

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 79/2014

[2015] SCSC 567

THE REPUBLIC

versus

GERARD HOAREAU

Accused

Heard: 18th November 2015

Counsel: David Esparon Principal State Counsel, Vipin Bernjamin and Lansinglu Rongmei,
State Counsel for the Republic
Anthony Juliette and Nichol Gabriel for the accused

Delivered: 18th November 2015

RULING

M. TWOMEY, CJ

[1] Mr. Juliette, Counsel for the accused person, Gerard Hoareau, has made a submission of “no case to answer” at the conclusion of the prosecution case in which the accused person had been charged with murdering Damienne Hoareau and causing grievous harm to Thara Hoareau on 25th November at La Retraite Mahe.

[2] The relevant statutory provisions in relation to such a submission are contained in the Criminal Procedure Code, namely Section 265 (1) (c) which provides that “the judge shall decide all matters of fact necessary to be proved in order to enable evidence of particular matters to be given” and “(d) whether any question which arises is for himself or for the jury”, and Section 249 (1) of the Criminal Procedure Code which provides that:

“If, when the case for the prosecution has been concluded, the Judge rules, as a matter of law, that there is no evidence on which the accused could be convicted, the jury shall, under the direction of the Judge, return a verdict of not guilty.”

- [3] The interpretation of what constitutes “no evidence” as formulated in section 294 (1) supra has been interpreted in case law both in the UK and Seychelles. In *Green v R* (1972) S.L.R 55 Sauzier J stated in reference to a submission of no case to answer that:

“The considerations which apply at that stage are purely objective and the trial Court is not asked to weigh the evidence. At that stage it is only necessary for it to find that a reasonable tribunal might convict.”

- [4] In jury trials there is an evidential burden on the prosecution to adduce sufficient evidence on the facts in issue to satisfy the judge that such issues should be left before the tribunal of fact, in other words the jury. That duty is described colloquially as “the duty of passing the judge.” [See Adrian Keane and Paul McKeown ‘The Modern Law of Evidence’ (9th edition, Oxford University Press) 82.

- [5] The questions of fact on which the judge must be satisfied before the opening of the defence case are the existence or non-existence of preliminary facts and the sufficiency of evidence in order to decide whether an issue should be withdrawn from the jury. The evaluation of all of the evidence adduced is only called for at the stage of summing up for the jury. However some minimal evaluation of evidence is also required to determine whether the prosecution has established a prima facie case at the close of its case.

- [6] The seminal case in the United Kingdom on the issue of ‘no case to answer’ is that of *R v Galbraith* [1981] 73 Cr. App. R. 124 in which Lord Lane, Chief Justice held at P. 127:

“(1) If there is no evidence that the crime alleged has been committed by the accused person there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’ reliability or, other matters which are generally speaking 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

accused person is guilty, then the judge should allow the matter to be tried by the jury.... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.”

[7] *Galbraith* has been followed by the courts in Seychelles in *R v Marengo and ors* (2004) SLR 116 and in *R v Matombe (No. 1)* (2006) SLR 32. In fact *Galbraith* was itself an enunciation of common law principles long established and reiterated in a Practice Direction of the Divisional Court of England in 1962 and applied in Seychelles in the cases of *R v Lepere* (1971) SLR 112, *R v Stiven* (1971) SLR 137 and *R v Olsen* (1973) SLR 188, authorities provided to this Court by Mr. Esparon, Prosecuting Counsel.

[8] The sum total of these provisions and the established case law together with the submission made by Defence Counsel makes it imperative that this Court examine at this juncture whether there is evidence in this particular case which can be relied on to hold that there is sufficient evidence that a reasonable tribunal might convict the accused person.

[9] It is therefore essential to determine the evidence on record so far as adduced by the Prosecution and in the words of the Court of Appeal in the case of *Serret v R* SCA 14 of 1995 at the time the submission was made

“(whether such evidence was credible or not) to establish the various matters which the prosecution had to prove namely -

- (a) the fact of death - which was not in dispute;
- (b) that the [accused person] committed the act which caused the death ...
- (c) that the [accused person] had the intention to cause death or that he had the knowledge that the act causing death would probably cause the death of or grievous harm to some person ...”

and in terms of the second charge against the accused person, whether the prosecution has established

- (a) that Thara Hoareau suffered wounding which caused her serious harm- a fact which is not in dispute;
- (b) that it was the accused person who committed the act which caused her grievous harm;
- (c) that her wounding was unlawful;
- (d) that at the time of the wounding the accused person intended to cause her grievous harm.

