

IN THE COURT OF APPEAL OF SEYCHELLES

KENNETH STEVE ESPARON

APPELLANT

v.

THE REPUBLIC

RESPONDENT

SCA No: 01 of 2014

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- 1. ROBERT BILLY JEAN**
- 2. FRANKY CLEMENT THERLERMONT**
- 3. NADDY PETER DELORIE**

APPELLANTS

v.

THE REPUBLIC

RESPONDENT

SCA No: 02 of 2014

=====

GEORGES MICHEL

APPELLANT

v.

THE REPUBLIC

RESPONDENT

SCA No: 03 of 2014

Before: MacGregor P, Domah, Fernando, Twomey and J. Msoffe JJA

Counsel: Mr. N. Gabriel for K. Esparon

Mrs A. Amesbury for R. Jean, F. Thelermont and N. Delorie

Mr A. Juliette for G. Michel

Mr. D. Esparon with Mr H. Kumar for Respondent

Date of Hearing: 6 August 2014

Date of Judgment: 14 August 2014

JUDGMENT

DOMAH, JA.

[1] The appellants were arrested on various dates between January 2013 and February 2013 and have been on remand since, under charges of drug trafficking under the Misuse of Drugs Act, possession of firearms and ammunitions under the Penal Code and Wild Animals and Bird Protection Act. Not all of them are charged alike. Originally, there were a number of suspects. Charges were withdrawn against a couple of them and some new ones were added. Be that as it may, the above five appellants found themselves jointly charged under 14 counts of an information for various offences, carrying sentences varying from one year's imprisonment to life imprisonment.

[2] The Prosecution applied before the Supreme Court for the remand of the appellants to custody. The appellants objected. The matter was heard by Burhan J. who acceded to the motion of the Prosecution to remand them to custody pending trial. The case was then listed for trial before Robinson J. The trial had a couple of false starts and the appellants applied for bail before her. They pleaded, inter alia, that there had been a change/s of circumstances since the earlier decision of remand; enforcement of their right under article 19(1) of the Constitution which guarantees a citizen a right to a fair hearing within a reasonable time; the proper consideration of their application of the Guidelines in **Roy Beeharry v The Republic [SCA 11 of 2009]**.

[3] The learned Judge did not think that there had been any change in the circumstances. She dwelled on the fact that she had done everything within her powers and possibility, considering the constraints of her court calendar, to expedite matters and, as a result, been able to secure 16 September 2014 up to 29 October 2014 for trial. She further weighed the appellants' right to liberty with the fact that they were facing serious charges for dealing in

controlled drugs which attracted life imprisonment. In her assessment, the possibility of the appellants absconding or attempting to obstruct the course of justice was apparent and strong. She, accordingly, decided for their continuing remand to custody.

[4] The appellants have appealed against that decision to this Court. All the five appeals are more or less identical in nature based on the fact that there were changes in the circumstances from the moment the case was lodged, which changes warranted their release. Charges had been dropped against two of the accused persons. No early hearing dates could be found for the prompt disposal of their case as required by Article 19(1) of the Constitution. They have also averred that the wrong principle of jail instead of bail had been applied by the learned Judge.

[5] The Respondent is resisting this appeal. It is the case of the Respondent that the learned Judge was correct all along the line in her determination of the application. There were no changes in the circumstances. The charges were of a serious nature. The Guidelines of **Roy Beeharry v The Republic** [supra] had been followed.

[6] At the hearing of this appeal, the focus of hearing changed. The consideration was no longer whether each of the appellant was entitled to bail in his particular circumstances of the case. It was whether the Court of Appeal had at all the jurisdiction to entertain this appeal. The argument centered around the effect of section 342 (6) of the Criminal Procedure Act ("the Act"). In other words, does the Court of Appeal have the power to hear an appeal from a refusal of the Supreme Court to grant bail to a party who is appearing before that Court. Or should he not re-apply before the same jurisdiction as circumstances warrant?

[7] The jurisdictional issue would sound, on the face of it, to be an astounding question to raise, all the more so when account is taken of the fact that there have been so many instances where this Court has entertained such appeals. However, the fact remains that in none of the previous cases had the existence of section 342 (6) enacted in 1999 been noticed.

[8] Mr H. Kumar, appearing for the Attorney General, submitted that the jurisdiction of this Court is circumscribed by section 342 of the Act. In other words, appeals to this Court will only lie where there has been a conviction for the purpose of challenging that conviction and/or the sentence meted out. Since an applicant who has been refused bail has not been convicted, still less sentenced, he is precluded from appealing.

SECTION 342 (6) OF THE CRIMINAL PROCEDURE CODE

[9] Section 342 reads:

"342 (1). Any person convicted on a trial held by the Supreme Court may appeal to the Court of Appeal –

(a) against his conviction ...

(b) against the sentence ..."

(2) Any person who has been dealt with by the Supreme Court under section 7 ...

(3) any question of law reserved by way of case stated by the judge (underlined part paraphrased)

(4) The Judge may in his discretion, in any case in which an appeal to the Court of Appeal is filed or in any case in which a question of law has been reserved for the decision of such Court of Appeal, grant bail pending the hearing of such appeal or the decision of the case reserved.

(5) An application for bail under this section shall be by motion, supported by affidavit, served on the Attorney-General, and may be heard in Chambers.

(6) Except as it is otherwise provided in this section, an appeal shall not lie against an acquittal, conviction, decision, declaration, decree, direction, order, writ or sentence."
[underlining ours].

[10] In fact, section 342 (6) could not be clearer. If there had been any doubt on the matter before it was passed, there could not be any doubt thereafter. It specifically excludes the power of this Court to hear a matter until its conclusion by the trial court ending with a conviction. The wording is ominous: *"Except as it is otherwise provided in this section, an appeal shall not lie against an acquittal, conviction, decision, declaration, decree, direction, order, writ or sentence."* Thus, in his view, to the extent that a decision on bail is a decision pending conviction or sentence, there is no appeal possible under the law.

[11] The Appellants have challenged that interpretation and come up with a plethora of judgments from our jurisdiction and other comparable jurisdictions as well as referred to the jurisprudence of the European Court of Human Rights to argue that their application is one which stands on its own. In the submission of Mrs Amesbury and Mr Gabriel, section 342(6) does not find its application to the present case. They argue that a decision to grant or not to grant bail is a constitutional right and this Court should be able, when the appellants are seeking to exercise of that right to seize this Court's jurisdiction, all the more so when it is on an appeal from the decision of the Supreme Court. The constitutional jurisdiction of this Court may not be ousted by a legislative provision, is their argument.

[12] The other argument of the office of the Attorney General is that the Court of Appeal does not have inherent powers, unlike the Supreme Court, but only such powers as have been conferred by an Act of the Legislature so that, under the doctrine of the Separation of Powers, it

would be impermissible for the Court of Appeal to assume a jurisdiction which it does not possess. Jurisdiction of a Court is a matter of public order (“ordre public”). Section 342(6), specifically circumscribes the jurisdiction of the Court of Appeal.

[13] We agree with the view that the jurisdiction of the Court of Appeal is limited to hearing cases on appeal as laid down in the law. For the Court of Appeal to assume a power which it does not have would be an impermissible encroachment on the power of the Legislature. To that extent, full effect should be given to the scope as well as the limitations of section 342 of the Act.

