IN THE SEYCHELLES COURT OF APPEAL

In the matter of:

REFERENCE BY THE ATTORNEY-GENERAL UNDER SECTION 342A OF THE CRIMINAL PROCEDURE CODE (CAP.54) AS AMENDED: NUMBER 18 OF 2003

[BEFORE: RAMODIBEDI, P., PERERA J.A., RENAUD, J.A.]

Hearing on 3 November 2004.

Opinion delivered on 16 November 2004.

Mr. Govinden for the Attorney-General.

OPINION

RAMODIBEDI, P.

[1] Acting in terms of s.342A of the Criminal Procedure Code (CAP.54) As Amended (the "Code"), the Attorney-General has referred the following question for an opinion by this Court namely:

> "The Attorney General seeks your Lordships' opinion on the scope and extent of the provisions of Article 46(7) of the Constitution of the Republic of Seychelles (CAP.42) ("the Constitution"). More particularly what should be the proper procedure which should be followed if in the course of any proceedings before the Supreme Court a question arises with regard to whether there has been or is likely to be a contravention of the Constitution and the Supreme Court is satisfied that the question is not frivolous or vexatious or has not been the subject of a decision of the Constitutional Court or the Court of Appeal?"

[2] S.342A(1) of the Code empowers the Attorney-General to seek this Court's opinion in the following terms:

> "The Attorney-General may, if the Attorney-General desires the opinion on a point of law which arose in a criminal proceeding, refer the point –
>
> (a) ----------
>
> (b) where the point of law arose in a criminal proceeding before the Supreme Court or a Juvenile Court or court-martial presided over by a judge, to the Court of Appeal, for its opinion on the point of law."

[3] The Article in the Constitution which the learned Attorney-General relies upon for the opinion sought reads as follows:-

> "46(7) 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."

[4] It must be observed at the outset that the words "or has already been the subject of a decision of the Constitutional Court or the Court of Appeal" do not really convey the intention of the Legislature. It seems patently most unlikely that the makers of the Constitution could have intended that if the court is satisfied that the question raised "has already been the subject of a decision of the Constitutional Court or the Court of Appeal," the court must nonetheless refer the question for determination by the Constitutional Court. I say this for two reasons:-

(a) the words "not frivolous or vexatious" indicate in my view, that the makers of the Constitution sought to discourage

busybodies in constitutional litigation thus leaving the Constitutional Court or the Court of Appeal with more deserving constitutional cases. Thus interpreted, the makers of the Constitution were clearly conscious not to clog the Constitutional Court or the Court of Appeal with "frivolous" or "vexatious" cases.

(b) If the question raised has already been the subject of a decision of the Constitutional Court or the Court of Appeal it stands to reason, as a matter of logic and common sense, in my view, that there would be no need to refer it for the determination by the Constitutional Court. It would merely be an academic exercise. In this regard it is hardly necessary to say that courts of law are not interested in academic situations.

[5] What then must one make of Article 46(7) of the Constitution? Viewed in the light of the aforegoing considerations, it seems to me logical that the makers of the Constitution must have intended the use of the word "not" between the words "has" and "already". It makes constitutional sense and harmony then to accordingly read into the Article the missing word "not". The omission of this word can simply be put down to a typographical error. In this regard it is reassuring to note that in a parallel Article namely Article 130(6) of the Constitution which is substantially similar to Article 46(7) the word "not" actually appears between "has" and already". For convenience that Article merits quotation in full. It reads:-

> "(6) Where in the course of any proceedings in any court, other than the Court of Appeal or the Supreme Court sitting as the Constitutional Court, or tribunal, a question arises with regard to whether there has been or is likely to be a contravention of this Constitution other than Chapter III, the court or tribunal 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 or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court."

Thus construed, and at the risk of appearing to legislate (which of course is the function of the Legislature), the phrase in Article 46(7) should read:-

> "or has not already been the subject of a decision of the Constitutional Court or the Court of Appeal."

To hold otherwise would defeat the whole purpose of the Article which, as I say, was to confine the Constitutional Court or the Court of Appeal to deserving Constitutional cases which have not been the subject of a decision of either of these two Courts. A purposive interpretation as suggested herein is therefore called for in order to give flesh and meaning to the actual intention of the makers of the Constitution. Indeed I may add for completeness that Mr. Govinden for the learned Attorney-General fully supports this interpretation.

[6] I now turn to the facts of the case in so far as they are relevant for the disposal of the matter. They are indeed common cause. A certain lady (hereinafter referred to as "the accused") whose identity may not be disclosed in terms of s.342A(8) of the Code stood trial before Karunakaran J. in the Supreme Court on two counts as follows:-

1. Importation of a controlled drug contrary to s.3 read with s.26(1)(a) of the Misuse of the Drug Act; and

2. Trafficking in a controlled drug contrary to s.5 read with s.14(d) and 26(1)(a) of the aforesaid Act.

[7] The admitted chronology of events shows that after the close of the prosecution case the exhibits, namely cannabis resin, which the accused was alleged to have been trafficking in went missing at the Supreme Court Registry. It is not clear from the record of proceedings when exactly these exhibits went missing. The proceedings of Friday 18 July 2003, however, bear reference. They read as follows:-

> "Mr. Govinden: My Lord, I believe there is a case to answer. We have closed our case. Ms. Zatte was the one for the Republic before.

