

IN THE SUPREME COURT OF SEYCHELLES

Reportable
CS 43/22

THE REPUBLIC
(rep. Mr. Kumar)

Plaintiff

Versus

ABDUL KARIM KHUDABIN
(rep. Mr. Raja)

Accused

Neutral Citation: *The Republic vs Abdul Karim Khudabin CS 43/2022*

Before: D. Esparon Judge

Summary: Submission of no case to answer

Heard: 6th October 2023 all written submissions has been filed

Delivered: 14th December 2023

ORDER

Submissions of no case to answer and submission that the charge is defective and bad in law-
Submissions of no case to answer is dismissed and the charge is defective but not fundamentally defective
or bad in law.

RULLING

D.ESPARON JUDGE

INTRODUCTION

[1] The Accused stands Charged in Count 1 with the offence of Attempt to destroy a property by explosives contrary to and punishable under section 326 of the penal Code, The particulars of the Offence reads as follows;

‘Abdul Karim Khudabhin of 28 years old, unemployed, of Beoliere, Mahe, on 06th September 2022 at Brilliant Housing Estate, Mahe, unlawfully and with intent to damage a property namely a black Hyundai Elantra car belongs to Mrs. Katty Jenifer Samson bearing registration number S 30320, by an act of pouring an explosive namely gasoline on the said car which was parked at the residence of Mrs. Ketty Jenifer Samson at brilliant Housing Estate, Mahe’.

[2] The Accused has been charged in count 2 with the offence of willfully and unlawfully damage a property contrary to and punishable under section 325(1) of the Penal Code. The particulars of the offence reads as follows ;

‘ Abdul Karim Khudabhin of 28 years old, unemployed, of Beoliere, Mahe, on 06th September 2022 at Brilliant Housing Estate, Mahe, willfully and unlawfully damaged a property namely a Black Hyundai Elantra car belongs to Mrs Katty Jenifer Samson bearing registration number S30320’ .

[3] The Accused has been charged in count 3 with the offence of willfully and unlawfully damage a property contrary to and punishable under section 325 (1) of the Penal Code, The particulars of the offence are as follows;

‘ Abdul Karim Khudabhin of 28 years old, unemployed, of Beoliere, ,mahe on the 6th September 2022 at Brilliant Housing Estate, mahe, willfully and unlawfully damaged a property namely a Hundai Grand I10 car belongs to Hunt Deltel & company Limited bearing registration number S30657.

[4] At the closed of the prosecution case Counsel for the Accused has made a submission of no case to answer.

SUBMISSIONS OF COUNSELS

- [5] Counsel for the Accused has submitted to the Court that the prosecution has failed to establish a prima facie case against the accused and relied on the case of R V Galbraith (1981) 37 CR App. R . 124 which has been followed in the case of R V Marengo (2004) SLR 116, R V Matombe (No.1) (2006) SLR 32 and the case of R V Hoareau SC Cr 79/2014.
- [6] Counsel for the accused submitted that all the evidence in the cases is purely circumstantial in nature and that it is highly unsafe to convict on such evidence as no witness had seen the accused attempting to damage the vehicles or willfully and unlawfully damaging the said vehicles.
- [7] According to Counsel for the accused that as there is an averment in the 1st Count that gasoline is an explosive, Counsel relied on the definition of the word explosive in the Explosives Act and submits to the Court that gasoline is not an explosive.
- [8] Furthermore since the word attempt is used in Count 1 of the Charge sheet and that the real effect of section 326 of the penal code is the act of damaging and not attempt, the charge is defective and that in both count 2 and count 3, there is no mention of explosive substance and hence the charge is defective.
- [9] On the other hand Counsel for the prosecution also relied on the case of R V Galbraith (1981) 73 Criminal Appeal Report 124. Counsel submitted that the case relies on circumstantial evidence and relied on the case of Patrick Sopha V/S Republic of which the learned trial judge explained how to address the issue of circumstantial evidence in the case.
- [10] Counsel for the prosecution submitted to the Court that the cumulative effects of facts spoken by witnesses, and the exhibits relied on by the prosecution and that when those are taken together, those evidence are conclusive evidence in establishing the guilt of the accused. That the chain of circumstantial evidence does not leave for conclusion consistent with the innocence of the accused.
- [11] Counsel for the prosecution relied on the witnesses that testified in the case including the video footage produced in the case relating to the movement of the said car which he

alleged that the accused was driving that day up to the place where the offence. The admission made by accused to Bachilles Bareau when he was coming down from Brilliant housing estate 'that he put a fire and he would not let anyone to disrespect him'.

