

SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC 129

CO26/2022

In the matter between

THE REPUBLIC

(rep. by Mr H. Kumar and Mrs G. Leste)

and

LUSSEL LABICHE

(rep. by C. Andre)

1st Accused

ASHTEN ELIZABETH

(rep. by Mr A. Govinden & Ms E. Chang-Thiou)

2nd Accused

Neutral Citation: *Republic v Labiche & ors* [CO26/22] [2023] SCSC 129

Before: Govinden CJ

Heard:

Delivered: 16 February 2023

RULING

Govinden CJ

In the trial Corporal Tania Solin testified that she came to the Anse Aux Pins Police station where the 2nd accused was being detained on the 30th May 2022. In view of certain developments

in the investigation she wanted to have a further statement under caution from the 2nd accused then 2nd suspect. According to her the statement was taken in the presence of Sgt Marianna Eulentin. Upon the prosecution attempting to produce the said statement into evidence the learned defence counsel of the 2nd accused made the following objections.

- (1) That the statement was improperly obtained and was not given voluntarily as it was based on pressure and his client was not cautioned.
- (2) The 2nd accused right to silence was breached as she had exercised her right to remain silent on the 28th May 2022 upon the advice of her counsel and despite that on the 30th May Officer Solin went on to take a statement under caution from the 2nd accused outside the presence of counsel.

As a result of this objection this court ordered for a trial within a trial to take place in order for the prosecution to establish that the said statement was properly obtained.

The Republic called 2 witnesses in this case. The first witness was Corporal Tania Solin who testified that on the 30th May 2022 she left her office at around 3.30pm and reached the Anse Aux Pins police station at around 3.50pm and she was accompanied by Sgt Marianna Eulentin. At the station she informed the officer that she had come to see the 2nd accused and she asked them to lend her an interview room. Ashten was brought in the interview room at around 4.05pm. She informed Ashten that she was interviewing her in that on the 20th May Sgt Eulentin had put some questions to her regarding developments in the criminal investigation with regard to a notebook found at her residence and some audio recording and she had refused to state upon the advice of her counsel Mr Cesar and in view that the investigation was still open whether she wanted to give a statement on the developments. After she cautioned the 2nd accused and informed her of her rights to remain silent and her rights to have a lawyer present. 2nd accused then informed her that she was ready to give a statement and that she was going to write it herself. She was aware that Mr Cesar was no longer counsel on record for the 2nd accused as she had phoned him in the morning of the same day and the latter had told her that he was no longer counsel for the accused. However, when informed of her right to counsel anew on the 30th the 2nd accused did not inform her that she wanted to have a new counsel. According to the witness

as she wanted to write her own statement she gave her a statement form after she had put the time of caution on it. The statement started at 4.09pm and ended at 9.45pm. At all time it was witnessed by Sgt Eulentin. After statement was completed the accused read it and she was asked whether she wanted to add, alter or correct anything. The accused then signed as correct and she signed it and Eulentin signed it also after she had certified it. They left the station at 9.50pm in order to go to their office to do some paper works. The witness was shown a page in the investigation diary of the case and she identified entries at 1530pm where it stated that she and officer Eulentin left the station to go to Anse Aux Pins police station. Another was on the same day at 2210pm where it stated that the officers are back in office and one was at 2211pm where it was entered that the 2nd accused had given a statement to the officers.

Under cross-examination the officer stated that Sgt Eulentin had reported to her what happened on the 28th May with respect to the interview of the accused in the presence of counsel. She denied that she has told the 2nd accused that she had to give a statement under caution no matter what. She insisted that there was no questioning when the accused was writing her statement in a story form and she said that she only requested for some water. She denied that the 1st accused last statement was shown to the 2nd accused at the time of her writing her statement. She denied having breached the 1st accused right to remain silent. She denied putting any pressure upon the accused in order for her to give the statement even if it was 5 hours 40 minutes long.

Sgt Eulentin testified next. Her evidence as a whole is consistent, cogent and corroborative of the evidence of Corporal Solin except the following.

- (1) With regards to what happened on the 28th May 2022 when the 2nd accused was being interviewed in the presence of counsel, beside stating that she exercised her right to remain silent, according to her she also went on to state what was contained in the audio, that is a plan to disinform the Ernesta family after they would have killed the deceased and with regards to the notebook, that it contained written plan how to kill the deceased. She testified that she told all those to Solin. Corporal Solin evidently did not tell the court about this.

(2) She stated that on the 28th when the 2nd accused was being interviewed and cautioned she was only the witnessing officer and it was Sgt Simeon who was questioning.

The defence called the 1st accused. She testified that she was questioned on the 28th May 2022 in the presence of her lawyer with regards to the notebook and the audio files and upon advised of her counsel she refused to give a statement and exercise her right to remain silent.