[10] The only material evidence adduced by the Prosecution at the end of its case which connects the accused person with the death of Damienne Hoareau and the serious injury of Thara Hoareau was the latter’s statement in court that she recognised her father as one

of the intruders at the house and the testimony of two shopkeepers of La Retraite in which they recall selling a bottle of Guinness to the accused person at their shop some four hours before the incident.

- [11] Mr. Juliette, for the accused person, has submitted that as the only evidence tying the accused person to the two offences is one of identification, the case of *R v Turnbull and others* [1976] 3 All ER 549 should apply. That case is authority that where the prosecution relies on identification evidence wholly or substantially a warning should be issued on the special the need for caution before convicting the accused in reliance on the correctness of the identification. Mr. Esparon for the prosecution has relied on the case of *Allain Ah-Kong v R SCA 9/2005* to submit that there is a distinction between identification evidence and recognition evidence and that the latter is stronger and more reliable. The point is well made but the same warning is required in recognition cases (see the discussion in Adrian Keane and Paul McKeown ‘The Modern Law of Evidence’ (9th edition, Oxford University Press) 244. The case of *Ah-Kong* can be distinguished from the present case as in that case the recognition was made by three witnesses who corroborated each other.
- [12] At this stage it befalls me to warn myself of the danger of finding the identification evidence adduced sufficient to lay before a jury. Without weighing the evidence to any great extent I warn myself that the identification of the accused person was made by a person who had been injured and had lost of blood, was lying on the floor in a corridor which was dimly lit by an exterior light on the outside of the kitchen wall not adjacent to the corridor in question and that although she was near sighted she was not wearing her glasses at the time of the identification.
- [13] It must also be noted that two out of court statements made by the witness, Thara Hoareau, do not support the evidence given in court. She does not identify her father but states that one of the intruders had the build of her father and walked in a way that was similar to her father and that the lower part of his body was black (whether that was his body or his trousers) and on another occasion that his foot was hairy. I note that the accused person is a white man. I also note that in the same statement the build of another intruder was described as that of the murdered victim’s boyfriend, Justin.
- [14] I also note that two shopkeepers at La Retraite place the accused person at their shop, some ten minutes walk from the victims’ house at about 9 pm, some four hours before the incident.
- [15] Is this a case that a Court should withdraw from the jury? In *R v Shippey* [1988] Crim. L. R. 39 CA Turner J stated that the requirement to take the prosecution evidence to “its highest” as contained in the second limb of *Galbraith* did not mean “picking out the plums and leaving the duff behind.” It did not mean that if there are parts of the evidence which go to support the charge then that is enough to leave the matter to the jury no matter what the state of the rest of the evidence is. It is the evidence as a whole that should be assessed. [See Archbold, Criminal Pleading, Evidence and Practice, 13th

edition, 4-365].

- [17] Lord Mustill in *Daley v R* [1994] AC 117 stated that while the honesty of a witness should properly remain to be decided by a jury, there were situations such as in cases of identification evidence in which the evidence even of an honest witness might be regarded as tenuous. I have meticulously and carefully carried out an assessment of the evidence adduced by the prosecution. It is clear that the only evidence linking the accused person to the crimes is the identification evidence of Thara Hoareau which has not been independently or satisfactorily corroborated. In my view this is too tenuous as evidence given the circumstances in which it was made.
- [18] For the purposes of section 249 (1) of the Criminal Procedure Code there is no evidence on which the accused can be convicted. It is my belief that it would be a derogation of my duty as a judge to allow this criminal process to continue. It would not only be in contravention of the Criminal Procedure Code, the rules of evidence but also of the constitutional right of the accused to have a fair hearing. Accordingly, I uphold the submission of no case to answer made by the defence counsel.

Signed, dated and delivered at Ile du Port on 18th November 2015

M. TWOMEY
CHIEF JUSTICE