

In Re: Republic v Ladouceur and Ladouceur v Republic

(2009) SLR 131

Joel CAMILLE for the applicant
David ESPARON for the Republic

Ruling delivered on 7 September 2009 by:

KARUNAKARAN J: The applicant Albert Ladouceur, a young man of La Digue (hereinafter called the defendant), was first produced before the Court on 29 November 2001, having been charged with the offences of:

1. “Trafficking in a controlled drug” contrary to section 5 read with section 26(1) (a) of the Misuse of Drugs Act 1990 - under count 1;
2. “Resisting Arrest” contrary to section 238 (b) of the Penal Code - under count 2 – and
3. “Assault on police officer” contrary to section 238 (b) of the Penal Code - under count 3.

The defendant was then, duly assisted by counsel and denied the charges. He had been released on bail. After eight years of procrastination, on 17 August 2009, the trial Court presided by Perera, J at an unusual and abrupt conclusion of trial, found the defendant guilty of the offences under count 1 and 2, without hearing the case of the defence and securing the presence of the defendant on a mere presumption that the defendant was absconding. His presumption was based on the fact, which in his own words, at page 10 of his judgment reads thus:

The continued inability of police to locate him (the defendant) on the warrants attracts the reasonable presumption that he is absconding.

Be that as it may. Having thus found him guilty, the trial judge convicted as well as sentenced the defendant in his absence and imposed a penalty of 8 years and 1 year imprisonment for the offences 1 and 2, respectively.

In fact, from the beginning of the trial through to the stage of closing of the case for the prosecution, the defendant has been cooperative and regularly attending the Court and was duly defended by counsel Mr A Juliette. The prosecution adduced evidence by calling a number of witnesses to prove the case against the defendant. After the close of the case for the prosecution, counsel for the defendant submitted on no case to answer. He contended before the trial judge that there was no evidence before the Court to incriminate his client since the substances allegedly recovered from the defendant had not been produced by the prosecution as exhibits in the case and that

consequently, the accused could not be called upon to present a defence, as he would be prejudiced in any defence he would put forward. However, the trial judge rejected the defence submission and on 9 March 2007 ruled that there was a case to answer and invited the defendant to make his election under section 184 (1) of the Criminal Procedure Code and present his defence if any. After a number of adjournments and orders dispensing with the attendance of the defendant, on 14 March 2008 the trial judge had fixed the case for mention. The defendant was not present. The case was adjourned to be mentioned again on 19 March 2008 at 1.45. In the said sitting of 14 March 2008, the trial judge, upon counsel's request, had also dispensed with the attendance of the defendant in advance, for the adjourned mention-date i.e. 19 March 2008. The defendant with the Court's prior approval was not present in Court that day. Immediately, the trial judge, in the absence of the defendant proceeded to fix the continuation of trial for 6 June 2008. The defendant was again not present. Subsequently, he had fixed the case for a couple of mentions, again, all those mention-dates were fixed in the absence of the defendant. The time was ticking for the trial judge to vacate his office and retire from service on 24 August, 2009. The judge has obviously, been under pressure of time, which pressure has effectively been transferred from the Bench to the Bar. A gusty reaction of counsel to such pressure has unfortunately, resulted in his abrupt withdrawal from the case altogether and led to the continuation of trial in the absence of the defendant. In fact, the defendant had no knowledge about what happened in Court nor had he received any summons/ notice informing him of the date set for continuation of trial or about the withdrawal of his counsel's appearance from the case at a critical stage. This unusual happening is evident on record and speaks for itself, when defence counsel Mr Juliette in an outburst says

My Lord, I do not feel comfortable with this, I would move for leave to withdraw. If it was for the prosecution case, the prosecution can proceed. Indeed, the trial judge has also made reference to this incident in his own version at page 9 of his judgment, which reads thus:

On 10 August 2009, when the case was taken up for continuation, I informed counsel that I am due to retire from service, effectively from 24 August 2009 and hence inquired as to what stand they (sic) took. Mr Juliette then moved to withdraw his appearance on the ground that he had no instruction.

