

SUPREME COURT OF SEYCHELLES

Reportable
CR 48/2023

In the matter between

THE REPUBLIC
(*rep. by Ms Ketlynn Marie*)

Prosecution

and

ROGER POOL
(*rep. by Mr Guy Ferley*)

1st Accused

BARRY SOUFFE
(*rep. by Mr Ryan Laporte*)

2nd Accused

MERVIN SOUFFE
(*rep. by Mr Ryan Laporte*)

3rd Accused

Neutral Citation: *The Republic v Roger Pool and Ors* CR48/2023 (7th June 2024)

Before: Govinden CJ

Summary: Amendment of charges; firearms offences; objection; defectiveness; of lack of particularisation

Heard: 28th May 2024

Delivered: 7th June 2024

ORDER

GOVINDEN CJ,

[1] The prosecution, through a Notice of Motion, has sought leave of this Court to amend the charges originally laid in the Information dated the 23rd of June 2023 by way of substituting the three charges with those found in the Information attached to the application. According to the Affidavit of the deponent supporting the application, this request is made as a result of a review of the evidence that has shown certain anomalies in the evidence that would make it difficult for the prosecution to prove their charges.

[2] The charges before the court reads as follows;

Count 1

Statement of Offence

Knowingly negotiating, procuring, arranging for, or in any way assist, the delivery to any other person, or the delivery by any person to any other person, of any firearm or any ammunition, by way of sale or otherwise, in circumstances which raise a reasonable presumption that the person knew or believed that such firearm and ammunition, was intended or likely to be used by any person in a manner or for a purpose prejudicial to public order, contrary to and punishable under Section 84(3) of the Penal Code.

Particulars of offence

In that, Roger Pool of Anse Boudin Praslin on or around the 29th May 2023 on Praslin knowingly negotiated, procured, arranged, assisted Barry Souffe of Anse Boudin, Praslin and Mervin Souffe, for the delivery to another person known to the Republic as Neeraj Malbrook, an AK 47 rifle with one loaded magazine, by way of sale or otherwise in circumstances which raise a reasonable presumption that the said Roger Pool knew or believed that such firearm, ammunition, was intended or likely to be used by any person in a manner or for a purpose prejudicial to public order.

Count 2

Statement of offence

Knowingly negotiating, procuring, arranging for, or in any way assist, the delivery to any other person, or the delivery by any person to any other person, of any firearm or any ammunition, by way of sale or otherwise, in circumstances which raise a reasonable presumption that the person knew or believed that such firearm and ammunition, was intended or likely to be used by any person in a manner or for a purpose prejudicial to public order, contrary to and punishable under Section 84 (3) read with 22 (a) of the Penal Code.

Particulars of offence

In that, Barry Souffe of Anse Boudin, Praslin and Mervin Souffe of Anse Boudin, Praslin on or around the 29th May 2023 on Praslin knowingly negotiated, procured, arranged or assisted for the delivery of an AK 47 rifle with one loaded magazine, by way of sale or

otherwise to a person known to the Republic as Neeraj Malbrook, in circumstances which raises a reasonable presumption that they knew or believed that such firearm and ammunition, was intended or likely to be used by any person in a manner or for a purpose prejudicial to public order.

Count 3
Statement of offence

Possessing or having under control of, firearm and ammunition without lawful authority or reasonable excuse, in circumstances which raise a reasonable presumption that such firearm, or ammunition is intended to be used for a purpose prejudicial to public order contrary to and punishable under Section 84(1) of the Penal Code.

Particulars of offence

In that, Roger Pool of Anse Boudin, Praslin, on or around the 29th May 2023 on Praslin, was in possession or having, under his control an AK 47 with one loaded magazine, without lawful authority or reasonable excuse, in circumstances which raise a reasonable presumption that such firearm and ammunition was intended to be used for a purpose prejudicial to public order.

