

## SUPREME COURT OF SEYCHELLES

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### Reportable

[2023]

CO 04/2022

In the matter between:

**THE REPUBLIC**

*(rep. by S Powles)*

**Republic**

and

**MUKESH VALABHJI**

*(rep. by J Lewis and ors)*

**1<sup>st</sup> Accused**

**LAURA VALABHJI**

*(re. by R Scott and ors)*

**2<sup>nd</sup> Accused**

**LESLIE BENOITON**

*(rep. by B Hoareau)*

**3<sup>rd</sup> Accused**

**LEOPOLD PAYET**

*(rep. by J Camille)*

**4<sup>th</sup> Accused**

**FRANK MARIE**

*(rep. by J Camille )*

**5<sup>th</sup> Accused**

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**Neutral Citation:** *The Republic v Valabhji & Ors* (CO 04/2022) [2023] ( December 2023)

**Summary:** Section 134(d) of the Criminal Procedure Code; Spousal communications privilege

**Before:** Govinden CJ

**Heard:** 16 November 2023

**Delivered:** 15 January 2024

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## RULING

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### GOVINDEN CJ

- [1] The Prosecution has sought to produce some written documents, which are said to have been written by the 2<sup>nd</sup> accused to her husband, the 1<sup>st</sup> accused, whilst she was under

detention in prison by virtue of the Order of this Court. Learned Counsel for the 2<sup>nd</sup> accused has objected to their admissibility on several grounds.

- [2] Firstly, on the ground that the items were neither found nor seized by the witness currently under testimony. Consequently, the witness would not be able to testify, firstly, as to the location where the items were found and, secondly, how, by whom and in what circumstances items were discovered. According to Learned Counsel, the testimony in regard to these details is necessary in order to establish the authenticity and the provenance of these letters, and hence their relevance.
- [3] Learned Counsel proceeded to raise another point, which she said was even more fundamental. She argued that the communication in question is from a wife to a husband and, therefore, is protected against disclosure and seizure on the grounds of spousal privilege pursuant to Section 134(d) of the Criminal Procedure Code (CPC).
- [4] Learned Counsel submitted that this Rule on compellability mirrors Section 1(d) of the English Criminal Evidence Act of 1898. She argued that although sections refer to compellability, the exception in Section 134(d) of the CPC creates several privileges, similar to the privilege in communications between lawyer and client. Learned Counsel submitted this means that communications between husband and wife are protected against the use of any coercive powers such as search and seizure just as much as they are protected against compelled disclosure through, for example, cross-examination. According to Ms Scott, this must be the correct approach as it would be absurd to create a privilege which allows the spouse to refuse to disclose a communication only for the opposing party to go ahead and seize it anyway. She argued that compelled disclosure from the recipient is prohibited just as much as compelled seizure is prohibited. Learned Counsel submitted therefore that if a Searching Officer had found legally privileged documents in suspect's belongings, the Officer would be under a duty to immediately hand them back and not use them. According to Ms Scott's submissions, the same applies to spousal communications under the Rule on compellability.
- [5] On the other hand, Leaned Counsel for the Republic, in response, submitted that the application to exclude this letter is fundamentally misconceived. It is argued that, firstly,

Section 134 is concerned in its entirety with the competency of the accused person's husband or wife as witnesses. Subsection (d) provides that every person charged with an offence and the wife or husband, as the case may be, of the person so charged shall be a competent witness for the defence at every stage of the proceedings. Accordingly, Learned Counsel submitted that the provision is only applicable in circumstances where husband or wife is a witness giving evidence and that this is not the case here as we have not reached the stage where either Mr or Mrs Valabhji is due to be a witness in their own defence.

- [6] Secondly, Learned Counsel argued that subsection (d) only guards against a husband disclosing communications made to him by his wife or to a wife disclosing communications made to her by her husband. Accordingly, he submitted that subsection (d), if applicable at all, would only be applicable in the circumstances of this case if Mr Valabhji, as the husband, was being compelled to disclose the communication made to him by his wife and that is plainly not the case here. In summary, he submitted that Section 134(d) does not in any way prevent the author or maker of a communication from being compelled to disclose communication made by them as it only prevents a compulsion being placed on the receiver of the information being compelled to disclose it once having received it.
- [7] The third point raised by the Learned Counsel is that the document is a draft letter and was not sent and was not communicated by one party to the other. The letter is only relied upon by the Prosecution against Laura Valabhji, the maker of the document. It is argued that the Prosecution is a third party giving evidence of spousal communications.
- [8] Learned Counsel grounds his reply on the case of *Rumping v Director of Public Prosecutions* [1962] 3 All ER 256, a decision of the House of Lords in the jurisdiction of England and Wales dealing with the questions of marital communications. Learned Counsel referred to the facts of the *Rumping* case, where the appellant, who was a mate of a Dutch ship, was convicted of non-capital murder. Part of the evidence for the prosecution admitted at his trial consisted of a letter that he had written to his wife in Holland, which amounted to a confession. The appellant had written the letter on the day of the killing on board of his ship. He handed the letter in a closed envelope to a member of the crew

requesting him to post it as soon as the ship arrives at the Port outside of England. The appellant was arrested when the ship reached Liverpool and after his arrest the member of the crew handed the envelope to the Captain of the ship who has delivered it to the Police. The member of the crew, the Captain and the translator of the letter gave evidence at trial; but the wife was not called as a witness. The ground of appeal against conviction was that the letter was wrongly admitted in evidence. It was held that the appellant was rightly convicted and that the letter was admissible in evidence.