Be that as it may, on the face of the record it is evident that the trial judge with due respect, has hurried to conclude the trial before his retirement date by resorting to section 133A of the Criminal Procedure Code, and eventually convicted and sentenced the defendant in his absence and without his knowledge. The defendant, a Digwa and a permanent resident of La Digue, having learnt about his conviction and sentence from the 8 o'clock news on SBC, at his earliest opportunity on the following morning surrendered himself at 6.00 am to the La Digue Police Station.

In these circumstances, the defendant has now come before this Court with the instant

application seeking an order to set aside his conviction and sentence and order the said matter to be tried *de novo* in terms of section 133 A (3)(b) of the Criminal Procedure Code, as amended by Act No 17 of 2008.

The affidavit filed by the defendant in support of his application reveals the following.

On 17 August 2009, in a judgment of the Supreme Court before Judge Ranjan Perera, he was convicted on one count of trafficking in a controlled drug, namely cannabis and a further count of resisting arrest. He was sentenced to 8 years imprisonment in total. The said conviction and sentence were given in his absence and he got legal advice that this was done in accordance with article 19(2) (i) of the Constitution read with section 133A of the Criminal Procedure Code as amended. He has further averred that the said conviction was given before he had presented his defence of the case.

According to the defendant, in reaching the said judgment the Court held incorrectly that there was a 'reasonable presumption' that he was absconding from Court in view of the fact that since his last appearance on 14 March 2008, he had not put up appearance in Court. Consequently, there have been four warrants for his arrest and the police reported to Court that they could not locate him either on Mahé or La Digue where he was residing. His then attorney, Mr Anthony Juliette had also indicated to Court the he had not heard from him and on 10 August 2009 withdrew his appearance on his behalf and did not object to the trial proceeding against him. The defendant avers that he had not been aware of any of those facts and happenings in Court.

The defendant thus, rebuts the said presumption stating that at no point of time had he intended to abscond or had absconded from Court. He had always attended Court up to his last appearance. The alleged defaults have all been attributed to legal advice he received from his attorney's office.

On 19 March 2008, he failed appearance as he had to travel from La Digue to Mahé on the 5.30 am schooner, *Seraphina* to arrive Mahé at 8.30 am. Without his knowledge the schooner broke and could not leave La Digue on the said date. He then made contact with his sister, one Rency Ernesta, who resides on Mahé, to inform his attorney. The defendant was informed by Rency that she contacted his attorney's office and spoke to one Veronique Juliette, assistant to his attorney. Miss Juliette was to advise the Court accordingly. The defendant was then informed that he would be informed of his next date by Miss Veronique Juliette. Subsequent to that date, he had contacted the office of his attorney on many occasions and at all material times he could not speak to his attorney as he was not available. He had the chance to speak only to Veronique, who informed him that the case was to be called on 8 July 2009.

On the said date he attended Court and verified the Court's list but could not see his name. He then met with his attorney at the Court who informed him that the case had been called the day prior ie 7 July 2009. The defendant insisted that he was advised that the case was for 8 July. The defendant was then advised by the attorney to leave and that he would be contacted by his chambers to be informed of his date. As at all

material times, he was working on La Digue at the construction site, he left Mahé immediately for La Digue. He was further advised by his attorney, that there was a possibility of a re-trial in view of the fact that Judge Perera was completing his tenure and that he would advise him of what was going to happen with his case thereafter.

Whilst on La Digue he contacted his attorney's chambers and was advised by Veronique that the case was to be called on 20 July 2009. Again he was advised not to put in an appearance as he would be informed of the outcome at a later date from the chambers. Thereafter, after various contacts by phone to the chambers, he could not get in touch with his attorney. He did get in touch with Miss Julliette who again advised him that the case was to be called on 6 August 2009 and that again he could stay on La Digue and will be advised of his next hearing date.

Sometime after 15 August he was informed by a friend on La Digue that there has been a judgment against him. And he was declared wanted by police on national television. The defendant verified for himself on the 8 o'clock news on the same day and on the following day he surrendered himself at 6.00 am to the La Digue police station.

