SUPREME COURT OF SEYCHELLES

Reportable
[2024]
CO 04/2022

In the matter between:

THE REPUBLIC **Republic**
(rep. by S Powles)

and

MUKESH VALABHJI **1st Accused**
(rep. by J Lewis and ors)

LAURA VALABHJI **2nd Accused**
(re. by R Scott and ors)

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

LEOPOLD PAYET **4th Accused**
(rep. by J Camille)

FRANK MARIE **5th Accused**
(rep. by J Camille)

Neutral Citation:	*The Republic v Valabhji & Ors* (CO 04/2022) [2024] (March 2024)
Summary:	Admissibility of documents from electronic devices; the Best evidence Rule and chain of evidence
Before:	Govinden CJ
Heard:	27 February 2024
Delivered:	19 March 2024

RULING

GOVINDEN CJ

[1] The Defence are objecting to the admissibility of one pendrive, item P16(a), containing electronic documents which the Prosecution says were seized from the premises of the first three accused and item P17, item P18 and item P19 being print outs of the content of item P16(a).

[2] Mr Zaiwalla's objection on behalf of the 1st and 2nd accused is founded on the basis that the Prosecution cannot produce in evidence the print out and sub copies, which he has itemized as P16 through P19. The reason for that being that the physical storage, which are said to have been seized from the home of the 1st and 2nd accused have not been produced. According to the Learned counsel, original physical devices are clearly available to the Prosecution as Mr Stephenson even brought it into Court.

[3] The Learned counsel referred to Archbold 1962 edition at paragraph 1062. He submitted that it provides that it is a general rule of the best evidence that the original of the document must be produced if it can possibly be obtained. It is not the next best evidence that can be obtained. If the original cannot be obtained then the next best evidence can be produced. This means that as a general rule where a written document is to be used as proof, the original document must be itself produced and in fact can be proved by the person who actually saw or heard; or if it appears that there was any better evidence existing, but that which is produced, the non-production of such evidence makes presumption that if produced, the foundation for it must first be laid by proving that original evidence cannot be physically produced and secondary evidence is a true copy of the original evidence

[4] I have given very close attention to this objection raised by Mr Zaiwalla and both the law of Seychelles and that of the UK on this aspect of the law of Criminal Evidence. The best evidence rule is a legal principle that holds an original of a document as superior evidence. The rule specifies that secondary evidence, such as a copy or facsimile, will be not admissible if an original document exists and can be obtained.

[5] The rule has its roots in 18th century case *Omychund v Barker* (1780) 1 Atk, 21, 49; 26 ER 15, 33 wherein Lord Harwicke stated that no evidence was admissible unless it was "*the best that the nature of the case will allow"*. Although a number of older authorities refer to a *'best evidence principle'*, as Jonathan Parker LJ observed in *Springsteen v Masquerade Music Ltd* [2001] EMLR 654 at [64], *"even in its heyday, the best evidence rule was not an absolute rule"*.

[6] The rule was not without criticism and over the years the principle waned perceptibly. In *Garton v Hunter* [1969] 2 QB 37, 44, Lord Denning MR dismissed the principle out of hand with the words, *"That old rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is available in your hands, you must produce it. You cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility"*. In *R v Pentonville Prison, ex p Osman* [1990] 1 WLR 277, the Divisional Court declared itself *"more than happy to say goodbye to the . . . rule"*, noting that *"the little loved best evidence rule has been dying for some time"*. It should be noted though that in *Kajala v Noble* (1982) 75 Cr App R 149, 152 Ackner LJ had claimed that one vestige of the rule survived: *"The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if the original document is available in one's hands, one must produce it"*.

[7] In *Springsteen v Masquerade Music Ltd* [2001] EMLR 654, at [76] and [79], however, the Court of Appeal extinguished even this final flicker of the rule: *"The authorities … establish that by the mid-nineteenth century, if not earlier, the so-called 'best evidence rule' was recognized by the courts as no more than a rule of practice to the effect that the court would attach no weight to secondary evidence of the contents of a document unless the party seeking to adduce such evidence had first accounted to the satisfaction of the court for the non-production of the document itself"*.

[8] This judgment seems to have finally dispelled any lingering notion under the current common law of England that it is a condition of admissibility that evidence proffered must be the best that the nature of the case will admit. According to Blackstone's Criminal Practice, the best evidence rule in England and Wales, as used in earlier centuries, *"is now all but defunct"* (*Hooper; Ormerod; Murphy; et al. (eds.). Blackstone's Criminal Practice (2008 ed.).Oxford. p. 2285. ISBN 978-0-19-922814-0*).

[9] Nevertheless, judges continue to employ the expression 'best evidence' from time to time, if only to signify that there may have existed more immediate or compelling means of establishing a particular fact than the evidence actually adduced (see, for example, *JF* [2002] EWCA Crim 2936 per Bell J at [32]). Generally speaking, therefore, the position is well expressed in *Haddow v Glasgow City Council*, 2005 SLT 1219 by Lord Macphail at [14], who declared that *"the "best evidence rule" is not a general exclusionary rule of evidence but a counsel of prudence"*.

