

**Republic v Agathine
(2006) SLR 10**

David ESPARON for the Republic
Frank ELIZABETH for the Accused

Ruling delivered on 26 October 2006 by:

PERERA J: This Court, by order dated 22 June 2006, authorised the accused, who was already on bail, to proceed to Mauritius to undergo investigative procedures on the basis of a medical report furnished. His passport which was impounded by the Court was not returned, but he was required to obtain a travel document from the Director of Immigration. On 22 June 2006, when the order was made, the case was listed for continuation of hearing on 12 and 13 October 2006. Consequently, he left for Mauritius on 8 July 2006. The travel document is valid only till 6 January 2007.

When the case was taken up for trial on 12 October 2006 at 9.00am, Mr Elizabeth, Counsel for the Accused informed the Court that the Accused was still awaiting the necessary tests being done. He produced reports and receipts from the "Medpoint" Hospital in Mauritius in proof of the tests done so far and the payments made for them. He produced another report from "Medisave Medical Centre" dated 21 July 2006, stating that for further tests, the cost would be around Mauritius R60,000. Mr Elizabeth submitted that the family of the Accused is making arrangements for the necessary funds to be remitted to the Accused, and that he will return to stand trial as soon as all the tests have been completed.

The Prosecution has closed its case, but the Accused had not been put to his election under Section 184(1) of the Criminal Procedure Code. Mr Elizabeth is prepared to make the election on his behalf. Section 184(1) requires that when at the end of the Prosecution case, "it appears to the Court that a case is made out against the Accused person the Court shall again explain the substance of the charge to the Accused, and shall inform him" of the choices. The election is therefore a personal choice of the Accused. Where he is legally represented, he could make his choice on the advice of his Counsel. In the alternative, Counsel could, with the concurrence of the Accused inform the Court of the choice. In *Mathiot v R* (1978) SLR 91 where the Accused was unrepresented, it was held that:

The absence of the mention in the record that the Magistrate had asked and recorded the question whether the Accused had any witnesses to examine or other evidence to adduce in his defence, was fatal to the conviction.

In any event the Court must be satisfied that the Constitutional Right of the Accused to be defended, either in person or with legal representation, is not contravened. Hence I rule that in the absence of the Accused, and without the agreement of the Accused,

Counsel appearing for him has no right to make an election under Section 184(1).

Mr Esparon, Learned State Counsel moved for a hearing in absentia under Section 133(1) of the Criminal Procedure Code and Article 19(2) of the Constitution. With respect, Section 133(1) applied when "if it is proved that the Accused person has absconded and there is no immediate prospect of arresting him". Article 19(2) guarantees that an Accused shall not be tried in absentia "except with the person's own consent". Hence even his Counsel cannot agree to the trial proceeding in his absence. The derogation to that right is "unless the person's conduct renders the continuance of the proceedings in the person's presence impracticable". There is no such situation in the present case. All safeguards have been taken by this Court, in its order dated 22 June 2006 for the Accused to proceed abroad for medical treatment and return for trial. Hence this application is premature. If the Accused fails to return after his travel document has lapsed, the Court would be in a better position to consider an application for the trial proceeding in absentia. Ruling made accordingly.

Record: Criminal Side No 38 of 2005