[12] Counsel for the prosecution relied on section 2(a) of the Explosives Act and submitted to the Court that inflammable fuel called gasoline even though not explicitly termed as explosive substance, that it falls under the category of explosives under the second limb of the interpretation section of which it is that the substance gasoline is used for explosion and that the witness who testified for the prosecution from the fire services who stated that if the fire on the vehicle was not stopped in time, these affected vehicles would have exploded.

[13] Counsel for the prosecution has submitted to the Court that the prosecution has established a prima facie case against the accused.

ANALYSIS AND DETERMINATION

[14] Before this Court decides on the merits of the submissions of no case to answer it is important that the Court deals with the point of law raised by counsel for the accused in his submission of no case to answer namely since the word attempt is used in Count 1 of the Charge sheet and that the real effect of section 326 of the penal code is the act of damaging and not attempt, the charge is defective and that in both count 2 and count 3, there is no mention of explosive substance and hence the charge is defective.

[15] It is evident as to Count 1 that the accused has been charged under section 326 of the penal Code which provides as follows;

' Any person who, unlawfully and with intent to destroy or damage any property, puts any explosive substance in any place whatever, is guilty of a felony, and is liable to imprisonment for fourteen years'.

[16] The statement of offence as to count 1 of the charge sheet reads as follows;

[17] 'Attempt to destroy a property by explosives contrary to and punishable under section 326 of the penal Code and the particulars of the Offence reads as follows;

‘ Abdul Karim Khudabin of 28 years old, unemployed, of Beoliere, Mahe, on 06th September 2022 at Brilliant Housing Estate, Mahe, unlawfully and with intent to damage a property namely a black Hyundai Elantra car belongs to Mrs. Katty Jenifer Samson bearing registration number S 30320, by an act of pouring an explosive namely gasoline on the said car which was parked at the residence of Mrs. Katty Jenifer Samson at brilliant Housing Estate, Mahe.

[18] It is evident that in count one that instead of averring the wording of the said provision of the law being the elements of the offence in the statement of the offence, the wording in the marginal note has been averred. However this Court notes that in the particulars of the offence as to count one the elements of the offence has been averred by using the words found in the said provision of the law.

[19] As a result this Court has to determine whether the charge sheet is fundamentally defective or bad in law and should be dismissed or it is only defective and can be cured. This Court also bears in mind of the provisions of the Law namely section 111 of the Criminal Procedure Code and Article 19(2) (b) of the Constitution. Section 111 of the Criminal Procedure Code reads as follows;

‘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’.

Article 19(2) (b) of the Constitution provides that;

‘(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’;

[20] Section 7 of the Interpretation and General Provisions Act reads as follows;

‘Marginal notes and headings in an Act and references to other Acts in the margin of an Act do not form part of the Act and shall be treated as having been inserted for convenience or reference only’.

[21]

This Court has considered section 7 of the Interpretation and General Provisions Act and is of the view that since marginal notes do not form part of the Act and shall be treated as having been inserted for convenience or reference only hence the reference to 'Attempt to destroy property by explosives in the marginal note to section 326 of the Penal Code, should pursuant to section 7 of the Interpretation and General Provisions Act be treated as having being inserted for convenience or reference only and not as part of the act.

[22]

A similar situation arose in the case of Jules V/S R SCA 11 2002, where Bwana JA stated the following;

'What is of great importance for the purpose of deciding this Appeal is the first point- that of an Appellant being charged and convicted for an offence that does not exist. It is being argued by Mrs Antao that 'sexual interference with a child' is not an offence under our laws. Those words are mere marginal notes which do not form part of statute. The trial judge seems to concur with these views. We take the same view. Marginal notes in any statute are not inserted therein by the legislator. These are rather inserted, by drafts persons for the purpose of ease of reference. As such they cannot be considered as forming or being part and parcel of the relevant part of that particular statute'.

