

**IN THE SEYCHELLES COURT OF APPEAL**

**FRANKY SIMEON**

**APPELLANT**

**VERSUS**

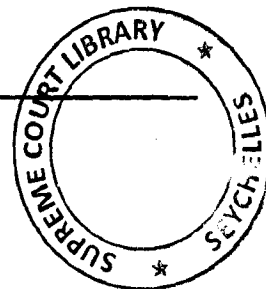
**THE REPUBLIC OF SEYCHELLES  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

*Criminal Appeal No. 26 of 2002*

*(Before: Silungwe, Pillay & Matadeen, JJA)*

*Mrs. A. Georges for the Appellant  
Mr. A. Fernando for the Respondents*



**JUDGMENT**

*(Delivered by Pillay, JA)*

This is an appeal against a decision of the Constitutional Court of Seychelles which held that the appellant's fundamental right to a fair hearing under Article 19 of the Constitution of Seychelles had not been breached.

The grounds of appeal are as follows:-

1. The Constitutional Court erred in ruling that the Court, in the instant case the Seychelles Court of Appeal, ought to have been cited as a respondent in that Justices of Appeal are not liable in any proceedings for anything done or omitted to be done by them in the performance of their functions.
2. The Constitutional Court erred in concluding that the Court of Appeal's omission to consider all the appellant's grounds of

appeal had not denied him a fair trial and thus had not contravened the Seychelles Charter of Fundamental Human Rights and Freedoms per Article 19 of the Constitution, and the Constitutional Court further erred in concluding that the said omission had not denied the appellant his right not to be retried thus rendering his new trial a contravention of the Seychelles Charter of Fundamental Human Rights and Freedoms per Article 19 of the Constitution on the basis that:

- (i) having identified and reached a decision on two fundamental issues, the exclusion by the Seychelles Court of Appeal of the remaining grounds of appeal were done judiciously and not capriciously and thus did not contravene the right of the appellant to a fair hearing;
- (ii) the grounds excluded by the Seychelles Court of Appeal did not contain any grounds different in substance to those considered by them and thus the appellant could not complain that he had not had a fair hearing in that:
  - (a) although determinations of any Court are meant to be made judiciously, this does not preclude an aggrieved party from contesting a Court's finding and having it reversed. The appellant was denied his right to a fair hearing in that the Seychelles Court of Appeal was not seen to be determining all the issues placed before it

and was thus deprived of the main procedural guarantee of a fair hearing.

(b) the Constitutional Court erred in its interpretation of grounds 8 and 10 of the appellant's memorandum of appeal, which the appellant claimed had not been determined by the Seychelles Court of Appeal and as a result wrongly concluded that both grounds were not different in substance to those considered by the Seychelles Court of Appeal.

3. Having but partly considered the arguments placed before it in respect of the declaration sought under prayer 3 of the petition, the Constitutional Court erred in not making a specific finding to the effect that the institution of proceedings against the appellant under section 192 of the Penal Code contravened, and that the continuation of the proceedings was likely to contravene, Article 19 generally and specifically Article 19(5) of the Seychelles Charter of Fundamental Human Rights and Freedoms."

We agree with Learned Counsel for the appellant that in the instant case neither the Justices of Appeal of the Seychelles Court of Appeal nor the Seychelles Court of Appeal itself ought to have been named as respondents. It is sufficient that the Republic and the Attorney General were put in as respondents and, since this was done in the present case, Rule 3(2) of the Constitutional Court Rules which states that "*all persons against whom any relief is sought in a petition under sub-rule (1) shall be made a respondent*

*thereto*" has been complied with, given the particular circumstances of this case.

We listened carefully to the arguments of Learned Counsel for the appellant and we are of the opinion that in addressing us on the issue of fair hearing she was trying through the backdoor as it were, to reopen issues that had already been canvassed and decided upon by the Seychelles Court of Appeal (Criminal Appeal No. 7 of 2001), namely whether:-

- a) the trial Court erred in directing the jury to return a verdict of guilty of either murder or manslaughter without giving the jury the further option of acquitting the appellant (ground 8 of the original grounds of appeal of the appellant);
- b) the trial Court erred in directing the jury to convict the appellant of manslaughter by virtue of diminished responsibility, given that diminished responsibility had not been in issue in the case (ground 10 of the original grounds of appeal of the appellant).

