SUPREME COURT OF SEYCHELLES

Reportable
[2024]
CO 04/2022

In the matter between:

THE REPUBLIC *(rep. by S Powles)*	**Republic**
and	
MUKESH VALABHJI *(rep. by J Lewis and ors)*	**1st Accused**
LAURA VALABHJI *(re. by R Scott and ors)*	**2nd Accused**
LESLIE BENOITON *(rep. by B Hoareau)*	**3rd Accused**
LEOPOLD PAYET *(rep. by J Camille)*	**4th Accused**
FRANK MARIE *(rep. by J Camille)*	**5th Accused**

Neutral Citation:	*The Republic v Valabhji & Ors* (CO 04/2022) [2024] 31 January 2024)
Summary:	Prosecution's duty of pre-trial disclosure; mirroring or imaging of electronic devices
Before:	Govinden CJ
Heard:	15 January 2024
Delivered:	31 January 2024

RULING

GOVINDEN CJ

[1] In this case, the form of disclosure and content of some disclosure materials by the Prosecution to the Counsels of the 1st and 2nd accused are being contested. Disclosure of the content of a number of electronic devices has been previously made by the Republic to

the Counsels of the 1st and 2nd accused. However, those were not accepted by their counsels as being properly disclosed due to the Defence's contention that it was not sufficient to mirror the content of the devices that they were from as it was downloaded from the Nuix system, which was used to examine the digital devices. According to the Defence, this is insufficient as a mirror image is obtained when you plugged in the devices in a computer and the expert takes a copy of the device, whether it be a hard drive; a phone; a pen-drive or a computer. Short of that, it is the contention of the Learned Counsel of the 1st and 2nd accused,that there would not be sufficient disclosure in law in this case and this would cause unfairness and prejudice to their clients. According to the Defence, the physical handing over of those devices to their experts are essential if mirror images are to be taken.

[2] The Republic, and more particularly, the Anti- Corruption Commission Seychelles (*the ACCS*), who is the actual custodian of the devices, objects to the handing over of the devices to the Defence experts for them to replicate and mirror them. Their objection is based on the ground that it wants to preserve to integrity of the content of the devices, which can be compromised if and when the original devices are given to the Defence. The ACCS' concern with respect to keeping the integrity of the devices is primarily founded on the fact that those devices which had been seized are also relevant for production in evidence in another case involving the 1st accused which the ACCS is prosecuting.

[3] These opposing positions are shown in the Notice of Motion of the 1st and 2nd accused dated the 14th of November 2023; the Reply of the Republic dated the 15th of November 2023 and the Response of the ACCS dated the 15th November 2023 and the accompanied submissions.

[4] In an effort to facilitate the parties in finding a practical solution, the Court, in adjourning this matter in December last year, advised them to allow their IT experts to come together and find out how can the mirroring takes place without compromising the content and integrity of the evidence. This in order to allow for the trial to proceed as fixed on the 15th of January 2024.

[5] It appears, however, that there has been no closure on this issue as the Court received a letter from Zaiwalla & Co dated the 4th of January 2024 stating that its forensic IT expert,

who has been given copies of the devices, cannot be satisfied that he has seen complete mirror images of the devices seized from its clients unless access to the seized devices themselves are given. The letter ended stating that it should be indicated by the prosecution whether a meeting with the Defence's experts is intended to take place when they arrive in Seychelles in order to be given physical access. The letter suggested that there is a possibility that a request would be made that this trial be adjourned until the demand of the Defence is met. It is accompanied by a Report from the IT forensic expert of the Defence, which concludes that the expert is *"unable to prepare a report which complies with ACPO guidelines and I am unable to answer the questions of whether the data provided is identical to the data on the seized devices or whether anything could have been added or removed after the devices were seized."*

[6] Subsequently, the Court invited parties to file formal pleadings on this issue, following which a hearing took place. The submissions of contesting parties and the documents filed before the Court show that the position has, more or less, not changed, with both parties adhering to their previous entrenched positions.