[23]

The Court of Appeal in the case of Jules (Supra) relied on the case of Ayres(1984) AC 447 where Lord Bridge stated the following at pp 460-61;

' If the statement of offence and particulars of the offence in an indictment discloses no criminal offence whatever or charged some offence which has been abolished , in which case the indictment could fairly be described as a nullity. It is obvious that a conviction under that indictment cannot stand. But if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but pleaded it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed.... It can be said with confidence that the particular error in the pleading cannot in any way have prejudiced and embarrassed the defendant'.

[24] In the case of R V/S Edmond (CO 38/ 2004) (2008) SCSC 117, where a similar issue was raised. The Court relied on the authority of the case of Jules V/S R (SCA 11 of 2005) which relied on the case of Ayres V R (1984) AC 447 where Perera CJ stated the following;

‘Hence there is prima-facie evidence of an act of indecency as particularized in the amended charge sought to be filed. It cannot therefore be stated that the accused would be prejudiced and that the injustice would be caused unless the prosecution witnesses are recalled’.

[25] In the case of the Republic V/S Romel Albert Criminal sides N0 4 of 2006, where the same issue arose, Perera ACJ stated the following;

‘In the present case, Count 1 which particularizes the offence as sexual intercourse, could well have been based on section 130(2) (d). In the case of Hibonne V/S R (1976) S.LR 47, it was contended in Appeal that the charge was defective in that in the statement of offence section 291 should read section 292 and that in the particulars of the offence mention should have been made of all the elements of the felony of breaking into a building with intent to steal. Sauzier J following the case of R V. Mcvitie (1960) 2 SA.RE.R 498 held that these defects did not make the charge bad in law, but only made it defective. He applied section 331(a) of the Criminal Procedure Code, and held that no failure of justice had been occasioned and that the accused had not been prejudiced. In the present case as well, although the statement of offence in count 1 is defective as to form, yet it could not be stated that the accused was prejudiced in his defence, as the offence was clearly particularized. For similar reasons, Count 2 is also not bad in law’.

[26] In the case of Rene v R (SCAR) CR App 3/1999, Ayoola P stated the following at paragraph 14;

‘It is not every defect in a charge that would cause the court to quash a conviction. Where the point of defect is, in the circumstances of the case, a technical one which the trial judge could have cured by an amendment, even at a late stage of the proceedings, without occasioning a miscarriage of justice, the Appellate Court

would not quash the conviction on the ground of a defect in the charge alone. In *R V Power* (1977) 66 Cr App R 159, the statement of offence incorrectly stated was 'Perjury contrary to S5A of the Perjury Act 1911' whereas it should have read 'making a false declaration not on oath contrary to S5A of the Perjury Act, 1911'. The error was first spotted after *Power's* conviction. The Court of Appeal (England) applying *R V Mcvitie* (1960) 44 Cr App R 201 applied the proviso to S2(1) of the Criminal Appeal Act 1968 which is in similar terms to the proviso to r41 of the Seychelles Court of Appeal Rules 1978 and refused to quash the conviction. It is noted that *R V Power* (Supra) as in the present case, the particulars of offence have correctly averred the ingredients of the offence. The apparent misstatement of the offence charged in the statement of offence has in no way misled the appellants and has not caused any miscarriage of justice'.

[27] This Court shall follow the above authorities as case law above which states that such a charge as in the present matter may be bad in law and fundamentally defective in the event that the accused is embarrassed and prejudiced in its defence. Hence the issue that has to be determined by this Court is that is the accused in the present matter prejudiced or embarrassed in his defence. This Court notes that the prosecution has averred the words used in the marginal notes in the statement of offence.