According to the defendant, he had not at any time been advised by his attorney or the police that he was wanted in regard to the matter before the Court on account of the various warrants of arrest issued against him. At all times he was doing construction works and living on La Digue and had shown no intention of escaping or absconding from Court. His attorney's representation in Court, that he had not ascertained the progress of his case, was made without his knowledge. He had indeed been in touch with his chambers on various occasions for the progress of his case. This is further supported, in his view, by the fact that at all times he had contact with his assistant and not him personally. Furthermore, the police averments that his whereabouts could not be ascertained are incorrect in view of the fact that, at all material times, he remained on La Digue and was only working on construction site publicly, on the island. He had been renting a small bedsitter with one Mr Medine Camille at Anse Reunion La Digue. Prior to that, he was occupying the property of one Alvis Way Hive at Anse Reunion, La Digue.

In the circumstances the defendant avers that he did not deliberately absent himself or abscond from Court proceedings. He had at all material times, acted upon instructions of his counsel through his chambers. The defendant further begs the Court's indulgence in considering this application in view of the fact that he had been deprived of presenting his defence to Court and his attorney, as per proceedings of 10 August 2009, had withdrawn his appearance on his behalf without informing him and has further consented for the trial to proceed against him without his instructions for the same.

On the question of jurisdiction, according to Mr J Camille counsel for the defendant, although this Court is not the trial Court, which actually convicted and sentenced the defendant, still this Court has concurrent jurisdiction with that of the trial Court in this matter, to order a trial *de novo* in terms of section 133 A (3) (b) of the Criminal

Procedure Code, as amended by Act No 17 of 2008.

In these premises, Mr J Camille submitted that the defendant has bona fide reasons in the instant case, for having defaulted appearance before the Court during trial. Therefore, he urged that the said conviction and sentence against the defendant be set aside and that an order for the matter to be tried *de novo* be made in this case, so that the defendant can present his defence properly ensuring a fair hearing as guaranteed by the Constitution of Seychelles.

On the other side, Mr D Esparon, State counsel resists this application contending in essence, that the defendant has failed to give bona fide reasons for having defaulted appearance for trial in this matter. Moreover, according to Mr Esparon, this Court not being the trial Court has no jurisdiction to make an order as sought by the defendant in his application.

I meticulously perused the record of proceedings on file. I carefully considered the submission made by both counsel for and against the application for a trial *de novo*. Obviously, there are two fundamental questions that arise for determination in this matter. They are:

1. Does this Court have jurisdiction to set aside the conviction and sentence of the trial Court and order that the defendant be tried *de novo*? If yes, then;
2. Has the defendant satisfied this Court that his absence from part of the trial was bona fide?

Before one proceeds to find answers to the above questions, it is important to peruse the relevant provisions of law pertaining to “trials in the absence of the accused” as contemplated in our Constitution and the Criminal Procedure Code.

“A trial in absentia” is indeed, an antithesis to the constitutional right namely, “Right to a fair and public hearing”, which is a fundamental human right guaranteed by article 19 (1) of the Constitution of Seychelles. The right to a fair trial or hearing explicitly includes the right to be tried in one’s presence. This is a key part of the right to defend oneself. This particular constitutional right is expressly, guaranteed by the Constitution as a rule under article 19 (2) (i), which reads thus:

Every person who is charged with an offence ...shall, except with the person’s own consent, not be tried in the person’s absence unless the person’s conduct renders the continuance of the proceedings in the person’s presence impracticable and the Court has ordered the person to be removed and the trial to proceed in the person’s absence.

It is also pertinent to note that the same Constitution has also provided a reasonable restriction as an exception to the above rule, under article 19 (12) thereof, which reads

thus:

For the purpose of clause 2(i), a person who has, in accordance with law, been served with a summons or other process requiring the person to appear at the time and place appointed for the trial and who does not so appear shall be *deemed to have consented* to the trial taking place in the person's absence.

