

**Republic v Georges
(1998) SLR 13**

Romesh KANAKARATNE, Senior State Counsel, together with Ronny GOVINDEN, State Counsel, for the Republic
Anette GEORGES for the accused, together with
Pesi PARDIWALLA, Nichole TIRANT and A. HARJANIS
Bernard GEORGES

Ruling delivered on 3 September 1998 by:

PERERA J: Before the trial in this case commenced, counsel for the prosecution moved under section 187 of the Criminal Procedure Code to amend the charges. The charges, as sought to be amended together with a summons had been served on the accused on 11 August 1998.

Particulars of the offence are as follows:

Mrs A Georges, counsel for the defence, submitted that in view of a motion dated 1 September 1998 filed by her seeking a postponement of the trial, she would reserve her right to object until this Court makes a ruling thereon. She referred the Court to the correspondence she had with the prosecution (copies of which have been exhibited as AG 1 to AG 8 and annexed to her affidavit dated 1 September 1998 in support of the motion). She submitted that the prosecution had failed to furnish a list of prosecution witnesses and their statements and hence the accused was unable to prepare his defence. There is however no motion before this Court seeking an order for their disclosure. It must be stated that the accused had already pleaded not guilty on 2 July 1998 to the original charges, and hence it should be presumed that he did so after understanding the nature of the charges.

I allowed the application of counsel for the defence to stay the motion of the prosecution to amend the charges and to permit her to support her motion dated 1 September 1998 seeking to postpone the trial. That motion is distinctly for the limited purpose of obtaining

an order that the trial herein be postponed pending the determination of the application to be filed on behalf of the defendant herein before the Constitutional Court seeking that Court's redress for an alleged contravention by the Republic herein of provisions of the Seychellois Charter of Fundamental Human Rights and Freedoms, namely the rights enshrined in articles 19 and 28 thereof.

Mrs Georges submitted that no application for disclosure was made to this Court as such application would have limited arguments only to issues relating to the "common law"; perhaps she meant the statute law as contained in the Criminal Procedure Code.

She further submitted that if that course was adopted then at some stage the Court would have to be called upon to refer the wider Constitutional questions to the Constitutional Court. She therefore submitted that the motion to postpone was not designed to delay the trial, but to obviate a possible delay by going directly to the Constitutional Court for a ruling on the matter.

The right of a person who claims there has been a contravention of a provision of the Charter of Fundamental Human Rights and Freedoms as contained in Chapter III of the Constitution to invoke the jurisdiction of the Constitutional Court is provided in article 46(1). In terms of article 46(7), any court, other than the Constitutional Court or the Court of Appeal shall, if it is satisfied that a constitutional question that arises is not frivolous or vexatious "adjourn the proceedings and refer the question for determination by the Constitutional Court". Mrs Georges, in answer to the Court, stated that she was not making an application under article 46(7) for a referral, but was seeking an adjournment of the present case to enable the accused to invoke the jurisdiction of the Constitutional Court under Article 46(1) directly. That indeed is the gist of the motion dated 1 September 1998.

The right contained in article 46(1) can be exercised by a person within 30 days of an alleged contravention. However if in the course of civil or criminal proceedings a party fails to comply with a procedural requirement, the aggrieved party should first seek to obtain redress before the court in which it arises, under the provisions of the Civil or Criminal Procedure Code; the existing statutory law. Applications for disclosure of a list of prosecution witnesses and their statements were made in the cases of *R v Wilbv Robert* (unreported) Criminal Side 8/1991, *R v Pillav* (1992) SLR 241 and *R v Murangira* (1993) SLR 30 following the procedural law.

Mrs Georges quite rightly reminded the Court that now we have a Constitution granting rights to a person charged with an offence. With respect, the constitutional provisions are safeguards and not meant to be invoked as supplementing the statute law. For example the provisions of article 18 relating to arrest, detention and bail are meant to safeguard the right to liberty. The Criminal Procedure Code deals with the specific procedural aspects. A person in custody applies for bail under the provisions of the Criminal Procedure Code and not under the provisions of the Constitution. The constitutional remedy may however be resorted to if bail is being refused on a ground which amounts to a contravention of that person's right to liberty. In such circumstances that person cannot bypass the procedural law and seek a declaration from the Constitutional Court merely on the ground that it is being done to obviate delays.

Lord Diplock delivering the judgment of the Privy Council in the case of *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265 at 268 stated-

The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom

guaranteed to individuals by chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action..... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the sub-section if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy....."