Mr. Juliette: My Lord, my client would like to have the substance examined by a competent officer of her own. We move accordingly.

Court: Is this one of the substances which are missing?

Mr. Govinden: My Lord, may we verify that formerly from the registry.

Court: Learned counsel for the defence is moving the court to produce the exhibits namely the substance alleged to be the drug involved in this case for analysis by a defence expert. I am not sure whether these exhibits are still in the custody of the registrar. In the circumstances I direct the Registrar to report to the court as to the fate of the exhibits namely Exhibits No. P8 and P9.

The case will be mentioned on 17th September 2003 at 9:00 a.m. The accused is warned to attend court on that date and time. Bail extended. Registrar is directed to submit a report to the court on the missing exhibits."

[8] The proceedings of 17 September 2003 also require quotation in full. They read as follows:

"Mr. Govinden for the Republic
Mr. Juliette for the Accused.
Accused – present

Court: I have received a letter from the Registrar in response to my order last time. You can have a look at it.
(Counsel shown letter)

Mr. Juliette: My Lord, all he says is that 8 pieces were stolen. Whether the exhibits were in respect of this case or not we do not know. May I move the Court that we wait for the outcome of the constitutional court case on the same issue.

Mr. Govinden: My Lord, the facts in that case are different from this one. May we have a continuation date.

Mr. Juliette: May I have copies of the proceedings.

Court: The case will be mentioned on 20th October 2003 at 9:00 a.m. The accused is warned to attend Court. Bail extended. Registrar to furnish copies of proceedings to Mr. Juliette.
(Emphasis added).

[9] In somewhat of a bizarre turn of events, on 20 October 2003 the learned Judge a quo did not "mention" the case as he had previously ruled but instead he delivered a written "Ruling" in which he dismissed the charge and acquitted the accused. He purportedly acted in terms of Article 19(1) and 19(2)(c) of the Constitution. These provisions read thus:-

> "19(1) Every person charged with an offence has the right, unless the charge is withdrawn to a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with an offence-
> (c) shall be given adequate time and facilities to prepare a defence to the charge."

[10] It is important to note that, in dismissing the charge and acquitting the accused, the learned Judge a quo did not invite counsel to make submissions on his proposed line of action. Nor did the court a quo invite counsel's submissions on the constitutional question he dealt with in his "Ruling" based on Article 19(1) and 19(2)(c). It is indeed common cause that none of the parties themselves raised this constitutional question, namely whether there had been or was likely to be a contravention of the Constitution.

[11] In embarking on the course of action he did , the learned Judge a quo reasoned that, by applying for an opportunity to call an expert witness to analyse the substance forming the subject matter of the charge, the defence was requesting the court to grant it "adequate time and facilities". He then concluded that he could not grant the "facility" requested because of "impossibility as the substance in

question that is, exhibit P8 has been irrevocably lost from the safe of the Registry."

[12] The learned Judge a quo then concluded:

"Therefore, as I see it, the Court is now positioned between Scylla and Charybdis and is unable to make any move in either direction. Making any order in this respect, either granting or refusing that facility to the defendant in my considered view, would equally infringe the Constitutional right of the defendant to have a fair trial and to have adequate facilities for the preparation of her defence to the charge, enshrined in Article 19(1) and 19(2)(c) respectively of the Constitution."

[13] In my view, the learned Judge a quo erred in at least five fundamental respects in adopting the approach that he did. Firstly, he mero motu introduced a constitutional issue in circumstances where such issue did not, and could not legitimately arise on the facts. In this regard it is important to bear two crucial factors in mind, namely:

(a) The evidence of Dr. Gobine who gave expert evidence for the prosecution went in completely unchallenged. His evidence was as follows:-

> "My findings were that all 8 pieces (forming the subject matter of the charge were cannabis resin and the total amount in weight of all 8 pieces although I weigh each item individually as the report here shows the total weight of all the items is 1 kg 975 g and 200 mg, that is the total weight."

Immediately after giving this version, Miss Zatte for the prosecution put the following question to Dr. Gobine:-

> "Q: Can you explain to the court what you mean by cannabis resin?

A: Cannabis resin is a control drugs that is obtained from the footing and flowering plant."

At this stage the learned Judge a quo interposed to say this:-

"Court: That is not necessary I think we all know cannabis resin."

When it came to his turn to cross-examine Dr.Gobine, Mr.Juliette for the accused told the court a quo that he had "[n]o questions". Indeed it is significant for that matter that on page 2 of the record, Mr.Juliette is recorded as having said the following:-

"My Lord Dr. Gobine (sic) qualifications and his findings are not disputed."

