

**Republic v Agathine
(2007) SLR 13**

David ESPARON for the Republic
Frank ELIZABETH for the accused

Ruling delivered on 21 June 2007 by:

PERERA J: The accused has filed a motion under article 46(7) of the Constitution for a referral of a constitutional issue, to the Constitutional Court. The issue is based on article 19(2) (e) which provides –

(2) Every person who is charged with an offence –

.....

(e) Has right to examine, in person or by a legal practitioner, the witnesses called by the prosecution before any court, and to obtain the attendance and carry out the examination of witnesses to testify on the person's behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

Article 19(10) contains the following derogation-

10 Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of-

(a) Clause (1)(2)(e), or 8, to the extent that the law in question makes necessary provision relating to the grounds of privilege or public policy on which evidence shall not be disclosed or witnesses are not competent or cannot be compelled to give evidence in any proceedings.

The accused stands charged on four counts involving alleged offences of importation and possession of 3 g and 499 mg of cannabis resin and 75 ml grams of cocaine. The prosecution case is that the said drugs were concealed in clothes in the luggage of the accused when he disembarked at the Seychelles International Airport from a flight from Johannesburg on 4 June 2005.

The accused has, in an affidavit filed with the motion for referral, averred that he is married to one Vanessa Agathine, a South African national and that she was deported from Seychelles two years ago. The order of deportation is being canvassed in an application for judicial review, in case no 142 of 2006 which is still pending disposal. In that case, it is averred that the deportation order was made on 18 June 2005.

In the present motion, the accused further avers that his entire luggage on his trip to Seychelles on 4 June 2005, was packed by his wife, and hence he had no knowledge of its contents. Relying on article 19(2)(e), he avers that if his wife cannot testify in this case he will not have a fair trial.

Pursuant to article 46(7) of the Constitution, where in the course of any proceedings, 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 (not) already been the subject of a decision of the Constitutional Court of the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.

This issue has not been the subject of a decision of the Constitutional Court or of the Court of Appeal. However, is it frivolous or vexatious?

The terms "frivolous" and "vexatious," in their legal connotations mean, cases or issues that are obviously unsustainable. In this respect, the Court has to consider how the alleged likely contravention of article 19(2)(e) relates to a defence witness who is unable to attend court due to a legal incapacity.

In this case, the prosecution has closed its case. Upon the Court finding that the prosecution has established a prima facie case, the accused was called upon to present his defence. He elected to give evidence on his own behalf and also to call witnesses. Mr Elizabeth informed the Court that he intended to call two witnesses from South Africa, one being the wife of the accused who cannot come to Seychelles as she has been declared a prohibited immigrant. Hence she has a legal incapacity to attend this Court to testify, and therefore is not competent nor compellable while the deportation order subsists. The powers of the Constitutional Court relate to the application, contravention, enforcement or interpretation of the Constitution. Hence, for the Constitutional Court to hold that article 19(2)(e) has been contravened in relation to the accused, it must necessarily determine that the deportation order was illegal. That is not a matter for the Constitutional Court, but for the Supreme Court exercising its supervisory jurisdiction under article 125(1)(c) of the Constitution.

Article 19(2)(e) recognises the principle of "equality of arms". Both the prosecution and the defence must have equal opportunities to present their cases. In the case of *R v Young* [2003] NZLJ 414; (2004) 4 CHRLD 389, (a decision of the Court of Appeal of New Zealand) a vital defence witness had gone to Sweden and was not available to testify. An application to the legal services agency to meet the costs of funding the return of that witness was refused, but was prepared to fund a video link. Later that arrangement also failed due to the costs involved. The accused was convicted. On appeal, it was held that if such facilities were available to prosecution witnesses, the defence witnesses were equally entitled to such facilities, on the principle of equality of arms. However as the prosecution in that case had not used such facilities, it was held that there was no breach of that principle. The Court observed that in those

circumstances, the statement made by that witness to the Police would have been admitted in evidence.

In the present case, the circumstances are different. The defence witness cannot be called due to a legal incapacity which has first to be cured before a different forum. There is therefore no nexus between the deportation order, which was based on an alleged false statement made by Vanessa Agathine to the Immigration Authorities, the charge against the accused, and the right of the accused under article 19(2)(e). Under article 46(1), the alleged contravention, or likely contravention in relation to the applicant, must be based on an "act or omission" which has a nexus. In these circumstances, the motion to refer the likely contravention of article 19(2) (e) of the Constitution to the Constitutional Court is frivolous and vexatious in the sense that that question is unsustainable. If the Supreme Court in the application for judicial review (Case no 142 of 2006) quashes the declaration of Vanessa Agathine as a prohibited immigrant, then she would not have any legal incapacity to be summoned by the accused to testify on his behalf. There would then be no contravention of article 19(2)(e).

For these reasons, the motion dated 14 May 2007 is dismissed.

Record: Criminal Side No 38 of 2005