

**SUPREME COURT OF SEYCHELLES**

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**Reportable/ Not Reportable / Redact**  
[2024] SCSC ...  
CO 01/2023

In the matter between:

**THE REPUBLIC**

*(rep. by Ms. Denys together with Mrs. Rongmei)*

**Republic**

and

**NICOLE GEORGES ISIDORE**

*(rep. by Ms. Benoiton together with Ms. Rene)*

**Accused**

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**Neutral Citation:** *Republic vs Isidore* (CO 01/2023) [2024]

(1<sup>st</sup> February 2024)

**Before:**

Esparon Judge

**Summary:**

Application for referral from the Supreme Court to the Constitutional Court under Article 46(7) of the Constitution of Seychelles

**Heard:**

29<sup>th</sup> January 2024

**Delivered:**

1<sup>st</sup> February 2024

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**ORDER**

**Application for referral from the Supreme Court to the Constitutional Court under Article 46(7) of the Constitution of Seychelles. Right to a fair trial pertaining to disclose of evidence. The Court had granted leave to amend witness list in terms of Section 247(10) of the Criminal Procedure Code. The Court declined to grant the Application and dismissed the Application.**

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**RULING**

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**ESPARON J**

[1] The Accused person is charged with the offence of murder contrary to Section 193 of the Penal Code on the 29<sup>th</sup> January 2024, then prosecution in the present matter moved the

Court Viva-Voce in terms of Article 247(10) of the Criminal Procedure Code to add 5 witnesses to the witness list. The Prosecution gave the following reasons as to why they wish at this stage of the trial to include five additional witnesses on their witness list namely that;

- (a) The first addition is that of an expert medical professional that will replace the current expert that is already included in the witness list that is said to provide an expert report of which the statement of the said medical doctor had already been provided to the defence. This substitution was argued by the prosecution that it is founded in the law of evidence of which when an expert is no longer able to be present in court, another expert witness that works in close proximity to the current expert can be called and that is regarded as having the same level of expertise, can replace the current witness that would originally have been called as a witness.
- (b) In respect of the other 4 witnesses, they were included on the list after the DNA report was received on the 22<sup>nd</sup> January 2024.

[2] Counsel for the prosecution further submitted that the amended witness list was filed with the registry on the 23<sup>rd</sup> January 2024 and there was confusion between the Registry and the prosecution regarding who would serve the list on the defence counsel.

[3] 3. The defence counsel made the following arguments;

- (a) In respect of Ralph Agathine, that he was involved in the case from the 5<sup>th</sup> January 2023 as this is when his statement was dated and therefore he could have been added to the witness list earlier.
- (b) In respect of Annesa Sinon, the report was received on the 22<sup>nd</sup> January 2024 yet the prosecution waited until the 29<sup>th</sup> January 2024 to make the application to court to amend the witness list.
- (c) In respect of Robin Oblime, the defence counsel submits that they only received his statement on the 25<sup>th</sup> January 2024, after the second witness Corporal Lucas had given evidence, however Oblime's statement was made on the 15<sup>th</sup> May 2023.

(d) In respect of Tulsi, there is no indication why he was only added to the list now, as he could have been added earlier.

(e) In respect of Dr Sahat replacing Dr Berdaisia, the prosecution did not provide to the Court when they became aware that Dr Berdaicia had left the jurisdiction and was unable to provide evidence at the trial.

[4] Counsel for the accused also relied on section 247(2)(a) of the Criminal Procedure in her in her submissions which states as follows;

*“(2) Where no preliminary inquiry has been held under section 192, subsections (3) to (9) shall not apply, and the public prosecutor—*

*(a) shall cause to be served on the counsel or attorney for the accused, or on the accused if he is not legally represented, not less than 14 days before the trial, notice of the names and address, or the designations, of all witnesses for the prosecution and the substance of the evidence they are expected to give; and”*

[5] Counsel for the accused further argued that these witnesses were not disclosed at least 14 days before the trial and that the reasons provided by the prosecution is not sufficient to warrant the inclusion of these witnesses under Section 247 (10) of the Criminal Procedure Code.