This, we are afraid, she cannot do i.e. have another bite at the cherry and review on its merits a decision of the Seychelles Court of Appeal on account of public policy considerations. If the appellant were allowed to have a review on its merits a decision of the Seychelles Court of Appeal –

- (a) he would in effect be criticising a decision of the Seychelles Court of Appeal to its face and, what is worse, allowing the Constitutional Court, a subordinate Court to the Court of Appeal,

to review on its merits a decision of the Court of Appeal which, it must be stressed, is the final Court of Appeal of Seychelles;

(b) he would be opening the floodgates to other unsuccessful appellants and, in so doing, seriously compromising the fundamental principle of the finality of judgments of the Seychelles Court of Appeal.

This petition which claims in essence that the appellant was denied his constitutional right of hearing before the Seychelles Court of Appeal cannot be sustained, given that it is clear from the record that the appellant's Counsel had all the latitude in the course of various sittings of the Court to put forward all the arguments that could be advanced on behalf of her client. What she cannot do now is to rehearse the same arguments or adduce further arguments on a review of the merits of the decision of the Seychelles Court of Appeal which is, it should be underlined again, the highest Court, and the final Court of Appeal, of the land.

The present case is to be distinguished from Attorney General v Joseph Marzochi & Anor (Civil Appeal No. 8 of 1996) where this Court held that the respondents were denied their right to a fair hearing in that their Counsel were not allowed to offer any submissions at all during the appeal. The Court of Appeal consequently quashed the judgment and ordered the appeal to be re-heard by a differently constituted majority of the Bench, on account of a serious procedural irregularity, namely that the respondents had not been afforded a hearing, which had rendered the proceedings a nullity.

The present case is completely different from that case since, as indicated already, Learned Counsel for the appellant had every opportunity before the Seychelles Court of Appeal to advance all her arguments and is now seeking to re-argue on the merits of the case.

We wish to point out for future guidance that if the Seychelles Court of Appeal is alleged by any litigant to have denied him his right to a fair hearing, as in the present case, the proper procedure to follow is to make an application by way of notice of motion to this Court and invoke the latter's inherent jurisdiction in the matter, instead of going to the Constitutional Court, as was done in the Marzorchi case, cited above. Moreover, it is open to the Constitutional Court to transfer any such application made before it to the Seychelles Court of Appeal, pursuant to Article 46(4) of the Constitution of Seychelles.

In any event, we reiterate what we stated to Counsel of the appellant in open Court, namely that the decision of the Seychelles Court of Appeal (Criminal Appeal No. 7 of 2001) dealt essentially with two fundamental issues:

- (1) the whole trial process became flawed on account of the refusal of the trial Court to refuse the motion of the defence to adduce expert evidence on the question of non-insane automatism; and
- (2) the trial Court misdirected itself on the issue of diminished responsibility,

so that certain grounds of appeal, including the two grounds relied upon by the appellant in this case, became "unnecessary" for consideration.

With regard to the third ground of appeal we have again to observe that the appellant is once more questioning an order relating to a fresh trial made by the Seychelles Court of Appeal on the following terms:

*“Both sides agree that, in the event of the court allowing the appeal, a retrial for manslaughter only may be ordered, although Mrs. Georges has strenuously argued that we should simply quash the conviction and make no order for a rehearing, thus leaving the decision whether or not to prosecute the appellant again in the hands of the learned Attorney General. We take the view, however, that a rehearing of the case is called for in the interests of fairness and the integrity of the criminal justice system, especially since the merits of the appellant’s defence of non-insane automatism was not properly dealt with during the trial” (the emphasis is ours).*

The appellant cannot question this order of the Seychelles Court of Appeal made under Article 19(5) of the Constitution of Seychelles which reads as follows-

*“A person who shows that the person has been tried by a competent court for an offence and either convicted or acquitted shall not be tried again for that offence or for any other offence of which the person could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal” (the underlining is ours).*

In the light of the wording of Article 19(5) cited above, it cannot be seriously argued that this Court has no jurisdiction to order a new trial in the matter. Moreover, we decline to make any pronouncement on the propriety

or otherwise of the Attorney General's decision to charge the appellant with two counts of manslaughter under Section 192 of the Penal Code, following this Court's decision to order a rehearing on two counts of manslaughter. It is open to the appellant at his retrial to raise this issue and pursue it on appeal to this Court if he so wishes, in the event that he is convicted thereon.

For the reasons given, we dismiss this appeal, with costs.

**A.M. SILUNGWE**  
**JUSTICE OF APPEAL**

**A.G. PILLAY**  
**JUSTICE OF APPEAL**

**K.P. MAHADEEN**  
**JUSTICE OF APPEAL**

Dated this 9<sup>th</sup> day of April 2003