[14] However, the jurisdictional issue of the Court of Appeal, in our view, can only be determined after the up-front issue has been resolved: what is the nature of an application and a determination of bail before the courts? If such a hearing is a mere incident in a criminal case or a part of it, then it is caught by section 342, more specifically section 342(6). On the other hand, if it is an action in its own right, then it is not.

[15] We have heard the arguments of learned counsel on both sides. There is overwhelming jurisprudence in other jurisdictions to show that bail is an action in its own right and that the determination of bail is a power so intrinsic to the courts. On that view, if section 342(6) was intended to cover bail, it would be regarded as unconstitutional. But we have to say that we are fairly certain that this could not have been intended by the legislator. Legislative sovereignty is a homage that Judicial sovereignty pays to a democratic Constitution based on the rule of law.

THE NATURE OF BAIL

[16] First, bail is the very *grundnorm* of a democracy from which all other freedoms emanate and are exercised. We are happy to pick up what Lord Bingham stated in **A v Secretary of State for Home Department [2005] 2 AC 68**, at page 42, a quote cited in **Khoyratty v The State**:

“..... Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.”

[17] Article 1 of the Constitution states: “Seychelles is a sovereign democratic state.” Article 5 states: “This Constitution is the supreme source of law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void.

[18] An enforcement of those provisions by the courts would require that bail be not taken away from the fundamental function of the Judiciary. To do otherwise would be at the risk and

peril of the consolidation of democracy and the rule of law in a democratic system of government.

[19] It is well worth recalling that the reason for which, soon after his arrest, in democratic system of government unlike in a despotic system, someone is first to be presented to nearest Court is for the Court to take judicial control of the citizen, impartially and independently of executive or political powers so that his rights as a citizen are given effect to. These rights include his right to be treated with dignity, his right to liberty, his right to be informed of the reasons of his arrest, his right to counsel, to medical attention, to visits by members of his family, etc. Article 18(8) could not be more clear. Once produced to Court, he has a right to be released, either conditionally or upon reasonable conditions, for appearance at a later date either for trial or for other matters preliminary to trial.

[20] It is the Court which decides which of those rights may be curtailed and on which conditions, after an adversarial hearing conducted by the prosecution and the defence. As such, the primary concern in a bail matter is under the rule of law. Article 18(7) provides for the exceptions but the Court should be satisfied that those exceptions exist. They are only circumstances which will assist the court in determining whether the person should be kept in custody. It may still find that the person needs to be released albeit that he is charged for treason and murder, that the offence is serious, etc. The reason the court will do that is because the prima facie evidence against the accused may be so weak.

[21] If the Court refuses bail, a proper justice system requires that the person has a right to have that refusal reviewed by a higher jurisdiction. From this point of view bail is not an incidence of a criminal trial to be caught by section 342(6) which deals with criminal matters. It is an independent action grounded in the Constitution: see **Noordally v the Attorney-General and Director of Public Prosecutions 1986 MR 220**; **Islam v Senior District Magistrate of Grand Port [2006 SCJ 282]**; **State v Khoiratty [2004 MR PRV 59]**; **Philibert v The State [2007 SCJ 274]**; **Roy v Beeharry [supra]**.

[22] From that point of view, a bail hearing is not part of a criminal case even if it has to be conceded that it walks in the shadows of a criminal trial. It has an independent life free from the criminal process yet walking hand in hand with it.

[23] The question which has legitimately arisen in this matter is whether a decision which the Supreme Court has taken to deny bail to an accused party who has made an application is appealable to the Court of Appeal. The argument is that he may apply to the same jurisdiction for a determination. The fact remains that the refusal to bail may not have been validly reached either in law or on the facts. The minimum standard for a fair justice system under the rule of law is to have a tier system of adjudication, affording someone a right of review or appeal from first instance decisions. Some enhanced jurisdictions have three-tier systems.

[24] The Legislature should be credited with the wisdom that it was fully aware of the existence of the procedure for bail for having mentioned it in subsection (5) of section 342 so that if subsection (6) has not included it specifically, it should be deemed to have excluded it. One may well argue that allowing or denial of bail is either a determination, a refusal or a denial so that it is not covered by section 342(6). Thus, to the extent that it is a determination, a refusal or a denial, it falls outside the restriction placed upon the Court of Appeal. However, there are more weighty arguments than the semantics in this case.

[25] It is fairly clear that section 342 deals with the question of criminal appeals. It cannot be said that a bail application is a criminal action. A bail application whether before the lower court or the Court of Appeal is a constitutional action. It may arise from the facts and circumstances of the application of a criminal law. But that does not make it an incidence of a criminal action. We have said above that it is born well before the criminal action and lives an independent life from the criminal action even if it lives in its shadows.

[26] The procedural isolation of a bail application before courts may be noted and evident by sub-section (5). The latter provision makes it a separate cause of action. It states that an application for bail under this section shall be by motion, supported by affidavit, served on the Attorney-General, and may be heard in Chambers. A bail application, then, is a case in its own right, independent of the criminal case.

[27] Section 342 deals with criminal appeals. The application, determination, refusal or granting of bail is not a criminal action. It is the exercise by a citizen of his constitutional right to bail under Article 18(8) of the Constitution.

[28] It is inconceivable that the Legislature, in its wisdom, would have wanted to oust by a criminal provision the constitutional right of a citizen to appeal to the Court of Appeal on his constitutional right to bail and in the same foul swoop taken away the Judiciary's intrinsic power to ensure that the citizen has a right to bail and a right to an appeal on his refusal or denial of bail. It is no answer that in case of refusal or denial of bail, a second application may be filed in due course. Even one second's restriction of liberty of a citizen in a democratic society is one second too many.

POWERS OF THE COURT OF APPEAL

[29] This leads us to the question of the powers and the scope of the Court of Appeal. The Court of Appeal only has such powers as are conferred by the Constitution and other laws. Article 120 of the Constitution provides as follows:

“(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."

[30] Sub-article 2 reads:

"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."

[31] Sub-article 3 speaks of the jurisdiction of the Court of Appeal. It reads:

"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."

[32] Sub-article 5 is of particular importance to us in this matter. It reads:

"Proceedings in respect of a matter relating to the application, contravention, enforcement or interpretation of this Constitution shall take precedence over other matters before the Court of Appeal."

[33] What is of significance is that the jurisdiction of the Court of Appeal is not limited to criminal cases only. It extends to all judgments, directions, decisions, declarations, decrees, writs or orders of the Supreme Court. That only means that it is the appellate jurisdiction for criminal, civil and constitutional matters.

[34] Thus, the Court of Appeal of Seychelles is not a Court of Criminal Appeal *simpliciter*. We derive appellate jurisdiction from the mere fact that the Supreme Court has exercised its first instance jurisdiction. As such, section 342(6), to the extent that bail is a matter of constitutional right of the citizen is not a criminal matter for which the Criminal Procedure Act will apply.

[35] Mrs Amesbury referred to Article 18(8) of the Constitution which provides:

"A person who is detained has the right to take proceedings before the Supreme Court in order that the Court may decide on the lawfulness of the detention and order the release of the person if the detention is not lawful."