[6] The Court then made a ruling referring to Section 247 (9) of the Criminal Procedure Code and permitted the inclusion of the witnesses under Section 247 (10) of the Criminal Procedure Code and further stated that no prejudice would be caused to the accused since we are only on the 2<sup>nd</sup> witness and there are 40 witnesses on the witness list in the event that the prosecution calls these witnesses at a late stage in the trial, no prejudice would be caused to the accused.

[7] On the 30<sup>th</sup> January 2024, Counsel for the accused has brought this current application before court, that the subsequent ruling made by the court to include the additional witnesses to the witness list, violates the right to a fair trial of the accused.

## **SUBMISSIONS OF COUNSELS**

- [8] Counsel for the accused further argued that the inclusion of the witnesses would prejudice the accused as he would not have adequate time and facilities to prepare his defence. Counsel for accused further submitted that in respect of the application by the prosecutor, that is was an attempt to remedy the defect that the prosecutor had, before seeking leave from the court, amended the witness list when the trial had already commenced. This being the witness list which was amended on the 26<sup>th</sup> January 2024 and the other on an unknown date.
- [9] Counsel for the accused submitted to the Court that any diligence would have indicated that these witnesses should be included on the list. One witness had given his statement last year. The application to court in terms of Article 247 (10) should have been done by a proper motion and no sufficient reason for the adding of these additional witnesses has been given. On these grounds, counsel for the accused submitted to the Court that the accused right to a fair trial has been violated.
- [10] On the other hand, Counsel for the prosecution has submitted to the Court that the witnesses were only added to the list after the DNA report was received, which was on the 22<sup>nd</sup> January 2024. Counsel for the prosecution submitted to the Court that they had no intention to withhold this information from the accused and made the DNA report available to the defence on the same day that they had received it. The witnesses were only added later, after the prosecution had an opportunity to examine the DNA test and determine if it would be necessary to call these witnesses. According to counsel for the prosecution, the prosecution has provided a good reason for withholding the name of such witnesses until the DNA results were received. Furthermore, due to the cyclone in Mauritius there was a further delay in receiving the DNA report before the day of the trial.
- [11] Counsel for the prosecution further submitted to the Court that the application by the counsel for the accused is vexatious as counsel for the accused was given notice that there would be a delay in obtaining the DNA results and that there is still sufficient time during the duration of the trial to prepare the defence of the accused as the additional

witnesses will be called at the end of the trial and that that the rest of the additional witnesses are formal witnesses.

### **ANALYSIS AND DETERMINATION**

[12] As regards to the present Application, the issue that the court has to determine is whether the question that has arisen with regards to whether there has been or is likely to be a contravention of the charter should be referred to the Constitutional Court pursuant to Article 46 (7) of the Constitution namely such question being whether the subsequent ruling made by the court to include the additional witnesses to the witness list violates the right to a fair trial of the accused of which would cause prejudice the accused as he would not have adequate time and facilities to prepare his defence.

[13] This Court hereby reproduces Article 46 (7) of the Constitution which provides as follows;

*“ Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court”.*

[14] When the court is determining such an Application, it is not for this Court to determine whether the right to a fair trial of the accused has been violated, but rather that the Court has to satisfy itself that the question raised by the defence is –

(a) that there has been or is likely to be a contravention of the Charter

(b) not frivolous or vexatious

(c) or has already been the subject of a decision of the Constitutional Court or the Court of Appeal.

[15] Therefore, only once the Court is satisfied of the above, shall the proceedings be immediately adjourned and the question be referred to the Constitutional Court for determination.

[16] In the case of *Adeline v Talma* (CS 79/2018) [2020] SCSC 375 (09 June 2020) in the context where the Supreme Court was requested to refer a matter to the Constitutional Court in terms of Article 46(7), the Supreme Court helpfully distilled the three essential elements for referrals to the Constitutional Court. The elements are that the question arises:

(a) In the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal,

(b) With regard to whether there has been or is likely to be a contravention [of the Constitution;

(c) that the question is not frivolous

(d) or vexatious

(e) or has [not] already been the subject of a decision of the Constitutional Court or the Court of Appeal.