[28] This Court notes that the particulars of the offence as to Count 1 reads as follows;

‘ Abdul Karim Khudabin of 28 years old, unemployed, of Beoliere, Mahe, on 06th September 2022 at Brilliant Housing Estate, Mahe, unlawfully and with intent to damage a property namely a black Hyundai Elantra car belongs to Mrs Katty Jenifer Samson bearing registration number S 30320, by an act of pouring an explosive namely gasoline on the said car which was parked at the residence of Mrs. Ketty Jenifer Samson at brilliant Housing Estate, Mahe.

[29] It is clear from the above that although the statement of offence contains averments of the exact wording of what is stated in the marginal notes, the offence is clearly particularized in the statement of offence, Hence this Court holds that although the statement of offence in count 1 is defective as to form, yet it could not be stated that the accused was prejudiced

or embarrassed in his defence, as the offence has been clearly particularized and contains all the elements of the offence. Hence since the charge is defective but not fundamentally defective or bad in law this Court shall not dismiss Count 1 for being only defective but not fundamentally defective or bad in law since the accused has not been embarrassed or prejudiced in his defence.

[30]

This Court also takes note of the defence raising such an issue as to a defective charge after the close of the prosecution case at the stage of the submission of no case to answer. It is the obligation of counsel for the accused to point out a defect in the charge as earliest as possible as soon as it has come to his attention. However raising it at a late stage after the prosecution has closed its case of which such charge cannot be amended or cured is tantamount to an ambush of the prosecution by the defence which is highly improper and should not be condoned by this Court.

[31]

This Court is of the view that the submissions of counsel for the accused that in both count 2 and count 3, there is no mention of explosive substance and hence the charge is defective has no merits since both in count 2 and count 3 of the charge sheet the prosecution has charged the accused under section 325(1) of the Penal code and upon a careful perusal of the said section, there is no mention of the word explosive substance in the said proviso and hence the word explosive is not an element of the offence under section 325 (1) of the Penal Code. As a result, this Court finds that both count 2 and Count 3 are not defective and not bad in law for not averring the word explosive in the said Counts.

[32]

As for the submission of Counsel for the accused namely since that there is an averment in the 1st Count that gasoline is an explosive, relying on the definition of the word explosive in the Explosives Act, he submitted to the Court that gasoline is not an explosive. This Court hereby reproduces section 2 of the Explosive Act which defines the word explosive in the following manner;

‘Explosives’ means-

(a) Gunpowder, nitro-glycerine, dynamite, gelignite, guncotton, blasting powders, fulminate of mercury or other metals, coloured fires and every other substance, whether similar to those herein mentioned or not, which is used or manufactured with a view to produce a practical, effect by explosion;

(b) Any fuse, rocket, detonator or cartridge, and every adaptation or preparation of an explosive as herein defined;

(c) Any other substance which then Minister may, by notice in the gazette, declare to be an explosive;

and includes any apparatus, machine, implement or materials used or intended to be used, or adapted for causing or aiding in causing any explosion in or with any explosives and also any part of any apparatus, machine or implement, but does not include arms and ammunition in respect of which a license or to deal in is regulated by any other law;'

[33] It is clear that the definition of explosives under section 2 of the Explosives Act is not an exhaustive definition but includes every other substance whether similar to these herein mentioned or not which is used with a view to produce a practical effect of explosion and it also includes materials used or intended to be used or adapted for causing or aiding in causing any explosion.

[34] The evidence of Francois Pierre who has been working at the Seychelles Petroleum Company for 30 years and he is presently the quality insurance manager. He gave evidence to the fact that gasoline is used for spark in ignition engine, internal combustion and is highly flammable. He also testified to the fact that it is possible to set fire on anything since it is very volatile. Under re-examination by Counsel for the prosecution he also stated that gasoline being a highly inflammable substance, it can be used for explosive purpose. This Court also notes that Counsel for the accused did not challenge the expertise of the witness either by way of cross-examination or by means of objecting to the expertise of the witness.

[35] As a result of the above definition of the law under section 2 of the Explosives Act and the evidence of Francois Pierre, this Court is of the view that gasoline falls within the definition of explosives since it is seen to be a substance which may be used with a view to produce

a practical effect by explosion or a material that may be used or intended to be used for causing or aiding in causing any explosion.