To her, the jurisdiction of the Appellate Court derives from Article 18(8). Section 342(6) is, therefore, not applicable to an application for bail. Admission or refusal to admit to bail or reduction of conditions of bail does not fall within the purview of section 342(6) which speaks of ouster of appellate jurisdiction in criminal matters.

[36] For the Court of Appeal to deny itself appellate competence to hear appeals from any *judgment, direction, decision, declaration, decree, writ or order of the Supreme Court* would create a dark hole in our democracy on such an important matter as the liberty of the citizen from which flows so many of his other freedoms and liberties.

[37] The purport of section 100(3) of the Act is worth noting. An application for bail is made by separate procedure: by way of application in Chambers. Thus, when there is a decision by the Magistrate's Court to deny someone bail, the Supreme Court is seized by way of an application under 342 (5). It should be odd that where bail is refused by the Magistrate's Court, there should be an appeal before the Supreme Court. On the other hand, where it is refused at the Supreme Court, there is no appeal at all possible.

[38] From the moment, the Supreme Court takes a decision one way or the other, it is appealable as a final decision in its own right to the Court of Appeal.

[39] The issue whether an application for bail is separate from a criminal trial was broached in the recent case of **R (Uddin) v Crown Court at Leeds [2013] EWHC 2752 (Admin)**. The question which arose was whether there could be a judicial review challenge of the decision of a trial judge during a trial to revoke bail.

[40] Having considered **R (M) v Isleworth Crown Court [2005] EWHC 363 (Admin)** and **Manchester Crown Court, ex parte DPP (1994) 98 Crim. App R 461**, HH J Jeremy Richardson QC, sitting as a judge of the High Court, decided as follows:

"[35] In my judgment, s. 29(3) prevents a judicial review challenge to a decision by a trial judge during a trial to revoke bail of a defendant. However, that forbidden territory has limitations and a clear boundary. Bail decisions before trial and after the trial, if there be a retrial or another trial (perhaps a series of trials) are not decisions relating to the trial itself are open to challenge by way of judicial review. Parliament has very clearly reposed trust in Crown Court judges in this regard."

[41] We have said enough by this time to show that the right to bail is a separate matter and should not be confused with the trial itself.

[42] That does not mean that the legislature may not legislate for bail. It only means that, while legislating for bail in the sense of regulating which are the conditions and which are the offences for which such and such conditions will apply, it may not remove the right of the citizen to go to the Judiciary to move for bail.

[43] The right to bail is provided in article 18 (7) of the Constitution.

[44] The jurisdiction of the Court of Appeal extends to hear appeals from the decision of the Appellate Court to either grant bail or to refuse bail or to revoke bail for that matter so long as it is either before or after trial. However, where a motion is made in course of trial, the Judge who is hearing the case is the best person to decide it, unless there is a good reason against such as the production of previous convictions. In this particular case, the trial has not started and a decision not to admit bail has been taken. It is appealable.

[45] From the above, the following may be deduced:

1. Bail is an inherent function of the Judicial arm of government and it cannot be taken away by the legislature by any law as such.
2. This inherent function of the Judiciary is so sacrosanct that, in a democratic society, it cannot be taken away even by a constitutional amendment;
3. In the exercise of this function, the judiciary needs to ensure that the principle is not reversed in the sense that bail instead of jail becomes jail instead of bail.
4. Bail may only be denied, after the Court has properly ascertained that compelling reasons exist in law and on the facts which justify the denial such as those enumerated in the Constitution .
5. Every application for bail is independent of the criminal case for which the person is being tried.
6. If the case is still awaiting trial and a defendant is still incarcerated he may apply to the Court for his release. If he is not released after an adversarial first instance hearing at the Magistrate's Court, he may appeal to the Supreme Court. If he is not released after an adversarial first instance hearing by the Supreme Court, he may appeal to the Court of Appeal.
7. If, on the other hand, his case is already listed to be heard before a particular judicial officer a motion may be made before that judicial officer unless there is a good reason against it such as the existence of previous convictions which may become one of the issues.
8. Even if a right to bail is often canvassed under a right to be tried within a reasonable time, it goes well beyond it.

[46] We are grateful to both counsel for the material they have provided to us which has made our task much easier than we had thought. We shall now move on to deal with the merits of the appeal in the light of the above.

[47] We are accordingly unable to agree with the arguments of the respondent. Bail is a separate matter from a pending case. It is not an incidence of a case. Its independent life may be gauged by the fact that it is by application and by separate motion in Chambers. Its file is different. Its number is different. In fact there is a Chinese wall which exists between the two files. The reason is that the bail file may contain matters such as the previous convictions of an applicant which should not be known to the judge deciding bail. In many jurisdictions, the judge who decides the bail applications would not deal with the case on its merits. Bail also walks in the shadows of a criminal case inasmuch as the Court before whom a defendant appears may well move that the Court should grant him bail because the case is taking too long. The Judge may, for good reason, grant him bail on being satisfied that the case is taking too long, the defendant is one that will not abscond, the facts are too tenuous against him and for many other reasons such as there have been a change of circumstances since the decision to deny him bail.

OUR DETERMINATION

[48] The facts of this case have been painstakingly set out in the judgment of Robinson J which we adopt. For our purposes, the only relevant facts for the purpose of this appeal from the decision of the learned Judge relate to the core issue whether the appellants, applicants, for bail below, are entitled to bail. Each applicant has set out his case for admission to bail.

[49] The learned Judge was, unfortunately not very much enlightened on the issues regarding the bail motion. The motion having been made on the ground that there was unreasonable delay, she applied her mind to the efforts of court to get the case out of the way and the efforts of the counsel to thwart those efforts. She should be commended for taking control of the case. However, in doing so, she was able to focus little in the principles that should have applied in the granting of bail. For example, all the applicants were treated alike, even if they did not all have the same charges against them. She should have treated the case of each applicant in its own right.

KENNETH STEVE ESPARON

[50] It is the case of Appellant Esparon that he was arrested on 28 January 2013 for an incident which had occurred in January 2013. On 25 February 2013, he was charged with the offence of unlawful possession of fire-arms and ammunition without licence and has been in custody since pending trial. The trial is fixed for 16 September to 29 September 2014.

[51] The offence of possession of firearms without a licence carries the maximum penalty of one year's imprisonment.

[52] There is no evidence that the firearm and ammunition was actually used by the Appellant. There is no evidence that it was inextricably linked to the offenders or offences which relate to possession of dangerous drugs.

[53] The information contains 14 Counts against 7 accused persons for various charges under the Misuse of Drugs Act, the Penal Code, the Firearms and Ammunition Act, the Wild Animals and Bird Protection Act. 4 of the charges are only alternative offences.

[54] The maximum penalties they risk is life imprisonment on a recent amendment to the law which has hardened the penalty.

[55] Of the 14 charges on the information, the charges against Kenneth Steve Esparon are only two, one of which is alternative to the other. It is aiding and abetting the other suspects to be in possession of a firearm: namely, a rifle 47 Rifle S/N 1953 EW4928 and one AK magazine of 30 bullets of 7.22mm each.

[56] Despite the high-sounding references of makes and particulars, the fact remains that this appellant's participation in the incident, if proved, is of a secondary nature rather than a primary nature. There is no evidence that the rifle and the ammunition was actually used and which caused damage to property or injury to persons.