It is not uncommon that in many democratic countries, occasionally a criminal trial is conducted without the defendant being present when he/she gives his/her consent to "a trial in absentia" or "walks out" or "escapes" or "flees" after the trial has begun, since the defendant has thus impliedly waived the constitutional right to have a fair hearing, to be present and face one's accusers. At times, such attempts are made by some to defeat the trial and divert the course of justice. In a historical view, it may be observed that during the Nuremberg War Crime trials following World War II, involving heinous crimes against humanity such as genocide, ethnic cleansing etc it was employed against Nazis who had committed atrocities and then disappeared, the most famous being Martin Bormann, Hitler's closest aide.

In common law legal systems, conviction of a person in absentia, that is in a trial in which they are not present to answer the charges, is held to be a violation of natural justice. Specifically, it violates the second principle of natural justice, *audi alteram partem*. No one should be condemned unheard. By contrast in some civil law legal systems, such as Italy, trial in absentia is permitted. For instance, in Italy a trial in absentia is called "in contumacia" and is perfectly allowed, as long as the tried person is notified. It is also interesting to note, there is a widespread perception that trials *in absentia* should not be provided for in the statute as this would be inconsistent with article 14 of the International Covenant on Civil and Political Rights which provides that the accused shall be entitled to be tried in his presence. Hence, it is always desirable for the Court to avoid such trials as far as possible and should exercise its discretion in this respect sparingly and judiciously and may allow trials in absentia, in deserving cases, for extraordinary circumstances or reasons. Indeed, a person accused of an offence must be given every opportunity to prepare and present his best defence, lest it be said that justice hurried is justice buried.

With these constitutional thoughts, international norms, jurisprudence and historical background of the concept in mind, one should approach, interpret and apply the relevant provisions of the statute applicable to trials in the absence of the accused in our jurisdiction. The relevant provision contained in section 133 A (3) (b) of the Criminal Procedure Code, as amended by Act No 17 of 2008 runs thus -

- (1) In the trial of any person before the Supreme Court with or without a jury or before any Magistrates Court may commence and proceed or continue in his absence if *the Court* is satisfied that the summons or other process requiring the person to appear at the time and place

- appointed for the trial has in accordance with law, been served on such person and that—
- (a) he had consented to the trial taking place in his absence; or
 - (b) he does not appear in Court; or
 - (c) by reason of his conduct the continuance of the proceedings in the person's presence has become impracticable and the Court has ordered the person to be removed and the trial to proceed in the person's absence.
- (2) The commencement or continuance of a trial under this section, shall not be deemed or be construed to affect or prejudice the right of such person to be defended by an attorney-at-law at such trial.
- (3) Where in the course of or after the conclusion of the trial of an Accused person under paragraph (b) of subsection (1) the Accused person *appears before Court* and satisfies *the Court* that his absence from the whole or part of the trial was *bona fide* then-
- (a) where the trial has not been concluded, the evidence led against the Accused up to the time of his appearance before Court shall be read to him and an opportunity afforded to him to cross-examine the witnesses who gave such evidence and challenge any such evidence; and
 - (b) where the trial has been concluded, the Court shall set aside the conviction and sentence, if any, and order that the Accused be tried *de novo*.
- (4) The provisions of subsection (3) shall not apply if the Accused person has been defended by an attorney-at-law at the trial during his absence.

I will now, proceed to find answers to the fundamental questions, in the light of the facts on record , the submissions of counsel and the laws relevant to the case rehearsed supra.

Needless to say, it is important to determine the question of jurisdiction first as it involves a fundamental point of law, before we proceed to determine the application on the merits.

It is true that this Court is not the trial Court which actually, convicted and sentenced the defendant in absentia. However, section 133A (3) (b) clearly states that -

After the conclusion of the trial in absentia of an accused person who was convicted and sentenced in his absence for having defaulted appearance, if he appears subsequently *before Court* [vide 133A (3)] and satisfies *the Court* [vide 133A (3)] that his absence from part of the trial was bona fide then – the Court [vide 133A (3) (b)] *shall* set aside the conviction, if any...