[3] The proposed ones are to the following effect;

Count 1
Statement of offence

Knowingly, negotiating, procuring, arranging for, or in any way assist, the delivery to any other person, or the delivery by any person to any other person, or any firearm or any ammunition, by way of sale or otherwise, in circumstances which raise a reasonable presumption that the person knew or believed that such firearm and ammunition, was intended or likely to be used by any person in a manner or for a purpose prejudicial to public order, contrary to and punishable under Section 84(3) read with 22(a) of the Penal Code.

Particulars of offence

In that, Barry Souffe of Anse Boudin, Praslin and Mervin Souffe of Anse Boudin, Praslin on or around the 26th May 2023 on Praslin knowingly negotiated, procured, arranged or assisted for the delivery of a firearm by way of sale or otherwise to a person known to the Republic as Neeraj Malbrook, in circumstances which raises a reasonable presumption that they knew or believed that such firearm, was intended or likely to be used by any person in a manner or for a purpose prejudicial to public order.

Count 2

Statement of offence

Possessing or having under control of, firearms and ammunition without lawful authority or reasonable excuse, in circumstances which raise a reasonable presumption that such firearm, or ammunition is intended to be used for a purpose prejudicial to public order contrary to and punishable under Section 84(1) of the Penal Code.

Particulars of offence

In that, Roger Pool of Anse Boudin, Praslin, on or around the 29th May 2023 on Praslin, was in possession or having under his control an AK 47 rifle with one loaded magazine, without lawful authority or reasonable excuse, in circumstances which raise a reasonable presumption that such firearm and ammunition was intended to be used for a purpose prejudicial to public order.

Count 3

Statement of offence

Knowingly negotiating, procuring, arranging for, or in any way assist, the delivery to any other person, or the delivery by any person to any other person, or any firearm or any ammunition, by way of sale or otherwise, in circumstances which raise a reasonable presumption that the person knew or believed that such firearm and ammunition, was intended or likely to be used by any person in a manner or for a purpose prejudicial to public order, contrary to and punishable under Section 84(3) read with 22(a) of the Penal Code.

Particulars of offence

In that, Barry Souffe of Anse Boudin, Praslin and Mervin Souffe of Anse Boudin, Praslin on a date unknown to the Republic in the year 2023 on Praslin, knowingly negotiated, procured, arranged or assisted for the delivery of a firearm, by way of sale or otherwise to a person known to the Republic as Sylvestre, Graham Labrosse, in circumstances which raises a reasonable presumption that they knew or believed that such firearm, was intended or likely to be used by any person in a manner or for a purpose prejudicial to public order.

- [4] The difference between the two 1st Counts is that the 1st accused is removed from the proposed Count, with only the 2nd and 3rd accused being averred to have knowingly negotiated, procured, arranged, or assisted for the delivery of a firearm and what was formerly specified AK 47 rifle is now simply referred to as a firearm. The former Count 2, is deleted and a Count of possession of an AK 47 firearms is brought against the 1st accused only, as Count 2, this was formerly Count 3. A new Count 3 against the 2nd and 3rd accused of knowingly negotiated, procured, arranged, or assisted for the delivery of a firearm to another person, with again the firearm, which was formerly referred to as an AK 47 rifle, now referred to simply as a firearm.
- [5] The Learned counsel for the 2nd and 3rd accused objects to the granting of leave to the prosecution to proceed with the 1st and 3rd count. It is his contention that the changes in the particulars with respect to the kind of firearm, being the subject matter of the offences, are prejudicial to his client in that initially there was specificity and the amendments removes the specificity. As a result, it is his contention that the charges are defective.
- [6] On the other hand, the learned representative of the Republic replied that the definition of firearms under the Penal Code does not require a description of the said firearm and that the lack of specificity does not prejudice the accused. It is his submission that he is pressing those charges in accordance with the evidence in hand, which shows that the offences do not involved a specific type of firearm. As a result, he submits that the charges are not defective and the motion for leave to amend should be granted.

[7] I have carefully listened to the submissions of both the Defence and that of the Republic. I have also thoroughly addressed my mind to the laws relating to particularization of charges, which I summarize below.