[7] The Court has given careful consideration to the issues arising before it and feels that unless a determination is made on this sensitive issue, the matter will not move forward as both parties appear to be taking a non-compromising approach. The question that the Court should decide upon, I believe, is whether mirror imaging forms part of the prosecution's disclosure obligation in this particular case before the Court.

[8] First of all it is my hope that all parties do not lose sight of the fact that this issue has arisen within the context of the prosecution's obligation of disclosure. Our system of disclosure in criminal procedure is founded on one the rights to fair hearing set out in Article 19 (2) (c) of the Constitution, which gives to an accused charged with an offence *"adequate time and facilities to prepare a defence to the charge"*; and which compels the prosecution to make sure that all material information is provided to the defence. In *Jespers v Belgium*, Application 843/78 the European Commission on Human Rights, considering the duty of enquiry incumbent upon a prosecuting agency with regards to a similar provision, had this to say;

"In short, Art. 6(3)(b) of the European Charter of Fundamental Rights recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities. The Commission considers that, if the element in question is a document, access to that document is a necessary 'facility'".

[9] Material information is considered to be information which:

1. would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
2. would materially strengthen the accused's case, or
3. is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.

[10] This duty and the content of the duty has been sufficiently addressed by the Constitutional Court in the case of *Parekh v The Republic and Anor* (CP 5 of 2021) [2022] SCCC 2 (26 April 2022), which in turn relied on pronouncements in the case of *R v Bernard Georges* Constitutional Case No.2 of 1998 and *ACCS v Valabhji and Ors* (CO 114/2021) [2022] SCSC 287. The information includes information, of which the Republic is aware, which is likely to be of real importance to any undermining of the Republic's case, or to any casting of reasonable doubt upon it, or which is of positive assistance to the accused. To sum up, the Republic must disclose any statement or other material of which it is aware and which materially weakens its case or materially strengthens the defence case.

[11] The Republic is not obliged to disclose all material information against the accused, only that information against the accused that forms part of the prosecution's case. Neutral information or information damaging to the defence and not part of the prosecution case need not be disclosed and should not be brought to the attention of the court (*R v H & C* 2004 AC 1324); neutral information being information with no evidential significance to any party.

[12] It is the Republic's duty to disclose information that is material to the defence. This duty does not depend on the defence making an application or request to the Republic for disclosure (*McDonald v HMA [2008] UKPC 46* at para 55, Sinclair at para 53)

[13] The Republic's duty is a continuing one. It continues throughout and to the conclusion of any trial. Any new information received by the Republic at any stage in the preparation of a case, during trial must be considered for disclosure. This process may require previous decisions in relation to disclosure to be reviewed to assess whether further information requires to be disclosed to the defence. The Republic's disclosure duty exists in perpetuity and extends to all information received and known to the prosecution in the course of investigation and criminal proceedings.

[14] The information to be considered for disclosure includes not only documents, but also other types and formats of information which come into the prosecution's possession. The information need not be in written form. It may, for example, include:

1. video/audio evidence;

2. information which has been provided orally, such as a negative result of a forensic analysis which has been reported to the prosecution by telephone; and

3. information contained in emails or text messages.

[15] This list is not exhaustive and it is essential to always remember that it is not the format in which the information is held that is important, it is the nature of the information itself

[16] Failure to disclose material information may result in a breach of Article 19 (2) (c) of the Constitution and constitute a miscarriage of justice. However, Article 19 is concerned with the right of the accused to a fair trial. In the ordinary course of events therefore, such an issue cannot be determined until after a trial has taken place. Thus a failure to disclose a statement may, in itself, not result in an unfair trial if, for example, the witness did not depart from their statement when giving evidence (*Kelly v HMA* (2006) SCCR 9). The court must consider the effect of any failure to disclose in the context of the circumstances as a whole (*McLellan v HMA* [2008] HCJAC 66). Further, as stated in *McInnes v HMA* (2008 HCJAC 53), it is the significance of the statement that has not been disclosed in the context of the actual trial as a whole which is of importance to whether the accused's right to a fair trial has been infringed.

[17] Failure to comply can lead to application for a court order by the defence to compel the prosecution to comply with its disclosure duty. Numerous such applications has happened in this case and, given the nature of the case, may happen in the future. This to me sums up the prosecution's duty of disclosure in Seychelles.