[57] It is quite likely that, despite the mandatory nature of the sentence, this appellant subject to evidence adduced against him of a more serious nature, be visited by a sentence which is below the period he will have spent on remand if he is kept in custody till the trial is over in September 2014. It is not permissible in a democratic society that a detainee awaiting trial should have served his sentence before trial. This appellant should be released on the following conditions:

1. that he gives a recognizance in his own name and one surety in the sum of SR50,000 to appear for trial as and when he is required by the Court till the final disposal of his case;
2. that he reports to the nearest police station every morning and afternoon to enable the police to ascertain his whereabouts during the period he is released on bail; and
3. that he surrenders his pass-port to the Authorities, if he has not already done so.

GEORGE MICHEL

[58] George Michel, for his part stands charged under 7 Counts. As with the case of Kenneth Steve Esparon, his participation seems to be from arm's length in the actual activities of the other alleged offenders in the form of counseling and aiding and abetting. The facts, if proved, are not as grave as with those who actually committed the offences.

[59] It is just that he be released as well, if on more stringent conditions that Kenneth Steve Esparon. George Michel is to be released on bail provided that he furnishes two securities:

1. a recognizance in his own name and one surety in the sum of SR100,000 to appear for trial as and when he is required to do so by the Court till the final disposal of the case against him;
2. that he reports to the nearest police station every morning and afternoon to enable the police to ascertain his whereabouts during the period he is released on bail;
3. that he surrenders his pass-port to the Authorities, if he has not already done so.

ROBERT BILLY JEAN; FRANKY CLEMENT THELERMONT; NADDY PETER DELORIE

[60] In the case of the other three appellants, ROBERT BILLY JEAN; FRANKY CLEMENT THELERMONT; NADDY PETER DELORIE, their case is of a different category altogether. They were charged as the authors of the trafficking on two charges under the Misuse of Drugs Act for as much as 79 kilograms and 779.6 grams of cannabis herbal material and 3 kilograms and 954.6 grams of cannabis resin; unlawful possession of firearms and ammunitions - a rifle 47 Rifle S/N 1953 EW4928 and one AK magazine of 30 bullets of 7.22mm each. They are also charged for possession of sea turtle meat of a total weight of 154.02 kilograms.

[61] These are grave charges. One may understand the anxiety of the Court to exercise caution in their case. They possess a yacht whereby the offences were committed. Their release will only be possible, on the most stringent conditions and if the trial which is set for September 2014 fails to take off, through no fault of their own.

[62] The appeal is allowed for appellant Kenneth Steve Esparon and Appellant Georges Michel. The Appeal is dismissed for Appellants Robert Billy Jean, Franky Clement Thelermont and Naddy Peter Delorie, with the qualification that it should be due for a reconsideration by the Supreme Court in the event their trial fails to take off on the day or days next fixed: i.e. between 16 September 16 to 29 October 2014.

F. MacGregor

President

S. B. Domah

Judge of Appeal

M. Twomey

Judge of Appeal

J. Msoffe

Jude of Appeal

Dated this 14 August 2014, Ile du Port, Mahe, Seychelles

IN THE SEYCHELLES COURT OF APPEAL

Kenneth Steve Esparon
Robert Billy Jean
Franky Clement Thelermont
Naddy Peter Delorie
Georges Michel

APPELLANTS

VS

The Republic

Respondent

SCA CR No: 1, 2 and 3 of 2014

BEFORE: MacGregor, Domah, Fernando, Twomey, Msoffe, JJA

COUNSEL: Mr. N. Gabriel for Appellant K. S. Esparon
Mrs. A. Amesbury for the Appellants R. B. Jean, F. C. Thelermont and N. P. Delorie
Mr. A. Juliette for Appellant G. Michel
Mr. David Esparon with Mr. H. Kumar for the Republic

Date of Hearing: 6th August 2014

Date of Judgment: 14th August 2014

DISSENTING JUDGMENT

A.F. T. FERNANDO. JA

1. This is an appeal against the Ruling of the Supreme Court given on the 3rd day of December 2013, whereby the Appellants along with two others were denied bail in a case where they are facing a varied set of charges for trafficking in controlled drugs, unlawful possession of firearms and ammunition, possession of turtle meat, conspiracy

to traffic and some for counseling others to commit the offence of trafficking, aiding and abetting others to commit the offence of unlawful possession of a firearm and ammunition and counseling others to commit the offence of possession of turtle meat. K.S. Esparon has only one charge against him, namely aiding and abetting others to commit the offence of unlawful possession of a firearm and ammunition. It is to be noted that the words 'ruling', 'decision', and 'order' are used interchangeably by courts in determinations pertaining to bail.

2. The Appellants save for G. Michel and K. Esparon have been in custody since 7th January 2013, while G. Michel and K. Esparon have been in custody since 25th February 2013. The case is fixed for hearing from the 16th of September to 29th of October 2014. Thus by the time the trial comes up for hearing the Appellants would have been in custody for almost for 21 months. It has also been the contention of the Appellants that the delay that will take place between their been remanded to custody and the eventual disposition of the case in 2015, will breach their constitutional right to a fair hearing within a reasonable time as guaranteed by article 19(1) of the constitution.
3. The delay to the hearing of the case can be attributed to several factors, the re-listing of the case before a Judge different from the one who was originally due to hear the case, amendment of the indictment to add two other accused, a second amendment by withdrawing charges against an accused under section 65 (a) of the Criminal Procedure Code, refusal by the Appellants to plead to the second amendment protesting against the withdrawal of the charges against the accused, filing of a constitutional petition by the Appellants against the exercise of prosecutorial discretion to withdraw charges against the accused, application by the Appellants to stay proceedings pending determination of the constitutional petition, an amendment for a third time by withdrawal of charges against another accused, illness of counsel and accused, accused changing counsel, continuation of other partly heard cases on the date this case was fixed for hearing, and the difficulty to find suitable dates for hearing in an otherwise busy cause list.
4. Before we can even proceed to the merits of this application we have to consider whether the Court of Appeal has the jurisdiction to entertain an appeal against a ruling made by the Supreme Court dismissing an application for release on bail of an accused pending trial before the Supreme Court. The same issue had come up before Justices MacGregor PJA, Hodoul and Domah JJ of this Court in the case of **Roy Beeharry VS The Republic SCA No: 11 of 2009** where the Attorney General argued that the Appellant in that case who had not been convicted for the offence of which he was facing charges is

not entitled to appeal against a decision remanding him to custody by the trial court, pending his trial. In Beeharry, Justice Domah stated:

“Suffice it to say that we are not persuaded by that argument. Our reasons, inter alia, are: (a) the Constitution is the principal source of law and any law inconsistent with the provision of the Constitution should be held void to the extent of the inconsistency; (b) section 342(1) of the Criminal Procedure Act as amended by Act 19 of 1998 applies to criminal cases and does not apply to a constitutional matter under section 18; and (c) bail is inherently a judicial matter and not a matter for the executive or the legislature which the latter in any way may take over from the Judiciary. A person who is denied bail has a right to appeal before the Court of Appeal subject to such conditions as the Court of Appeal may determine. In any case, the right to appeal is not limited to cases where there have been convictions or sentences. The Constitution provides in no uncertain terms that “there shall be a right of appeal to the Court of Appeal from a judgment, direction, declaration, decree, writ or order of the Supreme Court.” [underlining supplied]. It cannot be disputed that the denial of bail in this case was an order by the Supreme Court.”(verbatim)

5. In a Ruling delivered by a single Judge of this Court in **SCA NO CR 2 of 2013** in respect of another application by the very Appellants of this case the Court said:

“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.”

