issue of form that I have notice is that the Applicants have brought in evidence in the possession of the Anti-Corruption Commission of Seychelles (The ACCS) that are not relevant in this case. The Court have taken notice that there are another case in which the 1st Applicant is being prosecuted by the ACCS. These materials are not disclosable in this case and should be kept out of these proceedings. I note that their request at d(iii) relates to review of digital forensic by the ACCS that are not relevant here. They would be relevant if the Applicants deems them fit in their defence. There is therefore no obligation for the Republic which is prosecuting this case to make them available in this case to the extent that they are not being used by the Republic to prove the charges in this case. There is another instance where this appears. This relates to paragraph 9 of the affidavit of the Deponent when it refers to items and devices supposed to have been seized by the ACCS at their premises in case CR114/21, that the Applicant views can be disclosed in this case.

Now, having said this I will not go to what are the rights in issue in here.

Article 19(2)(d) of the Constitution provides that a defendant has a right to be defended before the Court in person or at the person's own expense by a legal practitioner of the person's own choice.

Article 19(2)(c) provides that a defendant shall be given adequate time and facilities to prepare a defence.

In considering a submission and motion based on article 19(2)(c) the Court must assess the defence as a whole and not any individual counsel, whether that counsel was denied adequate time and

facilities. Adequate time and facilities cannot be assess in the abstract as it would depend on the circumstances of each case. It is not possible to set an objective standard of what constitute time and facilities. As I have said before the complexity of the case, the number of the charges, the gravity of the charges, the materials, the number of defendants, the status of the defendants, the scale of the prosecution disclosable materials and number of the prosecution disclosable materials are all relevant.

As to right to legal representation for it to have any meaning it must include the right to be afforded reasonable time and opportunity to obtain the assistance of a lawyer of one own choice. Again the facts and circumstances of each case will dictate as to what constitute reasonableness as to time and opportunities.

That as it may I will now address each grounds put forward by the Applicants which I find relevant to the issue before the Court.

First of all, there is the payment of legal fees.

This is not a new issue. I have previously given a ruling in case CO114/21 on the 10th November 2022 on this very subject, which covers the contentious issues before the Court. It appears however that despite my decision there are still contentions between the Applicants and the ACCS with regards to the raising of invoices against accounts of companies in which the Applicant or Applicants have financial interest. This is evident by the letter written by the legal advisor of the ACCS to the counsels of the 1st and 2nd Applicants, attached as exhibit "A" to the reply of the Republic. When I look at the facts of this case and as I have said before those differences does not originate yesterday, it goes back a long way. In July 2022 ACCS refused to approve the invoice raised the Kobre and Khan for retainer fee due to the lack of breakdown of the fees. The ACCS then invited the Applicants to apply to the Supreme Court for a decision on the deadlock, but nothing was done to that effect. In my ruling of November, I issued guidelines to the parties as to the process. If that legal procedure had been followed this application would probably not been before the Court. For the sake again of repeating myself, the procedure is found under Section 60(6) of the Anti-Corruption Act. It provides for variation of any restrictions imposed by the ACCS on any of the accounts of the Applicants.

Given that this contentious issue relates to the right of the Applicants to counsel of their own choices and that their leading counsel is apparently not able to appear as a result of the contention, it is abundantly clear that the trial fixed cannot proceed unless this issue is addressed in a legal manner. However, the Applicants cannot rest on their laurels as they have to file the necessary applications as previously advised, so as for the deadlock between themselves and the ACCS to be resolved. I order the Applicants to file such applications before the Supreme Court within the next 14 days and having them served on the ACCS. These motions have to be filed not in this matter but in a separate application.

The issue with respect to the disclosure.

This issue has been the subject matter of previous decisions of this Court also. Notwithstanding the complexity of the case and subject to what I have held above, the prosecution should ensure that it discloses all prosecution materials to the Defence. This should include materials listed in Annex (B) of their reply. The prosecution has also a further duty to ensure that these two cases are not mixed. This case is not mixed with the case CO114/21. From the pleadings filed in this case it appears that the Defence is not able to discern or is incapable to discern what materials belongs to what case. The prosecution duty is to ensure that they are informed as to what are the facts of the case and what materials they are relying upon. This will go a long way in clarifying some issues relating to disclosure.

With respect to the USB containing the Anarchist Cookbook, I will not make any specific order as my order is on record.

As regards the CCTV/NVR at the residence of the two Applicants, which is also raised as a disclosure issue. This issue should not have been raised as it is a closed one based on the Court's ruling of the 21st November 2022.

As regards to documents in the possession of ACCS, they are not relevant to this case as I have ruled, to the extent that the Applicants find that some are relevant to their defences they should demand those from the ACCS. These materials are therefore not relevant to disclosure in this matter by the Republic. At any rate as I have ruled before the Court is not to go to the number of bytes of gigabytes or megabytes of documents disclosed as this is a matter between the parties.

With respect of the digital devices of the 2nd Applicant being analysed by the expert to the extent that it relates to this matter then they should be made available to both parties as per my previous decisions. The procedure is clearly set out in my decision. If the prosecution does not wish to rely on any of those materials in this case it is obviously at liberty to do so, provided that this is communicated to the Applicants. At any rate I will not accept that this Court would have to wait for the Applicants report on the report of the assessor appointed by the Court. I note that it was the Applicants who proposed his name to the Court in the first place.

With respect to the disclosable materials to the extent that those materials is still relevant as part of this ruling it is also a ground to adjourn this trial. However, the issue with regards to lack of disclosure is not necessary fatal to the prosecution as compared to the right to legal representation.

The 3rd Accused has raised the defence of the fact that the vacation of the trial would affect his right to be tried within a reasonable time. I find that this submission is too premature at this stage given that no trial date has been fixed yet. The Court will therefore address the issue of reasonability of the time at the appropriate time that it arises.

This is the ruling of the Court.

Signed, dated and delivered at Ile du Port on 31st day of November 2022.

Govinden CJ