[18] On the other hand, in the United Kingdom, the concept of imaging orders as compared to disclosure orders has developed over the years, although mostly in civil cases. In any civil fraud claim, preserving evidence can be just as critical as freezing the underlying assets. Some fraudsters will be looking to alter, conceal or even destroy evidence linking them to accusations of fraudulent wrongdoing. Therefore, imaging orders are effectively a screenshot of electronic evidence held by the individual or organisation against whom the order is made, including potentially relevant evidence that could implicate the fraudster.

[19] Successfully seeking an imaging order from the courts in England and Wales requires a party to give immediate access to electronic storage devices to an independent computer specialist, to copy the contents. Such devices range from computers to smart phones to virtual cloud storage, as well as online accounts including email accounts and payment systems.

[20] The goal of these orders is to preserve evidence at risk of being wiped or destroyed by the responding party. Their purpose is not to provide early disclosure or permit the claimant to build their case or defence. An imaging order is therefore a useful tool to help victims of fraud seeking urgent interim relief. Imaging orders are closely related to the more well-known search order, which enables a party with the benefit of such an order to enter the respondent's premises to search for and remove evidence that might otherwise be destroyed or concealed.

[21] Search orders are a draconian order which may permit a search of both business and home premises, and which therefore require significant substantiation and the putting in place of safeguards including the instruction of an independent supervising solicitor to supervise the search. The courts have emphasised that the primary purpose of a search order is to preserve evidence, not as some form of early disclosure.

[22] In the modern world, where more and more evidence is held in digital form, parties and their legal advisers have considered an imaging order may be a more proportionate tool for preserving evidence. Imaging orders do not involve physical entry into premises and are therefore less onerous and intrusive than traditional search orders. As a result, it is sometimes easier for the court to grant an imaging order than a search order.

[23] The test an applicant needs to satisfy in order to be granted an imaging order is not entirely settled. However, the test summarised by Justice Jacobs in *Arcelormittal USA LLC v Essar Steel Ltd* [2019] EWHC 724 (Comm), indicates that an applicant should show:

- a strong case that there is a cause of action on the merits;
- there is a serious danger to the applicant which the order will avoid – the evidence to be preserved must be of major, if not critical, importance;
- clear evidence that the respondent has relevant evidence;
- a real possibility that that evidence will be destroyed if relief is not given; and
- that the harm likely to be caused to the respondent by the order will not be out of proportion to the legitimate object of the imaging order.

[24] Having considered the totality of the issues before me it is clear to me that Imaging Order or Mirror Order is not required in in this case. There are no allegations by the defence that any of the evidence on the electronic devices must be preserved and that the evidence will be destroyed or damaged by the Republic or the ACCS if the relief is not given. The material on the devices have been disclosed to the defence as part of is duty to disclose and following a disclosure Order made by this court. Any issues with regards to their relevancy, admissibility and authenticity would be decided at the time of their production in Court. The duty on the Prosecution to disclose prosecution digital materials in this criminal trial in this jurisdiction does not oblige them to satisfy the defence or the court that the devices in which they are contained have been mirrored or imaged from the content of the digital devices in which they were stored. The obligation is for the prosecution to disclose disclosable materials as above referred and if there is any allegation with regards to their integrity, it would be decided by the court.

[25] Things would have been different had the devices themselves and their exact content been the subject matter of the charges before the court, hence, the need for proving their original state being a fact in issue. This is far from the case here.

[26] I, moreover, find that the defence has not proposed an independent IT forensic to the satisfaction of the Court, but rather their own appointed expert to do the mirroring. Something that has inevitable given rise to the issue of the possible alteration of the integrity of the materials.

[27] For these reasons I find that the Prosecution has fully complied with its duty of disclosure with regards to all the electronic documents found in the electronic devices disclosed to the defence albeit that the devices may or may not "mirror" the original devices in which they were found. The admissibility of any such documents shall be decided at the point of them being produced in evidence and their weight shall be tested during the trial process.

Signed, dated and delivered at Ile du Port on the 31 of January 2024

Govinden CJ