6. It is for this reason that this case originally listed to be heard before three Judges of this Court came to be heard by the full bench of the five Justices of Appeal.
7. The issue whether an accused who has not yet been convicted by the Supreme Court can appeal against a decision of the Supreme Court remanding him to custody during the pendency of his trial requires in my view a thorough examination of the provisions of articles 120(1)&(2) and 19(11) of the Constitution; sections 342(1)(6)&(4) of the Criminal Procedure Code (Cap 54) and the judgment of this Court in Treffe Finesse VS The Republic, dated the 19th of October 1995, Criminal Appeal No. 1 of 1995 which was the reason for the amendment to section 342 by the Criminal Procedure Code (Amendment) Act No. 14 of 1998.

8. **Article 120(1)** of the Constitution states:

“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.”(emphasis added)

Article 120(2) of the Constitution states:

“**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 added)

Article 19(11) states:

“**Every person convicted of an offence shall be entitled to an appeal** in accordance with law against the conviction, sentence and any order made on the conviction.”(emphasis added)

The Constitution thus provides in article 19(11) for a right of appeal to a person convicted of an offence, to appeal in accordance with law against the conviction, sentence and any order made on the conviction.” The Constitution does not confer any other appellate jurisdiction to the Court of Appeal as contemplated by article 120(1) in criminal matters. Further the appellate jurisdiction of the Court of Appeal has been subjected to article 19(11), which by implication restricts the right of appeal only to a convict. This can also be seen as an implied exception in the Constitution to the general right of appeal referred to in article 120(2).

9. The Act that otherwise provides an exception to the general right of appeal referred to in article 120(2) of the Constitution is the **Criminal Procedure Code (Cap 54)** and the relevant section is section 342 which deals with appeals from the Supreme Court to the Court of Appeal. Section 342 reads as follows:

“342 (1) Any person convicted on a trial held by the Supreme Court may appeal to the Court of Appeal –

(a) Against his conviction *other than on a conviction based on the person's own plea of guilty* –

- I. on any ground of appeal whenever the penalty awarded shall exceed six months' imprisonment or one thousand rupees;
- II. on any ground of appeal which involves a question of law alone;
- III. with the leave of such Court of Appeal or upon a certificate of the Judge who tried him that it is a fit case for appeal on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact or on any other ground which appears to the Court to be a sufficient ground of appeal;

(b) against the sentence passed on his conviction with the leave of such Court of Appeal unless the sentence is one fixed by law.

(2) Any person who has been dealt with by the Supreme Court under section 7 may appeal to the Court of Appeal as set out in paragraphs (a) and (b) of subsection (1) as if he had been both convicted and sentenced by the Supreme Court, whether the Supreme Court used its powers of revision or not.

(3) Irrespective of any appeal and whether a case be appealable or not, the Judge may reserve for the consideration of the Court of Appeal any question of law decided by him in the course of any trial. The question or questions so reserved shall be stated in the form of a case prepared and signed by the Judge himself, and such case shall be transmitted by him at the earliest convenient opportunity to such Court of Appeal:

Provided that nothing herein contained shall exempt the Judge from giving his own judgment on any such questions.

(4) The Judge may in his discretion, in any case in which an appeal to the Court of Appeal is filed or in any case in which a question of law has been reserved for the decision of such Court of Appeal, grant bail pending the hearing of such appeal or the decision of the case reserved.

(5) An application for bail under this section shall be by motion, supported by affidavit, served on the Attorney-General, and may be heard in Chambers.

(6) Except as is otherwise provided in this section, an appeal shall not lie against an acquittal, conviction, decision, declaration, decree, direction, order, writ or sentence passed by the Supreme Court.”(emphasis added)

The words “other than on a conviction based on the person’s own plea of guilty” in subsection 1(a) and subsection (6) were inserted by the Criminal Procedure Code (Amendment) Act No. 14 of 1998. It is in my view clear from section 342 that it is only a person convicted on a trial held by the Supreme Court who may appeal to the Court of Appeal.

10. The history behind the insertion of subsection (6) in section 342 is very relevant to understanding the issue whether the Court of Appeal has the jurisdiction to entertain an appeal against an interim order made by the Supreme Court, dismissing an application for release on bail of an accused pending trial before the Supreme Court. In the case of **Treffle Finesse VS The Republic CR Appeal No. 1 of 1995** the Court of Appeal by its judgment dated 19th of October 1995 considered whether the appellant in that case, Treffle Finesse, had a right of appeal against an interlocutory order of the Supreme Court before the trial in the Supreme court is concluded, namely against the ruling of the Supreme Court in a submission of no case to answer. The Court held:

“The general right of appeal conferred by Article 120(2) of the Constitution and the general jurisdiction of this Court to hear appeals from the Supreme Court conferred by Article 120(1) can only be restricted by the Constitution itself or by an Act which provides that there shall be no such jurisdiction or no such right. Counsel on behalf of the Republic contended that section 342(1) of the Criminal Procedure Code restricts the general right of appeal conferred by the Constitution.....

It is evident that while section 342(1) of the Code provides for appeal from a decision of the Supreme Court either as of right or by leave, its provisions are not at all exclusionary. The words “Except as this Constitution or an Act otherwise provides” envisage provisions which are expressly exclusionary and which exclude a right of appeal. Where the Constitution confers a right such right can only be taken away, where the Constitution so permits, by statutory provisions which are expressly and manifestly exclusionary. Section 342(2) [*sic, should be (1)*] of the Code which provides for a right of appeal cannot be interpreted as provision which excludes a right of appeal where the Constitution has conferred such right. It would have been a different matter if the Criminal Procedure Code had provided that no appeal shall lie to the Court of Appeal from a **decision** of the Supreme Court in any criminal cause or matter except as provided by the Code. To achieve the result which the Republic urges on this appeal we

are of the view that there will be need to amend the Criminal Procedure Code in the line suggested above."(emphasis added)