[8] The law with regard to the particularization of charges in this jurisdiction is to be found in Article 19(2)(b) of the Constitution and section 111 of the Criminal Procedure Code, which stipulates as follows;

Article 19 (2) (b) of the Constitution

“2) Every person who is charged with an offence—

(b) shall be informed at the time the person is charged or as soon as is reasonably practicable, in, as far as is practicable, a language that the person understands and in detail, of the nature of the offence;”

Section 111 of the Criminal Procedure Code

“Offences to be specified in charge and information with necessary particulars

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

[9] Particulars in a charge are crucial as they define the issues and hence determine what is relevant or irrelevant, and they specify the acts relied upon so that the accused may make a proper defence. In other words, their purpose is to concentrate and define the issues of fact, limit the issues to be tried, define the scope of the evidence, and prevent the defence being taken by surprise. Indeed, in a system of criminal justice, the particulars form part of the charge, and rightly so.

[10] Reading the above legal provisions, it is clear that the charge sheet must state the offence and contain sufficient particulars to give the accused reasonable information as to the nature of the charge. This Court is given the mandate to decide whether charges laid have been sufficiently particularized in law and are detailed enough so that the accused can reasonably plead to and present a defence; and if not, whether the prosecution should be required to provide further and/or better particulars of the offences charge. The language used in the particularization of the offence, read in context and the nature of the offence charged, would be of significant importance in the Court’s consideration.

- [11] In this case it is unquestionable that there has been changes in the particularization of counts and in that the type of weapon that is the subject matter of the offences was previously specified in greater details; it was averred to be an AK 47 rifle. Now in the new intended charges the weapon is simply indicated as a firearm. It is clear to this Court that there has been a reduction in the details as to the nature of the offences allegedly committed. The issue before the Court is whether this infringes the right to detailed particularization of the offences charged in these counts. It is to be noted that the objection is not that the offences as particularized, has become unknown to the law, but rather that now, as a result of the changes, there is insufficient particularization provided in them.
- [12] In normal circumstances the particulars of the offence are drafted in short form. Such relative brevity does not prejudice the defence since the way the prosecution put their case and the evidence they intended to call will sufficiently emerge from the documents served upon the defence by the prosecution before the plea, which is now the norm. The only instance that prejudice would arise here would be where the disclosure of the prosecution documents would still leave the defence in the dark as to the case they need to defend.
- [13] However, it is trite law that the more complicated the offence charged the more would be the necessity to give greater particularization. For example, in *Warburton-Pitt (1991) 92 Cr App R 136*, the prosecution's failure to particularize the facts upon which they relied in support of allegations of recklessness formed the basis of a successful appeal. The Court of Appeal stated that particulars of the allegations of recklessness were needed because the case was complicated and that there were a number of possible explanations for the incident. The test is: do the particulars provided, whether in the indictment or elsewhere meet the requirement that there should be clarity as to the nature of the prosecution case.
- [14] This test was reaffirmed by the Court of Appeal in *K [2004] EWCA Crim 2685, [2005] 1 Cr App R 25 (4080)*. The particulars of the offence needed to provide reasonable information as to the nature of the charge and as to the principal matters on which the prosecution relied. In the case of *Chargot Ltd [2008] UKHL 73, [2009] 1 WLR1*, the Supreme Court concluded that in a prosecution alleging breaches of the Health and Safety at Work Act 1974 it was sufficient that the risk to the employer's health and safety

was particularized, without further specifying the respects in which that risk was associated with his employment or identifying the cause of the accident in which the employee was injured. In the case of Clarke [2015] EWCA Crim 350 [2015]2 Cr App R 6 (74) an indictment for robbery was valid where the offence had been correctly described and the particulars supported the conviction of the offence and made the prosecution case clear. It was not necessary to specify the ingredients of the offence, such as whether a person had been put in fear or unlawful force had been used.