[36] As regards to the merits of the submissions of no case to answer by Counsel for the Accused this Court will adopt the principles as laid down in decided cases namely the case of *R V Stiven* (1971) SLR 112, *R V Olsen* (1973) SLR 188, *R V Marengo* (2004) SLR 116, *R V Matombe* (No 1) (2006) SLR 32 namely that;

I. There is no case to answer where;

- a) There is no evidence to prove an essential element of the offence; or*
- b) The evidence adduced by the prosecution has been so discredited as a result of cross-examination, or is so manifestly unreliable, that no reasonable tribunal could safely convict upon it.*

II. If a submission is made that there is no case to answer, the court should make a decision based on whether the evidence is such that a reasonable court might convict the accused and not whether the Court, if compelled to do so would at that stage convict or acquit the accused.

III. When the Court comes to the conclusion that the prosecution evidence, taken at its highest, is such that the jury properly directed could not properly convict upon it, it is the duty of the Court, upon a submission being made to stop the case.

IV. Where the prosecution evidence is such that its strength or weakness depends on the view to be taken on the reliability of a witness or other matters within the province of the jury, and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

[37] This Court takes note that the present case relies mostly on circumstantial evidence but not entirely. Hence it is important to define what is circumstantial evidence and for this Court to elaborate how the court should approach such evidence in relation to the facts of the

case. Murphy on evidence, eleventh edition at page 22 paragraph 2.3. 1 defines circumstantial evidence as follows;

‘Circumstantial evidence is evidence from which the desired conclusion may be drawn, but which requires a tribunal of fact, not only to accept the evidence tendered, but also to draw an inference from it’.

[38] In the case of Exall (1866) 4 F and F 922, Pollock CB employing the analogy of a rope, said at page 929;

‘One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.

Thus it may be in circumstantial evidence- there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion, but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of’.

[39] In the case of Hodge (1838) 2 Lewin 227228, Baron Alderson stated the following;

‘ that in a case in which the evidence against the accused consisted entirely of circumstantial evidence, the accused could be found guilty only if the jury were satisfied, not only that the circumstance were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person’.

[40] Murphy on evidence, eleventh edition at page 23 paragraph 2.3. 1 states as follows;

‘Wigmore presented a systematic analysis of the cases in which circumstantial evidence could be used to prove the physical commission of the Act itself, for

example evidence of planning and preparation preceding its commission, and evidence of avoidance of detection, such as destruction of evidence, flight from the scene, or other incriminating action taken after its commission'.

[41] This Court hence has to consider what circumstantial evidence is available on record in the matter. Firstly we have the evidence of Ivan Esparon who gave evidence to the fact that from the video footages he received elsewhere and these he extracted himself at different locations showing 2 vehicles travelling towards the perseverance petrol station and later from perseverance petrol station to Brillant up to the vicinity where the two cars were found to be burning at the brilliant Housing Estate by their owners or possessor. According to Inspector Esparon the said car had entered the perseverance petrol station but however before entering the said petrol station the vehicle had stopped and it could be seen in the said video footage that somebody was doing something at the front of the vehicle according to Inspector Esparon seems to be where the registration number is on the front part of the vehicle.

[42] Mr. Roger Nanon testified to the fact that on the 6th September 2022 when he was working at the Perseverance petrol station around 2.45 am, he testified to the fact that there was a person in the car that seems to be wearing a socks in the head and having a face mask which came to buy unleaded bezen in a gallon and he came in a vehicle make i10 having registration number S230 of which he knows the car very well and that the said car seems to be missing some digits in its registration number.

[43] The other witness who testified for the prosecution is Bachilles Bareau who gave evidence to the fact that the accused Abdul Khudabin arrived at his Residence around 11pm. After that they went together to collect his girlfriend Dania Maimee at Barbaron and he lent the Accused his Aunty's car S23022 which was a black Hyundai i10 car. Mr. Bachilles Bareau testified to the Court that he followed the said accused in car registration number S16555 driven by him together with his girlfriend and followed the said accused who was driving vehicle S23022 up to the perseverance petrol station and on the way back he noticed that the last 2 digits of car registration number driven by the accused were hidden. According to him, the said car driven by the accused stopped at Le Rocher whereby according to Mr

Bachille Bareau, the accused asked him to accompany him in the car he was in. He gave evidence to the fact that he accompanied the said accused in the vehicle driven by the accused and the went towards the Brilliant housing estate whereby the said Abdul Khudabin disembarked from the said vehicle and opened the back side door of the said car and took out a bag and went away.