11. I am constrained to think that it is in view of this suggestion by the Court of Appeal that sub-section (6) was inserted to section 342 of the Criminal Procedure Code by the Criminal Procedure Code (Amendment) Act No. 14 of 1998. The wording in section 342 (6) "Except as is otherwise provided in this section, an appeal shall not lie against an acquittal, conviction, decision, declaration, decree, direction, order, writ or sentence passed by the Supreme Court" is entirely in line with what was suggested by the Court of Appeal.
12. In the case of **Attorney General V Tan Boon Pou 1 of 2005** this Court held, in a case where the Attorney General sought to review, an order of acquittal by the Supreme Court: "Thus, we are now at a point where the Legislature duly stepped in as advised by this Court and decisively decreed in its own wisdom and in plain and unambiguous language that in terms of section 342 (6) of the Code, an appeal shall not lie, inter alia, against an acquittal." The Court went on to state: "the conclusion is inescapable, in my judgment, that **this Court has no original review jurisdiction over the Supreme Court decisions.** As a creature of statute, it has no jurisdiction beyond that which is conferred on it by statute either expressly or by necessary implication". (emphasis added)
13. It has therefore become necessary to have a re-look at the reasoning in Beeharry referred to at paragraph 4 above. (a) Since the amendment to the Criminal Procedure Code is in accordance with the wording "Except as this Constitution or an Act otherwise provides" in article 120(2) of the Constitution and was made in line with the suggestion of the Court of Appeal in Treffe Finesse, it cannot be said that the Criminal Procedure Code (Amendment) Act No. 14 of 1998 is inconsistent with article 120(2) as suggested in Beeharry. (b) This is an appeal from an order of the Supreme Court refusing to enlarge the accused on bail in a criminal case. It is not an appeal from a judgment of the Constitutional Court in respect of an application to it under article 46(1) challenging an order of the Supreme Court refusing to enlarge an accused on bail. Thus section 342 has application to this case. Provisions as to bail are contained in sections 100 to 110, 327, and 342(4) & (5) of the Criminal Procedure Code and the provisions pertaining to enlarging an accused on bail or remanding him to custody before or during the hearing of a case are contained in sections 179 and 195 of the Criminal Procedure Code and essentially matters arising in criminal cases. (c) It is an anomaly to state that by section 342(6) of the Criminal Procedure Code the Executive or the Legislature has taken over from the Judiciary, 'bail', which is inherently a judicial matter. Bail is undoubtedly a

judicial matter and not a matter for the executive or the legislature; and section 342 does not seek to take it away from the Judiciary. In fact it is the Judiciary, the Supreme Court or the Magistrates Court, that is vested with the authority of deciding and that decides whether an accused before or during the hearing of a case before it, should be enlarged on bail or remanded to custody. The judicial power of Seychelles in accordance with article 119 of the Constitution is vested in the Supreme Court and Magistrate's Court just as much with the Court of Appeal and in view of the provisions of article 125 the Supreme Court has original jurisdiction in constitutional, criminal and civil matters.

14. It is the Supreme Court or the Magistrates Court that is in the best position to determine whether an accused facing trial before it should be enlarged on bail or not. In **Roy Beeharry VS The Republic** (supra) Justice Domah stated:

“(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 the trial; (d) the trial court would be able to directly examine the defendant to gauge his plight. The appellate court is bereft of the many advantages which a trial court has, proceeding as it does from a record of proceedings and on a session by session basis.” This gives justification to the argument that an order of the Supreme Court pertaining to bail during the pendency of a trial shall not be appealed against and gives credence to the application of section 342(6) of the Criminal Procedure Code in regard to decisions pertaining to bail made by the Supreme Court.

15. There is however an important issue which had not been considered in Beeharry, namely, in the event of the bail conditions imposed by the Court of Appeal been breached by an accused who has been enlarged on bail by the Court of Appeal, before which court should he be produced for further orders? Is it the Supreme Court or the Court of Appeal which made the order and only sits “on a session by session basis”? This brings us to the issue of two courts, one exercising original jurisdiction and the other appellate jurisdiction, making orders even before the hearing is concluded before the Supreme Court in respect of the same case. Even in respect of civil matters one could appeal against an interlocutory order of the Supreme Court only if the interlocutory order disposes so substantially all the matters in issue as to leave only subordinate or ancillary matters for decision. If we are to go along with the judgment in Beeharry even the Attorney General will have a right of appeal against an order of the Supreme Court releasing an accused on bail.

16. In Beeharry the Court went on to state: “The Constitution provides in no uncertain terms that “there shall be a right of appeal to the Court of Appeal from a judgment, direction, declaration, decree, writ or order of the Supreme Court.” [underlining supplied]. There is no doubt that a remand to custody after denying bail or enlarging a person on bail, is a ‘decision’ or ‘order’ of the Supreme Court, which is caught up by the provisions of section 342(6) of the Criminal Procedure Code. In Beeharry it was categorically stated that “It cannot be disputed that the denial of bail in this case was an order by the Supreme Court.” In quoting article 120(2) of the Constitution the Court erred in omitting to make reference to the words “Except as this Constitution or an Act otherwise provides” which are absolutely necessary for and govern the interpretation of that article. Further in Beeharry it appears that the provisions of section 342(6) were overlooked as there is no reference to it in the judgment.
17. The issue we have to grapple with in this case is not whether an accused pending trial before the Supreme Court has a fundamental right as guaranteed in the Constitution to be enlarged on bail but whether the Court of Appeal has the jurisdiction to entertain an appeal from an order of the Supreme Court refusing to enlarge an accused on bail pending trial before it, and who has not been convicted. However lofty the right to bail may be, a court in order to consider it should have the jurisdiction. Translated from the Latin, “jurisdiction” means “the power to speak the law”. Jurisdiction denotes the constitutionally mandated authority of a court to seize and determine causes according to law and to impose punishments. Thus, it is axiomatic that jurisdiction is granted by law. Jurisdiction cannot be unilaterally or arbitrarily assumed by a court or created by the consent of parties to a dispute requiring adjudication. In **Halsbury, 3rd edition Vol 9 pp 350-51** ‘Jurisdiction’ has been defined to mean”.....the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means” (emphasis added). In countries like in the Seychelles where we have a written Constitution founded on the principle of separation of powers and with the legislative power vested in the National Assembly under article 85 the concept of a court possessing “inherent jurisdiction” becomes amorphous, especially because the jurisdiction of the Court of Appeal has been specifically set out in article 120. The only exception to this is where an Act confers on the Court power to make subsidiary legislation as provided for in article 89 and the powers of the President of the Court of Appeal and the Chief Justice to make rules respectively for the Court of Appeal and the Supreme Court. Thus the idea of an auxiliary stream of jurisdiction existing in

parallel to constitutionally authorised sources of jurisdiction seems to cut across the parameter of Article 85.

18. There lies a distinction between “inherent jurisdiction” and “inherent powers” of a court. The two concepts are quite distinct. Inherent jurisdiction refers to a jurisdiction granted by law to a court to hear and determine a matter. By contrast, inherent powers have arisen to consummate imperfectly constituted judicial power. It was stated in **Axiom Rolle PRP Valuation Services Ltd v. Rahul Ramesh Kapadia and others NZAC, 43/06, para. 24** that an inherent power is an entitlement in law to use a procedural tool to hear and decide a cause of action in the Court within jurisdiction. An inherent power is exercisable by all courts. It is a power which is incidental and ancillary to the primary jurisdiction. A court invokes its inherent power in order to fulfill its constitutionally-ordained function as a court of law. Inherent powers attach where a court has already been granted jurisdiction. Inherent powers necessarily accrue to a court by virtue of the very nature of its judicial function or its constitutional role in the administration of justice. Thus, inherent powers are part of a court’s resources; they are a necessary addition to the judicial function, facilitating the proper functioning of courts within the framework of jurisdiction granted to it by statute. Thus, whilst inherent jurisdiction is substantive, inherent powers are procedural.

