SUPREME COURT OF SEYCHELLES

**Reportable**
CO4/2022

In the matter between:

**THE REPUBLIC**
*(rep. by Mr Powles together with Miss Naidu)*

and

**MUKESH VALABHJI** — **1st Accused**
*(rep. by Mr James Lewis & Mr Zaiwallla)*

**LAURA VALABHJI** — **2nd Accused**
*(rep. by Ms Scott & Mrs Aglae)*

**LESLIE BENOITON** — **3rd Accused**
*(rep by Mr Basil Hoareau)*

**FELIX LEOPOLD PAYET** — **4th Accused**
*(rep by Mr Basil Hoareau)*

**FRANK MARIE** — **5th Accused**
*(rep by Mr Joel Camille)*

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| **Neutral Citation:** | *The Republic v Valabhji & Ors* (CO4/2022) [2023] 16 November 2023 |
| **Before:** | Govinden CJ |
| **Heard:** | 15 November 2023 |
| **Delivered:** | 16 November 2023 |

**RULING**

**GOVINDEN CJ**

[1] The Learned Counsel for the 3rd accused has objected to the admissibility of a transcript which the Prosecution wanted to adduce in the case. He objected to its admissibility on the

basis that both the transcript and its audio recorded version do not amount to a confession and, therefore, they amount to hearsay and an out-of-court statement of the accused.

[2] The Learned Counsel for the Republic, on the other hand, disputed this objection and argued that the content of both documents amounts to an admission of Count (2) of the indictment, in which the accused is charged with the offence of conspiracy contrary to Section 84(1) as read with Section 38(1) of the Penal Code together with the 4th and 5th accused.

[3] Both parties to the matter have agreed that it is necessary for the Court to look at the content of the transcript in order for it to make a factual determination as to whether it meets the definition of a confession and is therefore admissible. The Prosecution has called Mr Peter Bennett who took the accused person's out-of-court statement as Prosecution's sole and only witness in the *voire dire*. His evidence forms the basis of a trial within a trial in this regard.

[4] In coming to its decision the Court is mindful that in the UK the law as to admissibility of confession in evidence is now governed by the Police and Criminal Evidence Act 1984 (PACE). However, Seychelles Law is bound by the common law prior to it being crystallised by the PACE.

[5] Traditionally, the English Common Law has always made a distinction between an admission and a confession made by an accused to a person in authority. However, regardless of whether it's a confession or an admission, once objected to, the burden rests on the Prosecution to prove beyond a reasonable doubt that it amounts to an admission or confession and that it has passed the test of admissibility.

[6] In the context of criminal proceedings, in the Australian case of *Hazim v the Queen* [1993] 69 Criminal Appeal Report at page 371 to 380 explains the difference between confessions and admission as:

> "*The former involve admissions of actual guilt of the crime, whereas the latter relates to key facts which tends to prove the guilt of the accused of such crime.*"

[7] Justice Msoffe, Justice of Appeal in both cases *Lawrence v/s R SCA* [2015] and *Roble v/s R* [2015] SCA 24 explained that:

> *"A confession is generally described as an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a Court of Law. On the other hand, an admission is referred to as a statement of conduct adverse to the persons from whom it emanates".*

[8] Common law historically found that confessions and admissions made to the Police or the persons in authority were inadmissible, unless it is shown in a *voire dire*, beyond a reasonable doubt that it was not obtained through fear or prejudice or hope or advantage exercised or held out by a person in authority (see *Ibrahim v/s The King* [1914] AC 599, *Callus v/s Gunn* [1964] 1QB, 495 and *R v/s Prager* [1972] 1 WLR P260).

[9] In the case of *R v/s Hager* [2005] UKHL 6 Lord Steyn reiterated that *"a voluntary out of Court confession or admission against interest made by a defendant is an exception to the hearsay Rule and is admissible against him. That was the case under the common law".* He further stated that given the wide definition of confession under the PACE 1984, now admission also amounts to a confession.