[15] In Graham Pothin v R (SCA 13 of 2017) [2018] SCCA 17 (30 August 2018) the Court of Appeal held that where an offence charged depends on allegations which could be put on several different footings the particulars should be drafted with sufficient detail to inform the court and the defence as to the exact nature of the factual allegation so as to eliminate the possibility of a conviction on either of two alternative bases (paragraph 1-190 of Archbold 2012; *R v Litanzios* [1999] Crim.L.R. 667). The Charge sheet should set forth the relevant elements of the crime that has been committed and the manner in which the offence was committed (*S v Langa* 2010 (2) SACR 289 (KZP)) as well as a particular act, matter or thing alleged as the foundation of the charge (*Johnson v Miller* [1937] 59 CLR 467).

[16] In the South African case *African Paper Products (Pty) Ltd and Another v Director of Public Prosecutions: Eastern Cape and Another* (250/2020) [2022] ZAECMKHC 90 (31 October 2022), the Eastern Cape High Court emphasized the Constitutional right to a fair trial, which includes the right to be informed of the charge with specific detail. The Court stated that, “*The clear objective is to ensure that the charge (s) is sufficiently detailed and clear to an extent where an accused person is able to respond and importantly to defend himself or herself. In my view, this is intended to avoid trials by ambush*” (emphasis added). In deciding whether the charge sheet lacked particularization the court seemed to have focused on whether the material elements of the offence were sufficiently particularized by the prosecution.

[17] The brief background of the case: The applicants’ main contentions were that the charges of fraud and forgery lacked particularity in relation to the second applicant’s alleged involvement and therefore, did not disclose offences. One of the issues raised was that the prosecution was unable to state with precision the time and place of the forgery, save for as already set out in the charge sheet. With regard to this issue, the court held that: “... if

the time when an offence was allegedly committed is not a material element of the offence (as in the present instance), the failure to refer to time, does not render the charge defective (S v Vilakazi 2016 (2) SACR 365 (SCA))". The Court applied the same reasoning to the place where the crime was allegedly committed adding that, "It is only where the offence for which the person is alleged to have been charged with may only be committed in a particular place, such as on a public road, that the place is an indispensable element of the offence. See R v Mapikitla 1950 91) SA 336 (GW)."

[18] In its analysis the court emphasized:

*[56] The charge sheet **should set forth the relevant elements of the offence that has been committed and the manner in which such offence was committed. An accused should not be left to speculate about an element of the offence.***

[57] In R v Alexander and Others 1936 AD 445 at 447 it was stated that:

*"The purpose of a charge -sheet is to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. **It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him.**"*

[58] Accordingly, the primary determination is whether the charges sufficiently inform the second applicant of what case he has to meet.

*[59] I am satisfied that the charge sheet **sets out the relevant elements** of the offence of forgery in respect of counts 3 and 5, **including the manner in which the offences were committed.** Notwithstanding that the State, at this point, does not know, with certainty, the identity of the person who forged the documents, it is clear from the unambiguous terms contained in the charge -sheet that the State has nailed its colours to the mast and relies solely on the personal liability of the second applicant. It cannot be gainsaid that the second applicant has sufficient detail to (i) inform him of the nature of the charges against him; (ii) enable him to answer thereto; **and (iii) properly mount his defence. There can be no question that the second applicant is not at risk of a trial by ambush or prejudiced in his preparations for trial.** Whether the State will, in due course, **be in a position to prove its case on the evidence available to it, which evidence is not within the particular knowledge of this court, is not for this court to determine.** I am not at liberty, at this stage of the proceedings, to draw an inference concerning the strength or weakness of the State's case from the prosecutor's inability to furnish particulars.*

Analysis and Determination

[19] Based on all of the above, I have come to the following determinations. First of all I note that the two charges are relatively uncomplicated, without any technical components that necessitate particular emphasis through particularization. Secondly, there is a difference between evidence that needs to be tendered in support of the charges, which has to be produced at the trial and the objections as to charges. At this initial point in the case, the Court is not concerned with evidence, but rather if *ex facie* the charges meet the test set out in law. If, for some reasons the prosecution feels that according to their evidence the case is one where the accused persons concerned were simply wanting to sell a firearm rather than a specific kind of firearm, the prosecution would be at liberty to do the respective amendments so that they would, presumably, be able to prove their case based on this fact. This falls within their prosecutorial discretions and the court cannot interfere with it, unless there is a finding there that the amendments causes prejudice, which I find is the case here. As to whether the amendment would suffice to allow the prosecution to prove the offences according to the legal standard of proof would be one for the court to decide at the appropriate moment.

