

IN THE SEYCHELLES COURT OF APPEAL

1. Roy Patrick Brioché
2. Robert Billy Jean
3. Daniel Theophane Leon
4. Danny dereck Bresson
5. Franky Clement Thelermont
6. Naddy Peter Delorie
7. George Michel
8. Kenneth Steve Esparon

APPLICANTS

VS

The Republic

RESPONDENT

SCA NOCR 2 of 2013

Before A. F. T. Fernando JA

Mrs. A.G. Amesbury for the 1st to 6th Applicants

Mr. Nichol Gabriel for the 7th & 8th Applicants

Date of Hearing: 21st October 2013

Date of Ruling: 28th October 2013

RULING

A.F.T. Fernando JA

1. The application that came to be argued before this Court by the Applicants was for bail pending the final determination of all cases against them pursuant to article 18(7) of the Constitution.

2. The other application in the Notice of Motion for “the criminal proceedings against them in case Cr. No. 2/2013 be adjourned or stayed pending the determination of the Constitutional Court case, CP 06/13” was withdrawn by Counsel during the hearing. The Notice of Motion was also sought to be amended to delete the words “and pursuant to article 46/7” therein.
3. The instant application as argued by Counsel for the Applicants was for an order granting bail and not an appeal against the orders of the Supreme Court refusing to grant the Applicants bail on the 7th of January 2013, 25th of February 2013 and 25th of July 2013. Further the record of proceedings dated 25th of July 2013 furnished to this Court by Counsel for the Applicants 1 to 6 do not indicate that they had objected to the application for remand against all of them, made by Counsel for the Respondent.
4. The Respondent had raised two preliminary objections against the Application as follows:
 - 1) The Notice of Motion is incompetent in terms of Rule 18(1) and Rule 18(2) of the Seychelles Court of Appeal Rules 2005.
 - 2) The Court of Appeal has no jurisdiction to hear the Application since there is no appeal pending before the Court of Appeal in terms of Rule 25(1) of the Court of Appeal Rules.
5. It was the Respondent’s submission relying on articles 120(1) & (2) of the Constitution, that the Court of Appeal has only an appellate jurisdiction and does not have any original jurisdiction to entertain an application for bail in respect of a case pending before the Supreme Court.
6. The relevant articles of the Constitution reads thus:

“120(1) There shall be a Court of Appeal which shall, subject to this Constitution, have jurisdiction to hear and determine **appeals** from a

judgment, direction, decision, declaration, decree, writ or order of the Supreme Court and such other appellate jurisdiction as may be conferred upon the Court of Appeal by this Constitution and by or under an Act.

120(2) Except as this Constitution or an Act otherwise provides, there shall be a right of appeal to the Court of Appeal from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court."
(Emphasis by me)

7. In order to buttress his argument Counsel for the Respondent submitted that there was no appeal filed before this Court as required by rules 18(1) & (2) of the Seychelles Court of Appeal Rules, 2005. He also relied on rule 25 of the said Rules to argue that any interlocutory application can be made only in respect of a "pending appeal". It is clear that there is no pending appeal before this Court by the Applicants in respect of any judgment, decision or order of the Supreme Court.
8. Counsel for the Applicant's made a futile effort to argue that this Court does have the jurisdiction to entertain this application and exercise original jurisdiction seeking to rely on article 120(3) of the Constitution. Article 120(3) reads as follows: "The Court of Appeal shall, when exercising its appellate jurisdiction, have all the authority, jurisdiction and power of the court from which the appeal is brought and such other authority, jurisdiction and power as may be conferred upon it by or under an Act." (Emphasis by me). It is clear that this article applies when this Court has the jurisdiction to entertain a matter and when exercising it. The Constitution does not confer concurrent original jurisdiction to this Court with the Supreme Court when there is no appeal pending before it.
9. Counsel for the Applicants submitted that she relies on article 18(7) of the Constitution in making the application to this Court for bail and submitted that the said article applies from the time a suspect is produced before the court up to his conviction.

10. Article 18 (7) of the Constitution states:

“A person who is produced before a court shall be released, either unconditionally or upon reasonable conditions, for appearance at a later date for trial or for proceedings preliminary to a trial except where the court, having regard to the following circumstances, determines otherwise-

- a) where the court is a magistrates’ court, the offence is one of treason or murder;
- b) the seriousness of the offence;
- c) there are substantial grounds for believing that the suspect will fail to appear for the trial or will interfere with the witnesses or will otherwise obstruct the course of justice or will commit an offence while on release;
- d) there is a necessity to keep the suspect in custody for the suspect’s protection or where the suspect is a minor, for the minor’s own welfare;
- e) the suspect is serving a custodial sentence;
- f) the suspect has been arrested pursuant to a previous breach of conditions of release for the same offence.

11. Article 18(7) undoubtedly gives a right to a person to be released on bail in the appropriate circumstances, but the issue here is one of jurisdiction, namely whether this Court has ‘original’ jurisdiction to entertain such an application which I have already dealt with at paragraph 8 above.