(b) At the close of the prosecution case, the learned Judge a quo ruled that there was a prima facie case against the accused. This ruling requires quotation in full:-

"Court: At this stage, on a cursory look at the evidence, it appears to me that the prosecution has established a prima facie case against the accused for the offence of importation of a controlled drug contrary to Section 3 and read with Section 26(1)(a) of the Misuse of Drug Act and for the offence of trafficking in a controlled drug contrary to Section 5 and read with Section 14(d) and 26(1)(a) of the Misuse of Drug Act. Accordingly I find that this accused has a case to answer and (sic) the charge under both courts, namely counts 1 and 2".

It will be noted that in making the ruling that there was a prima facie case against the accused, the learned Judge a quo must have followed the provisions of s.184(1) of the Code which read as follows:

"184(1) At the close of the evidence in support of the charge, <u>if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence</u>, the court shall again explain the substance of the charge to the accused and shall inform him that he has the right to give evidence on oath from the witness box and that, if he does so,

he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence)(if any)." Emphasis added.

It is thus incomprehensible to me how one moment the accused had a case to answer and yet the next moment she was acquitted in the circumstances fully set out above when she had neither given evidence nor closed her case at that stage.

[14] Secondly, it is a fundamental principle of constitutional litigation that a court will not determine a constitutional question where, as here, a matter may properly be adjudicated on another basis. (The learned trial Judge ought to have dismissed the application by the defence to call an expert witness on the ground that there was no real dispute that the exhibit, namely the substance forming the subject matter of the charge was cannabis resin and that in any event it was irretrievably lost after it had been duly inspected and handed in as an exhibit). This principle finds its roots more than a century ago in the case of Liverpool, New York and Philadelphia Steamship Co. v Commissioner of Emigration US 33 (1885) at 39. The same approach has been adopted by the Supreme courts of India (see for example M.M. Pathak v. Union (1978) 3 SCR 334) and Namibia (in Kauesa v. Minister of Police 1996 (4) SA 965 (Nm SC) at 974 D-E). South Africa has followed suit in S v. Mhlungu 1995 (3) SA 867 (CC) at 895 E and so has Lesotho Court of Appeal in Khalapa v. Commissioner of Police & Another 1999-2000 Lesotho Law Reports and Legal Bulletin 300 at 357. The general principle gleaned from these authorities is that constitutional remedies should be used only as a last resort. That is a principle which this Court is happy to adopt as it is in line with the tenor and spirit of Article 46(7) of the Constitution to the extent that it ensures the Constitutional Court is not clogged with busybodies and undeserving "constitutional" cases such as the instant case.

[15] Thirdly, even if a constitutional issue legitimately arose, however, the court a quo was, in my judgment, obliged and indeed enjoined by Article 46(7) of the Constitution to immediately adjourn

the proceedings and refer the question for the determination by the Constitutional Court." This, he failed to do despite the peremptory nature of the Article as indicated by the use of the word "shall".

[16] Fourthly, in adopting the approach that he did, without inviting counsel's submissions the learned Judge a quo flouted the principle of natural justice (audi alteram partem rule).

[17] Fifthly, by determining the constitutional question himself the learned Judge a quo clearly usurped the jurisdiction of the Constitutional Court under Article 46(7) of the Constitution. In this regard it will be recalled from this Article as fully reproduced in paragraph [3] above that the proper court to determine a constitutional issue that arises in any court other than the Constitutional Court or the Court of Appeal is the Constitutional Court itself. It is self-evident in my view, therefore, that as a single Supreme Court Judge, and admittedly not sitting as a Constitutional Court Judge, the learned Judge a quo had no jurisdiction to embark upon the exercise that he did. He had no colour of authority to determine the so called constitutional issue in question and what he did was clearly an exercise in futility. It must indeed always be borne in mind that in terms of Article 129(1) of the Constitution, the minimum quorum of Supreme Court Judges sitting as a Constitutional Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution is two Judges sitting together.

[18] In the result, this Court opines that if in the course of any proceedings before the Supreme Court a question arises with regard to whether there has been or is likely to be a contravention of the Constitution and the Supreme Court is satisfied that the question is not frivolous or vexatious or has not already been the subject of a decision of the Constitutional Court or the Court of Appeal, the proper procedure is to immediately adjourn the proceedings and refer the question for determination by the Constitutional Court in terms of Article 46(7) of the Constitution. In so doing, the Supreme Court must always observe the principle of natural justice (audi alteram partem rule) and hear the parties involved on the question whether there has been or is likely to be a contravention of the Constitution and whether the question is not frivolous or vexatious or has not

already been the subject of the Constitutional Court or the Court of Appeal.

[19] Unhappily, this Court is constrained by s.342A of the Code to correct the court a quo's order. That sub-section reads as follows:-

"(2) A reference under this section shall not affect the acquittal or conviction by, or the decision, decree, direction, order, writ or sentence of, the forum below."

M.M. RAMODIBEDI
PRESIDENT

I concur : A.R. PERERA
JUSTICE OF APPEAL

I concur : B. RENAUD
JUSTICE OF APPEAL

Delivered at Victoria, Mahe this 16th day of November 2004.