[10] Several digital devices, seized at the premises of the 1st, 2nd and 3rd accused, which are considered as real evidence are not relevant and probative of the prosecution case. Hence tendering them in evidence per se in order to meet the best evidence rule would make little sense.

[11] To the contrary, it appears that some documents found on these devices have been found to be relevant and probative of their case. These are the documents that the Prosecution is attempting to produce in this case. I am of the view that the test of best evidence has to apply to these documents as found in digital format on the relevant devices. These are the documents contained in digital format in item P16 (a) and in hard physical format as item P17 to item P19 and no other items. It is these documents that need to pass the test of best evidence.

[12] There are ample evidence led before this Court that the electronic documents found in item P16 (a) has been mirrored and are an exact match of the originals found in their electronic devices seized from the accused premises. To this Court this mirroring of the original satisfies the requirements to make them the originals or as good as their originals and hence to be the best evidence. The old common law rule of best evidence goes back to a time when copies would be rewritten by hand and hence more vulnerable to inaccuracies. This is a bygone era as shown even by English case law. The current technology replicates the originals to the extent that that it can be argued that there can be more than one original. I am satisfied that all the documents contained in item P16 (a) are beyond a reasonable doubts exact copies of their originals and hence meet the best evidence rule. The Defence, having had disclosure of the documents, would be entitled to

see whether there are any inaccuracies or inconsistence and bring that forward as part of their cases. The printouts are only copies of the originals, given that their original digital versions are admissible, they would be admissible as copies of their electronically stored versions and would hence be admitted. This would go a long way in facilitating referencing of the document by the court, who would otherwise have to open up documents' mirrored versions on an electronic device.

[13] Mr Hoareau, on the other hand, whilst adopting the objection of Mr Zaiwalla, raised another objection to the admissibility of the evidence from the devices. He argued that in this case the chain of custody of evidence has not been established and the Prosecution bears the burden beyond a reasonable doubt to establish that chain of custody prior to the admissibility of items P16 to P19. He submitted that it is the authenticity of the exhibit which is in question and this is where the chain of custody of evidence is important to ensure to the court that what was seized or collected forms the part of its seizure or its collection and is exactly what is produced in court. That chain of custody must be established from the point of collection or seizure up until the point where that document or exhibit is sought to be produced before the court. It was submitted that if the chain of custody of evidence is not established that evidence would be rendered inadmissible because the court would not be able to ensure that the authenticity of the exhibit has been maintained.

[14] The Learned counsel referred to the fact that Vanessa Penfold, the Principal Exhibit Officer at ACCS, has not been called by the Prosecution and, as she was in the custody chain, there is a break in the chain of custody of the evidence. He also submitted on instances where the materials sought to be produced were taken from devices, which had not been produced before the court, and that these has not been produced by the Prosecution.

[15] I have given careful attention to the submission of Mr Hoareau and agree totally with him of the need for the court to ensure that the Prosecution proves that it has established the chain of evidence or custody. This is essential for the court to ensure that the authenticity and the integrity of any seized materials is preserve from the time of seizure to the time

of production in court. Chain of custody, in legal contexts, is the chronological documentation or paper trail that records the sequence of custody, control, transfer, analysis, and disposition of materials, including physical or electronic evidence. Chain of custody is of particular importance in criminal cases. When evidence can be used in court to convict persons of crimes, it must be handled in a scrupulously careful manner to prevent tampering or contamination. The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime, rather than having, for example, been planted so as to make someone appear guilty. This constitutes part of the facts of the case that the prosecution must prove beyond a reasonable doubt.

[16] I have carefully scrutinized the evidence led by the Prosecution in the light of this objection in order to see whether there has been any break in the chain of custody of the materials found in items P16 (a) to P19 from the time that they and the devices in which they were contained were seized at the premises of the 1st , 2nd and 3rd accused to the time that they were produced in court. I have given careful consideration to the testimony of all the officers involved in the handling of the impugned documents, that is that of Nadine Morel, Kevin Stephenson, Mr Shafiq Andrade, Mr Steven Sadler, Maureen Young, Ryan Durup, Rory Price, Aubrey Labiche and Mr David Cox. Having done this, I am of the view that the Prosecution has managed to prove beyond a reasonable doubt that the digital documents found in item P16 (a), item P17, item P18, and item P19 are the same ones that were seized from the digital devices at the residence of the 1st, 2nd and 3rd accused at the time, date and by the respective witnesses of the Prosecution.

[17] In my final determination, I accordingly rule that the said items can be produced in evidence by the Republic as part of their case.

Signed, dated and delivered at Ile Du Port on 19thMarch 2024.

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Govinden CJ