[10] I have read the transcript D8, Item P8, which is a replica of the audio version of the accused persons's statement, as alleged. Having done so, I consider that it amounts to an out-of-court admission against interest of the 3rd accused. It does not amount to an equivocal confession to any charges before the Court. Without going to the merits of the relevancy of the documents in great depth, at this stage, the Court finds that it amounts to a statement of fact adverse to its maker with respect to an issue relevant and alive before the Court between the Prosecution and this accused, namely whether or not he conspired with the 4th and 5th accused to commit the offence alleged in Count (1). The adverse nature of this document is reflected in both its contest at this stage and its content.

[11] In accordance with the common law, it will therefore be admissible. I also find that its content would have to be corroborated in a material particular and that the Defence is at liberty to contest the truth thereof at any stage during the course of this proceeding.

[12] Accordingly, I find that the statement found in Item P8 is admissible in evidence as an exception to the hearsay Rule and so is its audio version.

[13] In this case the Learned Counsel for the Defence has also argued that purely exculpatory statement, such as the one given by his client, which do not contain admissions, are not admissible. The situation following the introduction of the PACE in 1984 is clear. Statements made by a suspect, which do not contain admissions, are not liable to exclusion under Section 76 of PACE (see *R v Sat-Bhambra* [1989] 88 Cr App R 55).

[14] In other words, they are not subject to the hearsay exclusionary rule, which would render them to the test of admissibility as an exception to the hearsay Rule. However, it is the law that simply because exculpatory statements are used against a defendant during the trial process on the basis that they are false or inconsistent, does not mean that the statements become confessions for the purpose of Section 76 of the PACE (see *R vs Park* 99 Cr App P.270).

[15] As Seychelles still adheres to the pre-PACE common law, we have to consider the common law as it was when it comes to consideration as to whether exculpatory statement are admissible.

[16] The answer to this question has its roots in a group of early English decisions including the case of *Harrison v Turner* [1847] 1QB 48 32. These cases confirm the following principle: if a declaration made by the prisoner is given in evidence against him, it becomes evidence for him as well as against him; and any exculpatory matter in the declaration is to be considered by the Court and given such weight as the Court sees fit, having regard to the other evidence and the circumstances of the case.

[17] The Rule in these early English cases has been reaffirmed and applied in a number of jurisdiction in Canada in the case of *Capital Trust Co. v.Fouler* [1921] 64 D.L.R., R vs Hughes [1943] 1 D.L.R.

[18] The operation of this Rule is also seen in the case of *Donaldson vs The Police [1963]* of the New Zealand High Court, in the case Report N.Z.LR 750 of 1963; and in the case of *Mc Gregor* [1967] 3 W.L.R 274.

[19] When I look at all these authorities that I have read it is clear to this Court that for an exculpatory statement to be admissible, it must first of all be contained in an admission (i.e. in and assertion made by an accused person offered in evidence against him in order to avoid the rule against proof of prior consistent statement and the hearsay rule).

[20] Secondly, a purely exculpatory statement can never be admitted for an accused person in a criminal trial unless it is first offered against that person by the Prosecution, which is highly unlikely, but in this case it has happened. Third, the criteria of admissibility is that the statement is tendered in evidence against the accused. The statement generally must include item adverse to the accused. Adversity is judged by the Prosecution in accordance with the Prosecution case and its relevancy as to proof; it is not decided by the Defence. Fourthly, the admission must pass the test of admissibility.

[21] Accordingly, even if the statement was to be purely exculpatory in the eyes of the Defence, its exculpatory nature in the eyes of the Prosecution and its relevance in support of its case, provided it meets the above test, would not prevent the statement from being admissible.

[22] In the Privy Council case of *Anandagoda vs R* [1962] 1 W.L.R 817, it was held that a test of deciding whether a particular statement is a confession is an objective one. It involves determination of whether words of admission, in their context, expressly or substantially admit guilt or, taken together, in their context, inferentially admit guilt.

[23] Once the conditions for reception of confession has been satisfied, it assumes the same treatment as that of an admission when it comes to admissibility.

[24] In this particular case the Prosecution argues that inferentially based on the strength of each case, the admission is supportive of a count in the information. At this juncture the Court will not go into any depth as to whether this is true; this is a matter to be tested in the whole circumstances of the case. But *prima facie* I find that an admission is proven and, therefore, I rule that P8 can be introduced in evidence

Signed, dated and delivered at Ile Du Port on 24 November 2023

Govinden CJ