19. Inherent jurisdiction is a doctrine that a superior court has the jurisdiction to hear any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal. According to Canadian jurisprudence, the key restriction on the application of inherent jurisdiction is that the doctrine cannot be used to override an existing statute or rule. The clearest articulation of such restriction is set out in the Supreme Court of Canada decision in **College Housing Co-operative Ltd. VS Baxter Student Housing Ltd. (1976) 2 SCR 475** where the Court stated that a court cannot negate the unambiguous expression of legislative will and further held that:

“Inherent jurisdiction cannot, of course be exercised so as to conflict with statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.”

Murray CJ in the Irish case of **G. McG v. D.V, (No.2) [2000] 4 I.R. 1**, makes the following observation in relation to the circumstance where a particular jurisdiction is exclusively controlled by statute law:

“Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders.” (emphasis by me). This statement is very much applicable in the Seychelles context as the jurisdiction of our courts is expressly and completely delineated by the Constitution and statute law.

20. In **re Racal Communications Ltd [1981] AC 374 (HL)** the House of Lords had to interpret section 31 (1) of the Supreme Court of Judicature (Consolidation) Act 1925 which restricted the right of appeal conferred on the Supreme Court by section 27(1) of the said Act. Section 31 (1) provided: ““No appeal shall lie ... (d) from the decision of the High Court or of any judge thereof where it is provided by any Act that the decision of any court or judge, the jurisdiction of which or of whom is now vested in the High Court, is to be final ...” The said section 31(1) is somewhat similar to our section 342(6) of the Criminal Procedure Code. In his leading speech, Lord Diplock said: “The jurisdiction of the Court of Appeal is wholly statutory; it is appellate only. The court has no original jurisdiction. It has no jurisdiction itself to entertain any original application for judicial review; it has appellate jurisdiction over judgments and orders of the High Court made by that court on applications for judicial review.” And the learned Law Lord also made the following remarks: “Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court; and if, as in the instant case, the statute provides that the judge’s decision shall not be appealable, they cannot be corrected at all.” (emphasis added)

Lord Diplock’s statement pertaining to the jurisdiction of the Court of Appeal is an apt description of the jurisdiction of the Court of Appeal of Seychelles.

21. I am of the view that the Court of Appeal in view of the provisions of sections 342(1) and (6) does not have the jurisdiction to entertain an appeal from an order of the Supreme Court refusing to enlarge an accused on bail pending trial before it and who has not yet been convicted by the Supreme Court. A similar issue as to the jurisdiction of the courts of Seychelles arose when our courts had to consider dealing with piracy cases committed outside our territorial waters. Prior to the amendment to the Penal Code in 2010 the jurisdiction of the courts of Seychelles was one of a territorial jurisdiction. The fact that piracy is a crime against humanity was not sufficient cause to invoke the principle of universal jurisdiction and this necessitated an amendment to the Penal Code

to give our courts jurisdiction to try offences of piracy committed outside the territory of Seychelles.

22. It is prudent to look into the issue whether an accused person has a fundamental right to be released on bail as per the provisions of article 18(7) which deals with the right to liberty, once he has been charged before the court and trial dates are fixed and a fundamental right to appeal against an order of the Supreme Court denying bail. It is to be noted that the right to be enlarged on bail is not an unqualified right, like some other rights set out in Chapter III of the Constitution, and is based on a determination made by court on a consideration of the criteria laid down in article 18(7) (a) to (f). Once charged and an accused has taken his plea another corresponding right comes into application, namely the right to a hearing within a reasonable time under article 19(1). To ensure that an accused person gets a “.....hearing within a reasonable time” then becomes an obligation on the trial court. Thus a trial court in entertaining an application for bail pending hearing will have to balance the two rights and ensure that the accused will appear for the trial. Article 19 which sets out the right to a fair hearing provides for a right of appeal at sub-article (11) thus: “Every person convicted of an offence shall be entitled to appeal in accordance with law against the conviction, sentence and any order made on the conviction” (emphasis added). It is therefore clear that a right to appeal against an order of the Supreme Court denying bail during a hearing has not been specifically enshrined as a fundamental right in the Constitution. We must also bear in mind the maxim ‘*Expressio Unis Est Exclusio Alterius*’ which means the express mention of one thing implies the exclusion of another and which is a product of logic and common sense.

23. Counsel for the Appellants argued before us that this Court has all the authority, jurisdiction and power of the Supreme Court in view of the provisions of article 120(3) of the Constitution and thus have the jurisdiction to entertain this appeal. Article 120(3) states:

“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 added).

The short answer to this proposition is that such authority, jurisdiction and power exists only when this Court is seized with its ‘appellate jurisdiction’; and when it does not possess such jurisdiction, it cannot exercise any powers of the Supreme Court.

24. It was sought to be argued at the hearing before us that orders pertaining to bail do not come within the purview of article 120(2) of the Constitution as bail is so fundamental a right and also a matter that will not attract the application of section 342(6) of the Criminal Procedure Code. The argument was to the effect that an order pertaining to bail has to be looked at differently from other orders made during a criminal trial which would result in stopping a criminal trial midstream. If that be the case 'prohibition orders' made under section 31 of the Misuse of Drugs Act and 'restraint orders' made under section 26 of the Anti-Money Laundering Act, prohibiting a person charged with an offence under the said Acts from dealing with any realisable property also fall into the category of orders that will not result in stopping a criminal trial midstream. It is to be noted that prohibition and restraint orders necessarily infringe on the fundamental right to be treated with dignity, which is an unqualified right and the right to property which are enshrined not only in the Constitution but set out emphatically in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It is my view that granting or refusal of bail certainly is one necessarily involving the provisions of the Criminal Procedure Code. We do not have a separate Bail Act unlike in other jurisdictions and all provisions in relation to the granting or refusal of bail are contained in the Criminal Procedure Code.
25. Therefore I am of the view that we cannot give a restrictive meaning to the words 'order' or 'decision' in article 120(2) of the Constitution or section 342(6) of the criminal Procedure Code and state that orders in relation to bail are excluded from its provisions. If that is how the drafters of the Constitution meant it to be, I am certain they would have specifically provided for it under appealable orders in article 19(11) of the Constitution referred to earlier or excluded it specifically from the restrictions that could be placed on appealable orders in article 120(2) or from the application of the provisions of section 342(6) of the Criminal Procedure Code. It would also lead to uncertainty if the courts begin to interpret what type of determinations may be categorized as 'decisions' or 'orders' of the Supreme Court as envisaged by article 120(2) of the Constitution and section 342(6) of the Criminal Procedure Code. In my view the drafters of the Constitution had decided to give a free hand to the Legislature in whom the legislative power of Seychelles is vested to exclude without qualification, any 'decisions' or 'orders' of the Supreme Court from the purview of appealable orders. In **Abel V Lee (1871) LR 6 CP 365 at 371 Willes J** said: "It is not competent to a Judge to modify the language of an Act in order to bring it in accordance with his views of what is right or reasonable". In **R V Mausel (1881) 23 QBD 29 Lord Coleridge** stated that "It was the business of the courts to see what Parliament had said, instead of reading into an

Act what ought to have been said.” In **Daya Nand Mishra V State of Bihar (1992) 2 Pat LJ 716** it was held: that “The court cannot, while applying a particular statutory provision, stretch it to embrace cases, which it was never intended to govern.” In **Tara Dutta V State of Bengal 79 CWN 996** it was held: that “In interpreting a statute, the court cannot fill in gaps or rectify defects.” In **Ravichandran K V Metropolitan Transport Corporation Ltd, (2004) 3 LLJ Mad 152** it was held: “Undoubtedly, if there is a defect or omission in the words used by the legislature, the court would not go to its aid to correct or make up the deficiency. The court would not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result.” In **Kashinath Baba Asbe V State of Maharashtra (2001) AIHC 1271 (Bom)** it was held: “The court cannot aid the legislature’s defective phrasing of an Act, or add and mend, and by construction, make up deficiencies which are there.” In **Dental Council of India & Anor V Hari Prakash & Ors (2001) 8 SC 61** it was held: “What is not included by the legislature cannot be undone by the court by adopting the principle of purposive interpretation.”