[17] In respect of the first element, it is clear that this matter is currently being heard in the Supreme Court and therefore this section would be applicable.

[18] As regards to the second element, the defence submissions are that the decision made by the Court to allow the prosecution to add 5 more witnesses to the witness list would result in a violation of the accused right to a fair trial as the accused would not have adequate time and facilities to prepare his defence.

[19] The pertinent issues for the Court to determine in this Application is as to whether the question raised by counsel for the accused is not frivolous or vexatious and whether it has not already been subject to the decision of the Constitutional Court or the Court of Appeal.

[20] As regards to the question as to whether it has not already been the subject of a decision of the Constitutional Court or the Court of Appeal, in the case of ***R v Bernard Georges Constitutional Case No. 2 of 1998*** , Bwana J concluded that the Article 19(2) (c) as read together with the right to a fair trial creates an obligation on the part of the prosecution to disclose to the accused all the evidence which it intends to bring forward in the case and any other evidence that may be in favour of the accused.

[21] Bwana J further underlined the limitations that are drawn from Article 28(2) of the Constitution, however both Amerasinghe J and Alleear CJ disagreed on this point. Amerasinghe J further opined that the limitation on the extent of disclosure is drawn from Article 19 (10) of the Constitution.

[22] Amerasinghe J further held the following:

*“that if the discovery of such information can be made without any good reason to withhold such information, the failure would place the accused at a disadvantage to the extent that will amount to a denial of a fair trial to the accused as provided by Article 19 of the Constitution.”*

[23] Further it was held that;

*“for the accused to be on an equal footing with the prosecutor at the commencement of the trial or soon thereafter, I am fully convinced that the accused should be in possession of ‘a list of witnesses, their statement and the prosecution docket’ if no good reason exist to deny such a requirement.”*

[24] Bwana J further also held that;

*“the complexity of the case – the more complicated and/or serious it is, the greater the need for disclosure.”*

[25] 25. In the case ***Georges (supra)***, it was also highlighted that disclosure should not be left to the discretion of the Prosecutor and that where parties are unable to agree on the specificities of disclosure the trial judge would need to intervene. When making a

decision on disclosure, the judge must take into consideration the complexity of the case and other dictates of justice.

[26] In the case of ***Parekh v The Republic and Anor (CP 5/2021) [2022] SCSC 2***, the Constitutional Court was also tasked with determining whether the failure to disclose a police docket in time, amounted to the violation of the accused right to prepare a defence.

[27] In the case of ***Parekh (supra)***, the court emphasized the importance of having regard for the “*context and practicalities of Seychelles vis-a-vis disclosure requirements in criminal matters*”. This means that due regard must be given to the complexities faced in a small jurisdiction such as Seychelles.

[28] Further in the case of *Parekh (supra)* it was held at para 33 that:

*“the substance of the prosecution case must be made available to the defense before the accused pleads to the charge”*. However, further in para 34 the court further held that:

*“disclosure is also a continuing and on-going obligation. There are certain cases that due to the complexity of the facts of the case, the totality of the prosecution docket would not have been disclosed before the accused is asked to plead, though the substance of the case should have been”*. Here the Court has clearly made a distinction between the ‘totality’ of the evidence and the ‘substance’ of the case.

[29] This Court therefore finds that it is clear from the above case law that the Constitutional Court has extensively dealt with the question of the disclosure of evidence and the right to a fair trial.

[30] It has been held in both local and international jurisprudence that disclosure is an ongoing process. In ***Uganda v Okumu & Ors (Criminal Revision No. 0003 of 2018) [2018] UGHCCRD 206*** (13 December 2018) (Okumu Case), the issue before the court was that compiling evidence as the trial goes on is prejudicial to the accused as they will be incapable of effectively preparing their defences. The court held that;



*“The underlying principle of pre-trial disclosure is the avoidance of undue delay or surprise. Pre-trial disclosure, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony”.*

[31] In the ***Republic Vrs Baffoe-bonnie and Others (J1 6 of 2018) [2018] GHASC 40 (Baffoe-bonnie case)*** the court similarly held that the duty to disclose is a continuing one and should be completed when additional material and information comes into the possession of the prosecution. The court in the **Baffoe-bonnie case** also emphasized as follows:

