

**SUPREME COURT OF SEYCHELLES**

**Reportable**

[2022] SCSC ...

CM75/2022

Arising in CO90 of 2021

In the matter between :

**THE REPUBLIC**

*(rep. by Mr Kumar)*

and

**JIMMY ROY AZEMIA**

*(rep. by France Bonte)*

**1<sup>st</sup> Accused**

**ANDREW ESTRALE**

*(rep. by Joel Camille)*

**2<sup>nd</sup> Accused**

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<b>Neutral Citation:</b>	Republic v Azemia & Estrale CM75/2022) [2022] SCSC	7 June 2022
<b>Before:</b>	Govinden CJ	
<b>Heard:</b>	7 June 2022	
<b>Delivered:</b>	7 June 2022	

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**RULING**

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**GOVINDEN CJ**

[1] This is a Notice of Motion filed by the Republic under Section 126 of the Criminal Procedure Code in which it is seeking to recall 3 witnesses.

[2] In the Affidavit in support of the Application woman Police Sergeant Eulentin states that it is essential to recall Captain Luke Fonseka and Sergeant Dave Jeanne so that they be able to identify the exhibits produced physically in Court by the Exhibit Officer Dean Decommarmond, who was on an overseas training at the time of their testimonies. As a result of the Exhibit Officer not being present they only testified upon secondary

evidence, being photographs of the produced exhibits of which they identified on the photographs.

- [3] These two officers are scene of Crime Officers who participated in the seizure of the exhibits.
- [4] As regards to the 3<sup>rd</sup> witness to which the Motion applies and which his presence is being recalled he is Sub Inspector Dean Decommarmond.
- [5] The Learned State Counsel representing the State informs the Court that he is seeking his recall in order to rectify an error in his evidence, namely as to whom he handed over the exhibits which were send to Mauritius for analysis.
- [6] Learned Counsel for both accused vehemently objects to this Application. The Learned Counsel for the 1<sup>st</sup> accused submitted that the Court has a judicial discretion under Section 126 of the Criminal Procedure Code that has to be used judiciously. It should not be used to fill in the gap in the Prosecution case. He submitted that the Prosecution witnesses whose presence is being sought for the second time before the Court has already testified before the Court on the chain of evidence, though the content of the exhibited photographs, and by trying to call them the Prosecution is having a second bite at the cherry and it is trying to strengthened its case and it amounts to an abused of process. Moreover, he submitted that the Prosecution should have at least itemised the exhibits so that they could have been identified property in Court after which they would have produced by Decommarmond as evidence.
- [7] As to the evidence of Officer Dean Decommarmond Mr Camille submitted that it amounts to giving the Prosecution a second chance to fix its case and close a gap that has appeared in the Prosecution's case.
- [8] Mr Bonte Learned Counsel for the second Defendant joined the Motion of the 1<sup>st</sup> Defendant. With regards to Mr Decommarmond he submitted that the principle that one should take one witness as he is, should be sustained here. At any rate as regards the other witnesses, it is his submissions that if they are to be recalled they should keep to the issue of identification of exhibits only.

- [9] I have thoroughly given my careful attention to the Notice of Motion and the content of its supporting Affidavit and the submissions of Counsels for the Republic and the Defence. I do not take issue with the credibility of the deponent's evidence. I also share the same view of Counsel as to the scope of Section 126 of the Criminal Procedure Code. This provisions give to the Court a wide discretion a wide ranging discretion to recall and call witnesses in a criminal Prosecution. As all discretion it has to be exercised reasonably and judiciously, bearing in mind the interest of justice and that it should not be used in a way that is prejudicial to the accused. This principle is perfectly summed up in the case of Republic versus Tony Vidot and or CO60 of 2018.
- [10] Applying those principles to the facts of the case I am of the view that Captain Luke Fonseka and Sergeant Dave Jeanne should be recalled as this will cause no unfairness to the Defence, who will have the chance to cross examine them on the limited issue of identification of the physical exhibits produced. Their de novo testimonies are not second bites at the cherry as they have not testified about the identification of those exhibits physically produced by Officer Decommarmond. They had only testified and identified them on secondary evidence, which are photographs. They will now identify the original and best evidence and in so doing will assist this Court greatly in its factual determination of the facts in issue.
- [11] I note that on the 1<sup>st</sup> of February 2022 when the Prosecution open its case it did give to the Defence a Notice that it will in due course file such Motion as Officer Decommarmond was on overseas training at the material time. This also heavily mitigate any prejudice that the Motion could have caused.
- [12] The Application with regards to recalling Officer Dean Decommarmond pauses different challenges. In his testimony he testified that he handed over the exhibit to Police Officer Omblime, however now the Court is informed through Counsel and the Application that he apparently handed over the exhibits to Mauritian Forensic Officers directly. Learned Counsel for the Defence objected to his recall on the ground that this will be unfair and prejudicial to the Defence as it will mean that the Prosecution is attempting to fill in a gap in its case.

[13] I have considered the issues arising here. Having done so the Court is of the view that no gap has appeared in the Prosecution case as yet, something that can only be determined at the end of the Prosecution case.

[14] This Court is a Court of truth and in its quest to elucidate the truth and reality concerning the totality of the facts of the case it has power to recall any witnesses that it so decides subject to fairness being obliged to all sides. I will on this basis allow the recall of Officer Dean Decommarmond subject to the following conditions.

(1) He should only testify on the chain of evidence with respect to the handing over of the exhibits to the Mauritian Forensic Officers.

(2) He should be allowed to be cross examined thoroughly and re-examined both as to his credibility and the substance of his evidence in respect of this fact.

Signed, dated and delivered at Ile du Port on 7<sup>th</sup> June 2022

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Govinden C J