As I see it, the crucial words namely, “Court” and “the Court” used in the above section of law, require a careful interpretation in order to distinguish their respective meanings in the context in which they have been used by the legislature. This distinction holds the key to the jurisdictional issue. In fact, section 133A (3) reads inter alia, thus: “Accused person appears before *Court*...” Obviously, the omission of definite article “the” before the word “Court” used herein indicates that there is no specificity of reference to a particular Court or to the trial Court in this matter. The generic term “Court” used herein means and includes all courts of equal and competent jurisdiction, which all have original jurisdiction to entertain an application made by an accused person, who was convicted and sentenced by a different Court of competent, equal or concurrent jurisdiction and so I find. The corollary is therefore, that an accused person who has been convicted and sentenced in absentia, by a trial Court of competent jurisdiction, for having defaulted appearance from trial, may appear before any other Court of competent, equal or concurrent jurisdiction as that of the trial Court and satisfy that Court that his absence from the whole or part of the trial was bona fide. If the Court, before which the defendant appears, is so satisfied, then it shall set aside the conviction and sentence and order that the accused be tried *de novo*. For these reasons, I find answer to the first question thus, in the affirmative. Yes; This Court does have jurisdiction to set aside the conviction and sentence of the trial Court and order that the defendant be tried *de novo* provided he satisfies this Court that his absence from part of the trial was bona fide.

I will now turn to the second question. Needless say, this involves a question of fact. On the face of the reasons given by the defendant in his affidavit, I am satisfied on more than a balance of probabilities that his absence from part of the trial before the trial Court was bona fide.

On the one hand, it is truism in any justice delivery system that “justice delayed is justice denied”; on the other hand one cannot turn a blind eye to the fact that at times, “justice hurried is justice buried”. It is therefore, the duty of the Court to strike a delicate balance between these two conflicting interests, which are irreconcilable in the administration criminal justice, as both are inherent to the fundamental human rights and freedoms guaranteed by the supreme law of the land. Society is hurt when justice is delayed because of a legal and procedural technicality, but in the long run a democratic society is hurt still more, when lawless conduct by law enforcement agencies goes unchecked in the name of speedy justice. Having said that, I note, following are the conditions precedent required to be satisfied for the Court to allow a trial in the absence of the accused invoking section 133A of the Criminal Procedure Code:

1. First of all, the Court should be satisfied that summons or other process requiring that the person to appear for trial has been issued. [vide s 133A(1) (supra)];
2. The said summons or process has been served in accordance with law; and
3. Despite such service, the accused having taken notice or having had the knowledge of the trial date, should have wilfully defaulted appearance for trial. So, the courts ought to be careful to make sure that a defendant's absence is truly voluntary, rather than the result of foul play, ill health, or lack of notice, lest they create grounds for an appeal. [or]
4. In the alternative, the defendant should have consented to the trial taking place in his absence; [or]
5. Again in the alternative, by reason of the accused person's conduct in open Court the continuance of the proceedings in his presence become impracticable and the Court therefore, should have ordered the accused to be removed and the trial to continue in his absence.

In fact, the first three condition precedents [1, 2 and 3 supra] are the ones relevant to the case on hand. All of them should be satisfied conjunctively, for the Court to commence or continue the trial in the absence of the accused in this matter, whereas the conditions 4 and 5 though are not relevant to the case on hand, each of them may be satisfied disjunctively, depending on the peculiarity of the case the Court deals with.

Coming back to the instant case, it is evident conditions No. 1, 2 and 3 were not satisfied since (a) no summons or other process was ever issued by the trial Court, requiring the defendant to appear for trial or continuance of trial nor was he present in Court, when it set the date for continuance of trial (b) No summons or process was ever been served on the defendant in accordance with law, informing him of the date, the trial Court had set for continuance of trial in his absence; and (c) There is no ground for any reasonable tribunal to presume that the accused had constructive notice or had the knowledge of the trial date and to conclude that the defendant had wilfully and maliciously defaulted appearance for trial.

For the reasons stated hereinbefore, in my judgment, the defendant herein has satisfied the Court that his absence from part of the trial before the trial Court was bona fide. Consequently, I hereby set aside the conviction and sentence of the trial Court, dated 17 August 2009 and order the accused be tried *de novo*. Accordingly, I order the release of the accused Albert Ladouceur from prison forthwith. Furthermore, I restore the original bail conditions imposed on him, pending trial *de novo* in this matter.

Record: Criminal Side (CR) No 49 of 2001