[44] According to the witness upon returning back to the car after 20 minutes, the said accused embarked in the car and drove the car back in a hurried manner of which at that time according to the said witness the accused stated to him that he put a fire and that he would not let anyone disrespect him. Thereafter they joined the girlfriend of Bachille Bareau, Dania Maimee which they had left at Le Rocher and both vehicles left Le Rocher whereby they went to the Residence of Bachille Bareau and thereafter changed cars and dropped the said Dania Maimee to Barbarons and after that dropped the said accused at his residence at Beoliere.

[45] Mrs katty Samson testified to the fact that when she was asleep in the early hours of the 6th September 2022, she heard a man calling her stating that the car was on fire and as she came out of the house she saw that her black Hyundai Elantra car S30320 was on fire and that her husband tried to put out the fire and had to call the fire and rescue service for assistance. When the fire was put out, she noticed that her husband's company car Hyundai Grand i10 car S 30657 belonging to Hunt Deltel was also damaged due to the fire. After the fire was extinguished, she noticed the extent of the damage to her car as a result of the fire which was quite extensive. The evidence of Katty Samson is corroborated by the evidence of her husband Dereck Samson in material respect.

[46] Miss Jade Monnaie a witness for the prosecution testified in Court to the fact that the accused being her ex-boyfriend of which she has a child with him and after their relationship had ended and that she entered in a new relationship with one Havilah Melanie since July 2022, the accused used to threaten and harass her, he also used to make threatening calls to her. She stated that during the month of August 2022, the accused told her that he knows the place where Havilah lives and he knows the Hyundai Elantra car that Havilah drives.

[47] The other witness who testified for the Prosecution is Mr Terry Louise who gave evidence to the Court that he attended the scene of the incident in the early hours of the 6th September 2022 and that in his opinion the cause of the fire is one of deliberate act. He produced a report namely exhibit P17 corroborating his testimony in Court.

[48] Mr Francoise Pierre a quality assurance manager at Seypec who has 30 years of experience in this field gave evidence to the fact that in his opinion gasoline is used for spark in ignition engine, internal combustion and is highly flammable. He also testified to the fact that it is possible to set fire on anything since it is very volatile. Under re-examination by Counsel for the prosecution he also stated that gasoline being a highly inflammable substance, it can be used for explosive purposes.

[49] It is clear that in the present matter there are a number of circumstantial evidence as highlighted above. However this Court is of the view that this case does not depend solely on circumstantial evidence but there is an admission or confession made to a friend by the accused namely to Bachille Bareau while he was coming down very quickly from the Brilliant housing estate namely when he stated that he put a fire and that he would not let anyone disrespect him. Such admission or confession made to a friend by the accused in such circumstances is admissible in evidence.

[50] It is a well-established principle that at the stage of a submission of no case to answer, the prosecution has to only prove a prima facie case against the accused person. This Court has considered the evidence adduced by the prosecution in the matter, the submissions of Counsel for the accused and that of Counsel for the prosecution as well as the above cited case laws and holds that the prosecution has established a prima facie case against the accused as regards to count 1, count 2 and count 3 in order for the accused to answer the charges against him in the present matter since the witnesses who testified for the prosecution has not been so discredited as a result of cross - examination nor that they have been seen by this Court to be so unreliable that no reasonable tribunal would convict and that the prosecution evidence, taken at its highest, is such that a reasonable Court could

safely convict upon it and hence this is not a case whereby there is no evidence to prove an essential element of the offence.

[51] As a result of the above, the submission of no case to answer is accordingly dismissed.

Signed, dated and delivered at Ile du Port on 8th November 2023.



D.Esparon

Judge