On the 30th May she was told by officer at the Anse Aux Pins police station that CID was coming to get a new statement from her and she told them that she did not want to give a statement. At around 4pm Sgt Simeon, Corporal Solin and Sgt Eulentin then came to her cell and told her that they had come to take a statement from her no matter what and she refused and they insisted that she had to give the statement and brought her to the CID office.

In the interview room Officer Simeon, Solin and Eulentin were all present. Then officer Solin gave her a statement under caution form and then Sgt Eulentin related to what the 1st accused had said in his statement and told her what she had to say.

She wrote the statement because she had no choice. If the officers never came to her that day she would have followed her lawyer's advice and never given a statement.

She was not informed of her right to counsel. In the middle of her statement Corporal Solin gave her the 1st accused statement to read so that she could make the statement similar to hers. She said that her statement was 5 hours 45 minutes because Officer Eulentin kept questioning her. Corporal Solin had given her the 1st accused statement which she had to read and at the same time they were all asking her questions.

I have listened to all evidence led before me. I have considered their credibility especially with regards to the demeanours and the truthfulness as tested under cross-examination. I have also closely and attentively listened to the submissions. I have given also careful consideration to what the law says on the subject, namely that the prosecution bares the burdening of proving beyond a reasonable doubt that the statement was properly taken in the sense that no coercion,

inducement, threats or intimidation was put or made to the accused by the police which has sapped the free will of the accused which would make the statement involuntary. The prosecution also bears the burden of proving beyond a reasonable doubt that the accused constitutional right was not infringed.

With regards to the constitutional rights, the defence case is that there was a breach of the accused right to silent. The right stems from article 18(3) of the Constitution which states that a person who is arrested or detained has a right to be informed of the arrest or detention as soon as reasonably practicable thereafter in as far as practicable in a language that the person understands of the reasons for the arrest, a right to remain silent, a right to be defended by a legal practitioner of the person's own choice, in the case of a minor right to communicate with her parent or guardian.

It is clear that under Article 18(3) the right is to be informed of the right to silence. This right to be informed of the right to silent had on the 28th May 2022 being imparted to the accused and coincidentally also the right to counsel. As a result of being so informed she clearly maintained her silence on that day. Evidence however revealed that Mr Cesar withdrew his appearance and representation of the 2nd accused at least by the 30th May 2022. However, at that time the police investigation was in full swing and the investigators were still investigating the case. And the 2nd accused was being detained as a remandee at the Anse Aux Pins police station. The question is whether this stops the investigators from attempting to question the 2nd accused anew on the 30th May 2022. In the opinion of this court it did not. Once an accused or suspect has decide to exercised his or her right not to speak and remain silent it does not mean that on another occasion he or she will not speak. The police could have properly interviewed and attempt to get her to give another statement under caution even if she had refused before provided that she was again cautioned and informed of her right to silent and her right to counsel. And in this case I am satisfied that the police did so.

The right to silent can be waived by the right owner. The right owner may decide to end the right to silent and give a new statement. However, the police should if the fact shows that one has expressed the right to remain silent once, remind the right holder again of this right and

caution her before any attempt to take to interview him or her anew. To take a mechanical view of the right to silent which is what the defence is attempting to do would make the right unworkable. Seemingly, if what they are proposing is to be the case once a suspect has been cautioned and informed of their right to silent after the initial arrest in an investigation and that right being exercised, all statements taken from the suspect thereafter would be prima facie unconstitutional.

Closely associated to the right to remain silent in this case is the right to legal representation. This has not been directly made an objection in this case. However, given its relevance to the whole facts in issue the right to remain silent, the court has to make a finding.

Mr Cesar was counsel for the 2nd accused on the 28th May 2022 when the 2nd accused was advised not to give a statement under caution. On the 30th May 2022 when the police knew that Mr Cesar had withdrawn from the defence of the 2nd accused they went on and took a statement from her. That may seem on the face of it a ruse. However, I am satisfied that this was not the case. There is no evidence why Mr Cesar withdrew his appearance and there is no ill imputation put forth by the defence on this. However, it is clear that the 2nd accused was informed of her right to have a new counsel present when she was being interviewed on the 30th May when she gave her statement under caution. Again as I have said before the right to counsel is a right to be informed of the right to counsel. There is no positive obligation on the part of the police to ensure that a lawyer is present when a statement under caution is taken. In this case I am satisfied that the 2nd accused was informed of the right to have a counsel present and she did not request for a counsel to be present. As a result, I am satisfied that there was no breach of any constitutional right when the accused gave her statement on the 30th June.

As to the pressure being exerted upon the 2nd accused the defence is saying that 3 police officers were present at the time of taking of the statement. They pressured or pressed her by showing her the 1st accused statement under caution. They questioned her while she was writing the statement and asked her to give a statement that would coincide with that of the version of the 1st accused and that went on for 5 hours and 40 minutes. I have carefully listened to both sides of the story with this in mind. If the story is as per what the 2nd accused has said, it would obviously be oppressive. However, I chose not to believe her version and I find that it is a