[20] On the one hand, it can be said that the particulars of charge set out relevant element of the offence by referring to ‘firearm’. At this point, it can be premature for this Court to rule as to whether, in the context of the particular charges, which are all inchoate in nature, a specifically described firearm would constitute an essential element of the offences, the failure of proving the same being fatal to the prosecution case. This is a matter that has to be decided during the course of the trial proceedings. As was argued by the prosecution, section 84 does not differentiate between types of firearms.

[21] However, section 84(1) contains a defence to the charge of having “lawful authority or reasonable excuse”:

*84 (1) Any person who, **without lawful authority or reasonable excuse**, the proof whereof shall lie upon him, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that such firearm, offensive weapon, ammunition, incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order is guilty of a felony and is liable to imprisonment for seven years.*

[22] Therefore, the argument that the prosecution must specify the type of firearm is relevant in relation to offence under section 84(1). Under section 84(1) specification of the type of

firearm is actually crucial as, for instance, a person may have several firearms in possession, and may have lawful authority or reasonable excuse for the possession of some of them. In the context of section 84(1), the accused therefore must be informed which specific firearm prosecution is alleging the accused had in possession without lawful authority or reasonable excuse. In the present case, amended Count 2 (amendment which is not objected to) is under section 84(1) and particulars of the offence actually do specify the type of firearm as an AK47 rifle.

- [23] Section 84(3) (Counts 1 and 3, which are being objected to) does not specify that lawful authority or reasonable excuse are relevant factors; however, instead it specifies circumstances in which alleged acts under section 84(3) would constitute an offence:

*“84 (3) Any person who knowingly negotiates, procures, arranges for, or is in any way concerned in or assists, the delivery to any other person, or the delivery by any person to any other person, of any firearm or other offensive weapon, or any ammunition, incendiary material or explosive, whether by way of sale, hire, gift, loan or otherwise, **in circumstances which raise a reasonable presumption that he knew or believed that such firearm, offensive weapon, ammunition, incendiary material or explosive was intended or likely to be used by any person in a manner or for a purpose prejudicial to public order is guilty of a felony and is liable to imprisonment for five years.**” (emphasis added)*

- [24] Upon careful examination of the statutory language, it may initially seem to be irrelevant under this provision whether an individual, for instance, sold a rifle or a pistol. Similarly, the possession authorization for such firearms they sold may also appear immaterial, as the singular act of sale or delivery may suffice to constitute an offense. However, it is noteworthy that the section does not appear to enact an outright prohibition on the delivery, sale, hire, gift, loan involving firearms. Rather, such actions would only amount to an offence if carried out under circumstances which raise a reasonable presumption, as specified in section 84(3). In practical terms, this implies that an individual may have sold a pistol in circumstances which do not raise reasonable presumption under section 84(3) however, may have sold a rifle in circumstances which do raise such presumption. The specification of the type of firearm in such scenario would be important for the defence. Consequently, it is imperative that an accused person is informed of sufficient and adequate particulars specifying the type of firearm involved in order to effectively prepare their defence. In light of these considerations, notwithstanding that the prosecution may have specified a relevant element of the offence as ‘firearm’, further detailed particularization regarding the specific type of firearm should also be necessary.

[25] Accordingly, I order that the motion to provide further particulars of Counts 1 and 3 in the Information made on behalf of the 2nd and 3rd accused be granted.

Signed, dated and delivered at Ile du Port on 7 June 2024

Govinden CJ