- [9] Referring to the judgment, Learned Counsel submitted that it held very clearly that a marital communication is not a privilege if the evidence is given by a third party. In *Rumping* the prosecution was entitled to tender evidence of a letter written by husband admitting a crime to his wife, which had been obtained by police. It is argued that these circumstances are very similar, if not identical, to the circumstances in this case. Learned Counsel submits that as per *Rumping*, at common law there has never been a separate principle or rule that communications between a husband and wife during marriage are inadmissible in evidence on grounds of public policy. Accordingly, except in cases where the spouse to whom the communication is made is a witness and claims privilege from disclosure under Section 1(d) of the Criminal Evidence Act 1898, which is replicated in Section 134(d) of the CPC, spousal communications would be admissible in criminal proceedings. Learned Counsel concluded, therefore, that for all the reasons he has set out, the letter that was obtained from Mrs Valabhji, served on the 13<sup>th</sup> November 2021, is admissible against her and, therefore, should be admitted, whether it's admitted through the witness under testimony or another witness.
- [10] Learned Counsel for the 1<sup>st</sup> accused joined the reply and arguments of Counsel for the 2<sup>nd</sup> accused, arguing that his client was the recipient spouse, protected by the privilege. A protection which he argued had been breached by unlawful compulsory interception in this case.
- [11] I have carefully listened to the arguments presented by both sides on this objection and have given a close attention to the different legal provisions in issue and the case law cited.

[12] First and foremost, I accept the mutual position taken that the statutory provisions between Section 1(d) of the English Criminal Evidence Act of 1898 (now repealed) and that of the Seychelles, the exceptions in subsection 134(d) of the Seychelles CPC are identical, word for word. Given our common history, I have no doubt that the latter is but a local re-enactment of the former. Case law and pronouncements of the courts in England on Section 1(d) of the Criminal Evidence Act will no doubt help this Court in the interpretations of our Section 134 given their similitudes.

[13] Section 134 of the Seychelles CPC states:

*134. Competency of accused and husband or wife, as witnesses*

*Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:*

*Provided as follows:—*

*(a) a person so charged shall not be called as a witness in pursuance of this section except upon his own application;*

*(b) the failure of any person charged with an offence or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution;*

*(c) the wife or husband of the person charged shall not be called as a witness except upon the application of the person so charged;*

*(d) nothing in this section shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage;*

*(e) a person charged and being a witness in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;*

*(f) a person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—*

*(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of offence wherewith he is then charged; or*

*(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the complainant or the witness for the prosecution; or*

*(iii) he has given evidence against any other person charged with the same offence.*

*(7) Every person called as a witness in pursuance of this section shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses have given their evidence.*

*(8) Nothing in this section shall affect the provisions of section 197 or any right of the person charged to make a statement without being sworn.*

- [14] The words of both statutes are crystal clear and the parties have not ascribed any ambiguity to it. The Court will therefore apply the literal Rule of interpretation. It dictates that statutes are to be interpreted using the ordinary and plain meaning of the language of the statute. In other words, a statute is to be read word for word and is to be interpreted according to the ordinary meaning of the language. Ordinary words would be given their ordinary meaning, technical terms are given their technical meaning, and local, cultural terms are recognized as applicable.
- [15] The Court has had a close reading of Section 134(d) of the CPC, and having done so, I find that the provision first deals with the competency of legally married persons. Section 134 makes every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Competence refers to the ability of a person to give testimony. Hence, a husband and a wife are legally able to testify for one another and are not able to be called by the prosecution at a trial against one another, except for the situation referred to in Section 132(2) of the CPC (which are not relevant here).
- [16] In the same vein it deals with compellability of those witnesses who has been called as a witness in the defence of the charged spouse. This is done in the proviso (d), specifically stating that a husband or wife, while under testimony and being called by their respective spouses, cannot be compelled by the court to disclose any communication made to them during the marriage. This non-compellability, grounded in public policy, means that neither the defence counsel, the prosecution nor the court would be able to compel the testifying

spouse to disclose marriage communication, regardless of their form. This to the court is the limit of the marital privilege with respect of marital communication in our law.

- [17] Therefore, the literal meaning of the provisions supports the contention of the Prosecution that the letters written by the wife to the husband in this case does not come into the ambit of section 134 proviso (d) as the section applies only to testimonial privilege. The 1<sup>st</sup> and 2<sup>nd</sup> accused being husband and wife, respectively are not testifying or being summoned to testify, which would have made the issue of competency live. They are also not being compelled to produce any marital communication whilst under testimony, which would have made the issue of non-compellability live. The document was found by a third party as part of the investigation in this case. Provided it is relevant, the communication can be produced during the course of the Prosecution's case without infringing Section 134 of the CPC.
- [18] The House of Lords in *Rumping v Director of Public Prosecutions* [1962] 3 All ER 256 was interpreting Section 1(d) of the Criminal Evidence Act of 1898, an exact replica of Section 134(d) of the Seychelles CPC. The House of Lords held that except where the spouse to whom the communication is made is the witness and claims privilege from disclosure under section 1(d) of the Criminal Evidence Act, of 1898, evidence as to communications between husband and wife during marriage is admissible in criminal proceedings. This interpretation resonates with this Court and supports its views on the meaning to be given to section 134(d) of the CPC.
- [19] For these reasons the Court finds that the written documents, which are said to have been written by the 2<sup>nd</sup> accused to her husband, the 1<sup>st</sup> accused, whilst she was under detention in prison and seized by law enforcement officers are not privileged documents under Section 134 of the CPC and can be adduced in evidence.

Signed, dated and delivered at Ile du Port on the 15<sup>th</sup> of January 2024



Govinden CJ