26. This Court may, in its discretion, in a case in where an appeal against a conviction by the Supreme Court is filed, grant bail pending the hearing of such appeal. This is similar to the position in the UK. In the UK “The Court of Appeal has jurisdiction to grant bail to a person who has served notice of appeal or notice of application for leave to appeal against his conviction and/or sentence in the Crown Court (**Criminal Appeal Act 1968, s. 19**). The Court of Appeal also has power to bail a person who is appealing from it to the House of Lords (s.36).” See **Chapter 7.4 Blackstone’s Criminal Practice, 2010**.

27. It was also sought to be argued that orders pertaining to bail were ‘administrative’ and not ‘judicial’ orders and thus did not come within the purview of the word ‘order’ in article 120(2) of the Constitution or section 342(6) of the Criminal Procedure Code. This I believe is totally misconceived. When the issue of bail is decided under article 18(7) of the Constitution or under sections 179 or 195 of the Criminal Procedure Code during the pendency of a trial the Judge makes a judicial determination. It is stated in **N.S. Bindra’s Interpretation of Statutes 10th Edition**:

“.....Unlike France, with its droit dministrative (administrative laws) and its Concild Etat (State Council) to administer it, administrative laws and administrative courts find no place in the Constitution of Great Britain or of India.....” This statement applies to Seychelles as well. Bindra goes on to state: “Decisions which are purely administrative

stand on a wholly different footing from quasi judicial as well as from judicial decisions and must be distinguished accordingly.....In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting are left entirely to his discretion....”

In **Black’s Law Dictionary 9th edition** administrative order has been defined as: “An order issued by a government agency after an adjudicatory hearing.”

We are aware that the grounds upon which an administrative decision is quashed on an application for judicial review are different from the quashing of a judicial decision on appeal. One cannot invoke the right of appeal under article 120(2) of the Constitution which necessarily deals with ‘judicial’ decisions and at the same time claim that what is sought to be appealed against is an ‘administrative’ decision. It is my view that the Supreme Court does not make any ‘administrative’ orders in hearing cases.

28. I am very much concerned of the fact that there has been an inordinate delay in commencing the trial against the Appellants in this case and especially K.S. Esparon who has only one charge against him, namely aiding and abetting others to commit the offence of unlawful possession of a firearm and ammunition. I am of the view that If the Court of Appeal had the jurisdiction to entertain an appeal against an order of the Supreme Court on bail this would have been a fit case to enlarge all the Appellants on bail pending their trial taking into consideration the inordinate delay to commence the trial and the peculiar circumstances of this case. But this cannot grant us a power to assume a jurisdiction that has been specifically excluded from us by the Criminal Procedure Code, in accordance with article 120(2) of the Constitution. To do so would amount to going against the Constitution itself and the doctrine of separation of powers ingrained therein and usurping the power of the Legislature which is vested in the National Assembly.
29. It is to be noted that an order remanding an accused to custody pending trial is valid only for a period of 15 days in view of the provisions of section 179 and 195 of the Criminal Procedure Code and at the end of such period the order for remand lapses unless a fresh order for remand is made. This Court cannot act on the assumption that the Supreme Court will always remand an accused person pending trial before it, at the end of every 15 days, without good cause as urged by the Appellants’ Counsel.

30. I have also considered what remedy then is available to an accused in the event of a grave or manifest injustice committed by the Supreme Court in refusing to enlarge him on bail in view of the provisions of section 342(6) of the Criminal Procedure Code.

Article 19(13) provides:

“Every person convicted of an offence and who has suffered punishment as a result of the conviction shall, if it is subsequently shown that there has been a serious miscarriage of justice, be entitled to be compensated by the State according to law.”

Under this provision the period spent on remand in respect of the offence charged especially where there has been a delay in concluding the hearing will certainly be taken into consideration by the Constitutional Court or the appellate court hearing the case.

Article 18(4) provides:

“Where a person is convicted of any offence, any period which the person has spent in custody in respect of the offence shall be taken into account by the court in imposing any sentence of imprisonment for the offence.”

There is no specific provision in the Constitution to cater to a situation where a person who has been acquitted by a court after a long period of remand pending his trial. But where there has been an inordinate delay in concluding his hearing he certainly will be able to move the Constitutional Court under article 46 (1) of the Constitution, for breach of his right “to a fair hearing within a reasonable time” enshrined in article 19(1) and seek compensation for the damages suffered under article 46(5) (e) of the Constitution. Even an appellate court which allows his appeal and acquits him can grant him compensation for breach of his right to a fair hearing within a reasonable time where there has been a serious miscarriage of justice. In the **Attorney General’s Reference case [2004] 2 AC 72**, in the context of the provision of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which makes reference to a “fair and public hearing within a reasonable time”, Lord Bingham, with whom the majority agreed said:

“.....If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant” (emphasis added).

31. I have not made a determination on the second prayer of the Amended Notice of Appeal filed on the date of the hearing of this appeal which sought from this Court a “Stay of the proceedings/dismissal of the case” because this was not a matter canvassed before the Supreme Court and there is no determination of the Supreme Court on this matter.

32. I therefore dismiss this appeal.

A.F. T. Fernando
Justice of Appeal

Dated this 14th day of August 2014, Victoria, Seychelles

IN THE SEYCHELLES COURT OF APPEAL

KENNETH STEVE ESPARON

APPELLANT

V/S

THE REPUBLIC
RESPONDENT

SCA CR No.1 of 2014

ROBERT BILLY JEAN
FRANKY CLEMENT THELERMONT
NADDY PETER DELORIE
APPELLANTS

V/S

THE REPUBLIC
RESPONDENT

SCA CR No. 2 of 2014

GEORGES MICHEL

APPELLANT

V/S

THE REPUBLIC
RESPONDENT

SCA CR No. 3 of 2014

MSOFFE, J.A.

I have read and signed the Judgment of my brother Domah, J.A. I wanted to add the following. A bail decision is a judicial one and it is at the discretion of the court. However, much as it is a judicial decision, in its nature and scope, it is also an

administrative decision in the sense that one of its main purposes is to ensure that the accused person will not run away from, or rather escape, the jurisdiction. It is intended to ensure that he/she will always appear in court as when required to do so. It is different from other interlocutory decisions in a case such as no case to answer, refusal to admit a document in evidence, etc. By enacting section 342(6), I do not think, the legislature in its wisdom, intended to deny courts the exercise of the discretion and the right of appeal emanating therefrom.

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J. H. Msoffe

JUSTICE OF APPEAL