

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: A.Fernando (J.A), F. Robinson (J.A) , B. Renaud (J.A)]**

**Criminal Appeal SCA 15/2016**

**Appeal from Tribunal Decision SRV No. 15/2016**

**Arising from Supreme Court Decision CO 46 /2013)**

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Eric Njue

Appellant

Versus

The Republic

Respondent

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Heard: 27 November 2017

Counsel: Mr. A. Juliette for the Appellant

Mr. A. Subramaniam for the Respondent

Delivered: 07 December 2017

**JUDGMENT**

**F. Robinson (J.A)**

**1. THE BACKGROUND FACTS**

2. The facts which have led to this appeal are straightforward. The Supreme Court of Seychelles (hereinafter the "Supreme Court"), on 24 October, 2014, convicted the Appellant (then Accused) on his own plea of guilty of the offence of possession of a controlled drug of Class A contrary to section 6 (a) of the Misuse of Drugs Act, 1990, on an amended charge of possession. On 24 October, 2014, before the same Court, the Appellant was sentenced to a term of 5 years 4 months imprisonment with an order for the time spent in custody to be taken into account. The Appellant appealed to the Court of Appeal of Seychelles (hereinafter the "Court of Appeal") Criminal Appeal SCA42/2014

against the sentence on the ground that it is harsh and excessive in all the circumstances of the case, and that it is inconsistent and in disparity with other sentences for similar offences, pursuant to section 342 (1) (a) (iii) of the Criminal Procedure Code. On 22 April, 2016, the Court of Appeal of Seychelles comprising of F. MacGregor PCA, A. Fernando and J. Msoffe JJA maintained the sentence and dismissed the appeal.

3. On 1 June, 2016, the Misuse of Drugs Act, 2016, which repealed the Misuse of Drugs Act, 1990, as amended, came into force. The Misuse of Drugs Act, 2016, is hereinafter referred to as the "Misuse of Drugs Act". Section 51 (1) of the Misuse of Drugs Act empowered the Chief Justice, in consultation with the Minister responsible for Home Affairs, to constitute a Sentence Review Tribunal (hereinafter referred to as the "Tribunal") consisting of one or more judicial officers.

4. Section 51 (2) of the Misuse of Drugs Act delineates the jurisdiction of the Tribunal as follows—

"[a]n offender, who is serving a sentence of imprisonment under the repealed Misuse of Drugs Act, may apply, under section 51 (2) of the Act, for the review of the outstanding portion of the sentence in accordance with the Act".

5. A decision on review, under the provisions of section 51 of the Misuse of Drugs Act, may be appealed by either party to the Court of Appeal (section 51 (10) of the Act).

6. On 30 June, 2016, the Appellant made application to the Tribunal for the review of the outstanding portion of his sentence in accordance with section 51 (2) of the Misuse of Drugs Act. On 5 August, 2016, the Tribunal decided not to entertain his application and dismissed it. Pursuant to the Tribunal's decision, the Appellant has the right to appeal its decision within 14 days of the date of the said decision to the Court of Appeal. The Appellant has appealed against the Tribunal's decision and in his Notice of Appeal, dated 8 August, 2016, filed with the Supreme Court, he has filed 3 Grounds of Appeal, as follows.

7. **THE GROUNDS OF APPEAL**

- "(i) Quantity is below aggravating amount.
- (ii) Cooperation throughout investigation.
- (iii) Was a witness for the prosecution".

8. **THE ISSUE IN CONTROVERSY**

9. The interpretation of the background facts and the provisions of the law highlight an important issue: Whether or not the Tribunal has the jurisdiction to review the outstanding portion of the Appellant's sentence, which sentence was maintained by the Court of Appeal, in the exercise of its appellate jurisdiction?
10. I have to mention that I have considerable sympathy with the Tribunal. I add in passing that, "where a point goes to the jurisdiction of any court or tribunal, it is the duty of the Judge or tribunal to draw attention to, and decide, the jurisdictional issue, even though it has not been raised by any of the parties". (24 Halsbury's Laws of England (5th Edn) (2010) para 625).
11. At the appeal both Counsel were apprised of and were invited to address the Court on the issue.
12. The issue in the present appeal briefly calls for the interpretation of the Constitution of the Republic of Seychelles (hereinafter referred to as the "Constitution") on the issue of the jurisdiction of the Court of Appeal, the Supreme Court vis-à-vis that of the subordinate courts and tribunals.

13. **THE ANALYSIS**

14. Halsbury's Laws of England (5th Edn) (2010) para 623) defines —

"jurisdiction' as 'the authority which a court has to decide matters that are litigated before it or to take cognisance 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 similar means.

If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the claims and matters of which the particular court has cognisance, or as to the area over which the jurisdiction extends, or it may partake of both these characteristics...".

15. Also material to the meaning of jurisdiction are the remarks made in *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 408 per Isaacs J; *Braun v R* (1997) 112 NTR 31 at 39, per Kearney and Thomas JJ —

"The "jurisdiction" of a court is its *authority* to take cognisance of, and to decide, proceedings brought before it; its jurisdiction delimits its area of competence and authority. The concept is one of authority or capacity; and the essence of an inquiry into "jurisdiction" in this sense is as to its limits — whether a court has power to hear and determine the particular case".

16. In considering the issue, the starting point lies in Articles 119 (1) and 119 (2), 120 (1), 125 and 137 of the Constitution.
17. Article 119 of the Constitution provides —

"Judicial power of Seychelles

119 (1) The judicial power of Seychelles shall be vested in the Judiciary which shall consist of —



- (a) the Court of Appeal of Seychelles;
- (b) the Supreme Court of Seychelles; and
- (c) such other subordinate courts or tribunals established pursuant to article 137.