*“Contrary to the submissions by counsels for the accused persons, failure to disclose should not automatically render the material inadmissible. Failure to disclose should only lead to an adjournment to enable the defence to study the material before it is tendered or given in evidence to enable the accused effectively answer and defend the evidence contained therein”*

[32] Further it was held in the case ***Soon Yeon kong kim and another v. Attorney General, Constitutional Reference No. 6 of 2007***, that the Constitutional Court was unable to give any definite rule as to the time of disclosure in criminal trials because the circumstances of each case differ. It opined though that fundamentally, disclosure should be made before the trial commences depending on the justice of each case and on which documents to be disclosed. This is entirely within the discretion of the trial court.

[33] This Court is of the view that with the enactment of section 247 (10) of the Criminal Procedure Code, it is clear that the intention of the legislature was to allow for the discretion of the court to permit the prosecutor to call a witness when the trial had already commenced, subject to the prosecutor, with reasonable diligence, could not have been aware of the witness at the time notice was given under subsection (2) of the same Act.

[34] This court also notes that the objections of the defence counsel of receiving the witness statement at a later date after the trial had started, was only raised when the prosecution approached the court with an application in terms of section 247 (10) of the CPC. This

objection could have been raised at the beginning of the trial or even at anytime before the commencement of the trial.

[35] Similarly, this court also notes that after the Court made its ruling in terms of article 247(10) of the Criminal Procedure Code, counsel for the accused had the opportunity to ask for an adjournment from the court, which it failed to do. The defence could have requested from the court for an adjournment to consult with the accused in respect to the new witnesses added by the prosecution. Counsel for the accused also did not ask for discovery at an time before the trial or at the commencement of the trial. This Court is of the view that it is the obligation of Counsel for the accused to ask for an adjournment in the event that she felt that there was a need in view of the Court's ruling despite the Court stating that in view that there are 38 witnesses remaining to be called , no prejudice would be caused to the accused in the event that the prosecution would call such additional witnesses at a very late stage in the proceedings of which the Court rightly held so after counsel for the prosecution gave such an undertaking.

[36] In the case of *ACCS v Valabhji and Ors (CO114/2021) [2022] SCSC 287*, the court affirmed that disclosure is a continuing and ongoing obligation, especially in complex cases. Further it was held that in respect of considering adequate time to prepare the defence for the accused, the accused right to be tried within a reasonable time and the complexities of the case should be taken into consideration.

[37] As regards to the issue as to whether the application is not frivolous and vexatious, counsel for the prosecution has submitted that the application before court is vexatious as the defence was aware that there would be a delay in obtaining the DNA from Mauritius. Furthermore, counsel for the prosecution submitted that it is in terms of the law of evidence, an expert witness may be substituted for another expert witness in the case where the original witness is not available to give evidence.

[38] Counsel for the accused in this respect has submitted that the addition of the witnesses would cause prejudice to the accused as he would not have adequate time to prepare his defense.

[39] In the case of ***Kivanga Estate Ltd versus National Bank of Kenya Ltd Civil Appeal No. 217 of 2015***, it was observed that;

*“An action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense.”*

[40] In view of this Court’s finding at paragraph 29 of this Ruling that ‘this Court therefore finds that it is clear from the above case law that the Constitutional Court has extensively dealt with the question of the disclosure of evidence and the right to a fair trial, this Court finds that since the question before this Court has already been determined by the Constitutional Court, this Court is precluded in terms of Article 46 (7) of the Constitution from adjourning the matter and referring the question for determination by the Constitutional Court. In view of this Court’s finding, this Court finds no necessity to make any pronouncement as to whether such question and hence the application is not frivolous or vexatious.

[41] For the above reasons, this Court accordingly declines to refer such question raised by Counsel for the accused as to whether there has been or is likely to be a contravention of the charter as per the application of Counsel for the accused for determination by the Constitutional Court and as such shall not adjourn the proceedings for such reason. Hence I accordingly dismiss the said Application.

Signed, dated and delivered at Ile du Port on 1<sup>st</sup> February 2024.

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Esparon J