In that case a teacher was transferred without 3 months notice being given or an inquiry being held as required by the terms and conditions of his contract. Without availing himself of the review procedure, he applied to the High Court for a declaration that human rights and fundamental freedoms guaranteed by the Constitution had been violated. The Privy Council held that the adoption of that procedure instead of pursuing the remedy given by the regulations was misconceived.

On the same basis, the motion of the defence to adjourn the present proceedings for the purpose of invoking the jurisdiction of the Constitutional Court under article 46(1) is misconceived as this Court has not been moved for an order for disclosure in the first instance.

Article 19(2) of the Constitution provides inter alia that –

Every person who is charged with an offence -

(a)

(b)

(c)..... shall be given adequate time and facilities to prepare a defence to the charge.

The complaint of counsel for the defence in this regard is contained in the final letter dated 31 August 1998 sent to the Attorney General (exhibit AG 8) as follows –

The fact remains that less than 48 hours before trial we still do not know who is going to testify for the prosecution and consequently our preparation has suffered. May I humbly again request your list of witnesses?

Mrs Georges reiterated her request to the prosecution at the commencement of her

submissions in support of the motion. But the prosecution maintains that such a procedure is not warranted in the case of summary trials. This is a matter which this Court ought to have considered under the provisions of the Criminal Procedure Code, which is a law kept in force by the present Constitution. Mr Kanakarathne submitted that due to the late filing of the motion to postpone the trial some of the witnesses for the prosecution who were summoned had appeared in Court. In the circumstances the grounds on which the prosecution is withholding the list of witnesses would have diminished in merit. If, as the letter of 31 August 1998 stated, the preparation of the defence has been affected by the non-availability of the names of the prosecution witnesses, the defence ought to have followed the usual practice available in summary trials by making a proper application to this Court to peruse the record.

Sauzier J in approving that practice in the case of *Kate v R* (1973) SLR 228 at 233 stated –

"Although defence lawyers have no right in law to be given access to or a sight of the record or to be given a copy thereof, every effort should be made by the courts and by court officials to allow defence lawyers to have reasonable access to and make notes from the record of a case in which they are engaged."

That option is still open to the defence, since counsel for the defence submitted that the intention to apply directly to the Constitutional Court was purely motivated by the desire to expedite proceedings.

On a consideration of the circumstances created by the application to amend the charges, this Court cannot compel the accused to plead to the amended charges as it has been submitted that it contains major changes and that the decision to object would depend on the availability of the information sought from the prosecution. I am conscious that the right to a fair hearing also involves the hearing of the case within a reasonable time. The court cannot be a party to a delay. Hence with this view in mind and on the basis of the submission of the counsel for the prosecution that although the motion was being resisted on merits, the Republic had no objections to this Court considering the matters that have arisen as constitutional questions under Article 46(7), although the defence has not expressly sought such a course, I make a reference to the Constitutional Court in terms of article 46(7). In terms of rule 10(1) of the Constitutional Rules 1994, I state the following questions for determination by the Constitutional Court.

1. Does article 19(2)(c) of the Constitution in particular, and the right to a fair hearing as contained in Article 19 in general, oblige the prosecution to furnish a list of witnesses, their statements and the prosecution docket to an accused person in a summary trial before the Supreme Court under the provisions of the Criminal Procedure Code?
2. If an accused person is not entitled to the documents set out in question 1 above under procedural law, does a failure to furnish them by the

prosecution amount to a contravention or a likely contravention of articles 19 and 28 of the Constitution?

The defence is, however, entitled to decide whether to peruse the record and take notes, as indicated above, or to canvass the referral before the Constitutional Court in view of the submissions made by counsel for the defence as regards the effect of a delay of the trial on the accused in this case whose practice as a lawyer has been suspended.

The registrar shall forthwith list this referral for mention before the Constitutional Court with notice to the prosecution and the defence. The bail of the accused is extended on the same conditions.

ADDENDUM

Since writing the above ruling the defence has filed a motion dated 3 September 1998 supported by an affidavit of Mrs Georges, attorney for the accused, moving for an order of this Court ordering the prosecution to produced to the defence (1) a list of prosecution witnesses; (2) statements of those witnesses; and (3) any material in the prosecution docket having any bearing on this case, whether to be used by the prosecution or not, “in the event the motion dated 1st September 1998 heard yesterday is not granted.” In view of the ruling made today, this motion does not arise for consideration.

Record: Criminal Side No 26 of 1998