(2) The Judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles.

18. Article 137 of the Constitution, so far as relevant, provides —

" 137 Acts may —

- (a) provide for the establishment of courts or tribunals which are subordinate to the Court of Appeal and Supreme Court, in this article referred to as "subordinate courts and tribunals";

...

- (c) define or provide for the definition of the jurisdiction and powers of the subordinate courts and tribunals; ...".

Schedule 2 enabled by Article 6 of the Constitution defines "Act" to mean "a law made pursuant to article 86 [of the Constitution]".

19. Article 119 of the Constitution vests the judicial power of Seychelles in the Court of Appeal, the Supreme Court and such other subordinate courts or tribunals established by an Act, in accordance with Article 137 of the Constitution. In accordance with Article 137 of the Constitution, the National Assembly may establish courts or tribunals which are subordinate to the Court of Appeal and the Supreme Court and define or provide for the definition of the jurisdiction and powers of the subordinate courts and tribunals. Article 137 (a) of the Constitution refers to "establishment of courts or tribunals which are

subordinate to the Court of Appeal and Supreme Court" in the said Article as "subordinate courts and tribunals". Emphasis is mine.

20. The jurisdiction of the Court of Appeal is appellate and is set out in Article 120 (1) of the Constitution —

"Establishment and jurisdiction of Court of Appeal

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.". Emphasis is mine

Article 120 (1) of the Constitution makes it clear that the Court of Appeal is the court of final appeal.

21. Under Article 125 of the Constitution, the Supreme Court has original and supervisory jurisdiction and such other original, appellate and other jurisdiction as may be conferred on it by or under an Act.

"125 (1) There shall be a Supreme Court which shall, in addition to its jurisdiction and powers conferred by this Constitution, have —

- (a) original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution;
- (a) original jurisdiction in civil and criminal matters;
- (b) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority and, in this connection, shall

have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction; and

- (c) such other original, appellate and other jurisdiction as may be conferred on it by or under an Act."

22. It is noteworthy that the President of Seychelles, after obtaining the advice of the advisory committee on the power of pardon, may exercise his power of pardon under Article 60 (1) (a) of the Constitution as follows —

- (a) grant to any person convicted of any offence a pardon, either free or subject to lawful conditions;
- (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
- (c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; or
- (d) remit the whole or any part of the punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Republic on account of any offence.

23. 24 Halsbury's Laws of England (5th Edn) (2010) para (619), states the distinctions between superior and inferior courts: I have mentioned the following —

"the chief distinctions between superior and inferior courts are found in connection with jurisdiction. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to

be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular court.

An objection to the jurisdiction of one of the superior courts of general jurisdiction must show what other court has jurisdiction, so as to make it clear that the exercise by the superior court of its general jurisdiction is unnecessary. The High Court, for example, is a court of universal jurisdiction and superintendence in certain classes of claims, and cannot be deprived of its ascendancy by showing that some other court could have entertained the particular claim. In an inferior court, other than a county court, unless the proceedings show on their face that the cause of action arose within its jurisdiction, the claim cannot be maintained, and even in inferior courts with a local limit of jurisdiction it must appear that such limit is not being exceeded."

It is my view that although the above reference is to English courts the principle would directly apply to the Court of Appeal and the Supreme Court. In the case of *Attorney General v Tan Boon Pou* (1 of 2005) [2005] SCCA 21 (24 November 2005) the Court of Appeal stressed the point that the "Supreme Court is not an inferior court. Nor is it a court of limited jurisdiction...".

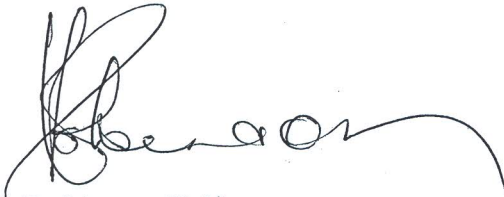
24. The framers of the Constitution have provided for the establishment by law of courts or tribunals, which are subordinate to the Court of Appeal and the Supreme Court. It follows, therefore, that the Court of Appeal and the Supreme Court are superior to such courts or tribunals established by law. It is such subordinate courts or tribunals that are subjected to the jurisdiction of the Court of Appeal and the Supreme Court.
25. Section 51 of the Misuse of Drugs Act gives the Tribunal, which is a subordinate tribunal, jurisdiction to review the outstanding portion of an applicant's sentence. Halsbury's Laws of England (5th Edn) (2010) para 623) states —



"Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing... Jurisdiction must be acquired before judgment is given *Thompson v Shiel* (1840) 3 Ir Eq R 135."

In the case of *Attorney-General v Lord Hotham* (1823) 3 Russ 415, 37 ER 1077, [1814-23] AA ER Rep 448 Judgment Date: 12/06/1833), it was held that where a limited tribunal takes it upon itself to exercise a jurisdiction which it does not possess; if it decides upon matters with respect to which it has no authority, its decision is a nullity and does not create any necessity for an appeal.

26. In the same light, where a subordinate tribunal or a subordinate court assumes a jurisdiction by virtue of a law, which is unconstitutional and consequently void, its decision is a nullity.
27. I am clearly and decidedly of the opinion that the Tribunal had no jurisdiction to review the outstanding portion of the sentence being served by the Appellant. I find that section 51 of the Misuse of Drugs Act is unconstitutional.
28. **THE DECISION**
29. In the circumstances I have no hesitation in declaring section 51 of the Misuse of Drugs Act unconstitutional and dismissing the appeal.



F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 07 December 2017