12. This Court said in the case of Steve Hoareau CR SCA 28/2010:

“A person is produced before a court, in view of the provisions in article 18 (5) of the Constitution; which makes it obligatory to produce before a court within 24 hours or where the circumstances set out in article 18 (5) applies

as soon as is reasonably practicable; of the arrest or detention of a person; so arrested or detained, if the person is not released.

It is of interest to note that sub-articles (5) and (7) have been placed under article 18 which deals with the “Right to liberty” and not under article 19 which deals with the “Right to a Fair Hearing”. The Right to a Fair Hearing commences when a person is charged with an offence for there cannot be a hearing without a charge. In placing articles 18 (5) and (7) under the “Right to liberty” the Constitution has drawn a distinction between pre-trial detention and detention under sections 179 and 195 of the Criminal Procedure Code, i.e. after a person has been charged by court. This is made further clear by the use in article 18 (7) of the words “for appearance at a later date for trial or for proceedings preliminary to a trial”. Two essential principles arise out of article 18 (5), namely no person can be detained without the order of a court and that a person cannot be detained for a long period without a charge.

Article 18 (6) states: “A person charged with an offence has a right to be tried within a reasonable time.” Once charged the release or detention of a person is at the discretion of the court, on which the obligation is placed to ensure that the accused is tried within a reasonable time. Thus the “Right to be Released” postulated in article 18 (7) is essentially for the pre-trial period although it is a factor that necessarily would be considered whenever a court makes an order for detention under sections 179 and 195, since it has a bearing on the right to liberty of a person and his dignity. Section 179 postulates a period after a person has been charged.

Section 179 of the Criminal Procedure Code reads thus:

“Before or during the hearing of any case, it shall be lawful for the court in its discretion to adjourn the hearing to a certain time and place to be then

appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may suffer the accused person to go at large or may commit him to prison, or may release him upon his entering into a recognizance with or without sureties, at the discretion of the court, conditioned for his appearance at the time and place to which such hearing or further hearing shall be adjourned:

Provided that, if the accused person has been committed to prison, no such adjournment shall be for more than fifteen clear days, the day following that on which the adjournment is made being counted as the first day.”

It is to be appreciated that the Constitution has vested the judicial power of Seychelles in the courts and therefore entrusted to the courts to ensure the protection of the fundamental rights of the people in administering justice. It is the duty of the courts to ensure that every person charged with an offence has the right unless the charge is withdrawn, to a fair hearing within a reasonable time.....”[vide article 19 (1)]. To ensure that a hearing takes place within a reasonable time the presence of the accused at the hearing is a must bearing in mind the exceptions set out in articles 19 (2) (i) and 19 (12). It is to be emphasized that the right to be released at the pre-trial stage under article 18 (7) of the Constitution and once a person has been charged under section 179 of the Criminal Procedure Code are qualified rights to be determined judiciously by the courts on whom the drafters of the Constitution have vested the judicial power of Seychelles. The only difference being that once a charge has been laid it becomes the duty of the court to ensure that the accused is afforded a fair hearing within a reasonable time. ”

13. A violation of the rights under articles 18(6), 18(7) and 19(1) may give a person the right to invoke the jurisdiction of the Constitutional Court under article 46(1).

14. The cases of Roy Beeharry SCA 11 of 2009, Steve Hoareau CR SCA 27 & 28 of 2010 and Garry Stephen CR SCA 3 of 2010, referred to by Counsel for the Applicants in the course of her submissions cannot be relied on by the Applicants to support their applications to this Court invoking the 'original' jurisdiction of this Court to grant them bail; as they were all judgments of this Court in exercising its appellate jurisdiction against orders for remand made by the Supreme Court. Whether there is a right of appeal against an order for remand made under sections 179 and 195 of the Criminal Procedure Code, i.e. after a person has been charged by court, continues to be in my mind, a moot point in view of the provisions of article 120(2) of the Constitution read with section 342(6) of the Criminal Procedure Code as amended by Act No. 14 of 1998.
15. I have been informed that the trial against the Applicants for trafficking in 79 KG & 779.6 grams of cannabis herbal material, 3Kg & 954.6 grams of Cannabis resin, possession of an AK 47 rifle 30 rounds of ammunition, and 154.02 KG of sea turtle meat is due to commence tomorrow.
16. In **Roy Beeharry** SCA 11 of 2009 this Court said “ where the case has already obtained a court fixture for hearing, the defendant’s best interest would lie in a fresh application for bail before the court where the trial is taking, or to take, place.....The prime reasons are, inter alia: (a) the trial court would be more “au fait” with the facts and circumstances of the case than the appellate court; (b) the trial court would best be able to evaluate the risks involved in the release to secure the defendant’s presence before itself; (c) the trial court would be the best judge in assessing what conditions will apply to secure the defendant’s presence on the day of trial; and (d) the trial court would be able to directly examine the defendant to gauge his plight. The appellate court is bereft of many advantages which a trial court has, proceeding as it does from a record of proceedings and on a session basis.”

17. It must also be said that a defendant need not consider his refusal of bail by the trial court as final and that he could continue to make applications for bail before the trial court at the end of every 15 days of remand.
18. I therefore uphold the objections of the Respondent and dismiss this application.

A.F.T. FERNANDO
JUSTICE OF APPEAL

Dated this 28th day of October 2013