

IN THE SEYCHELLES COURT OF APPEAL

Before: Robinson J.A

**Criminal Appeal CR SCA MA 16/2017
(arising in CR SCA 10/2016)**

Trevor Zialor

Applicant

Versus

The Republic

Respondent

Heard: 10 October 2017

Counsel: Mr. John Renaud for the Applicant

Mr. Khalyaan Karunakaran for the Respondent

Delivered: 17 October 2017

ORDER ON MOTION

F. Robinson (J.A)

[1] THE BACKGROUND FACTS

[2] Appellant was convicted on 7 April, 2016, for sexual assault contrary to section 130 (1) of the Penal Code read with section 130 (2) (d) of the Penal Code and punishable under section 130 (3) of the same Act. He was sentenced to a term of eleven (11) years imprisonment on 24 May, 2016.

- [3] Appellant's notice of appeal, dated 31 May, 2016, was lodged with the Registrar of the Supreme Court on 3 June, 2016, (hereinafter referred to as the "*Notice of Appeal*").
- [4] The Notice of Appeal states that the appeal is against sentence only.
- [5] On 23 August, 2016, learned counsel lodged an amended notice of appeal, dated 19 August, 2016, with the Assistant Registrar of the Court of Appeal of Seychelles. The amended notice of appeal sets out six (6) grounds of appeal against conviction, in addition to the ground of appeal against sentence.
- [6] The Court of Appeal of Seychelles comprising F. Macgregor PCA, A.F.T. Fernando JA and B. Renaud JA, heard the matter on 19 September, 2017. The Court of Appeal of Seychelles made an order for Appellant to seek leave, of the Court of Appeal of Seychelles, before Appellant will be permitted to rely on any grounds of appeal other than those set out in the notice of appeal. The said order required Appellant to file an application, supported by an affidavit, "*showing cause why the Appellant is out of time and why the Appellant should be given leave to amend the grounds of appeal.*" (Proceedings of 19 September, 2017, at 10:00 a.m. p 3)".
- [7] **THE PRESENT PROCEEDINGS**
- [8] On 29 September, 2017, learned counsel lodged notice of motion, supported by an affidavit, of even date, for leave to amend the Notice of Appeal, with the Assistant Registrar of the Court of Appeal of Seychelles. The affidavit proceeds to allege as follows —

"I, John M R RENAUD OF Allied Building, Francis Rachel Street, Victoria make oath and say as follows:-

1. *That I am the Attorney for the Applicant and I am duly authorized to make this affidavit on his behalf. The matters stated in this affidavit are based on my personal knowledge derived from my instructions in the course of conduct of the proceedings in this matter.*

2. *That the Applicant filed a Notice of Appeal against sentence on the 31st May 2016 in case number CR 10 OF 2016.*
3. *That the said Notice of Appeal was later amended by Counsel for the Applicant on the 26th day of August 2016 to include an Appeal against conviction together with an Appeal against sentence.*
4. *That I am further instructed by my client to seek the leave of the court to amend the Notice of Appeal filed by him on the 31st day of May 2016.*
5. *That I aver that the Notice and Memorandum of Appeal shall remain as the one filed on the 19th of August 2016 by Counsel.*
6. *That I pray the Honourable Court to grant me leave to amend the grounds of Appeal as per the Notice of Appeal filed on the 19th day of August 2016."*

[9] At the hearing of the motion for leave to amend the Notice of Appeal learned counsel for Respondent did not oppose the said motion.

[10] I read section 18 (8) of the Seychelles Court of Appeal Rules, 2005, as amended —

" 18 (8) The appellant shall not without leave of the Court be permitted, on the hearing of that appeal, to rely on any grounds of appeal other than those set forth in the notice of appeal:

Provided that nothing in this sub-rule shall restrict the power of the Court to make such order as the justice of the case may require."

[11] I have considered the provision of the law set out above and the affidavit made by learned counsel in light of the submissions of learned counsel.

[12] Learned counsel states that he has the authority to swear to the affidavit on behalf of Appellant. I note that no such authority is exhibited to the affidavit. Any document to be used in combination with an affidavit must be exhibited to the affidavit. (See *In Re*

Hinchliffe, A Person of Unsound Mind, Deceased, Court of Appeal, 5 November 1894 [1895] 1 Ch. 117). In view of that finding, I will not dwell further on this point.

[13] Hence, the issue that I have to decide relates to the propriety of the affidavit, in support of the motion, which was sworn by learned counsel on behalf of Appellant. It is my view that learned counsel, while representing Appellant before the court, cannot at the same time act as his witness. For that reason, I cannot receive the affidavit.

[14] I also need to mention that I have not decided the merits of the application. At a glance I would be hesitant to do so because the justice of the case requires that the affidavit be first put right.

[15] For the reasons stated above, I find that there is no valid application before me. I make the following orders.

[16] **ORDERS**

[17] I dismiss the application.

[18] Appellant may lodge fresh application with the Assistant Registrar of the Court of Appeal of Seychelles.

Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 October 2017