

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: A. Fernando (J.A), M. Twomey (J.A), L. Tibatemwa-Ekirikubinza (J.A)]**

**Constitutional Appeal SCA CP 03/2019  
(Appeal from Constitutional Court Decision CS 04/2018)**

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Jean Joseph Mellie

Appellant

Versu  
s

Government of Seychelles

First Respondent

Attorney General

Second Respondent

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Heard: 06 December 2019

Counsel: Mrs. Alexia Amesbury for the Appellant

Mr. Jayaraj Chinnasamy for the Respondents

Delivered: 17 December 2019

**JUDGMENT**

M. Twomey (J.A)

[1] The Appellant was convicted before the Supreme Court (SC) on 20 June 1997 for the offence of trafficking in controlled drugs and sentenced to twelve years' imprisonment. He appealed against both his conviction and his sentence to the Court of Appeal (CA), which appeal was dismissed on 9 April 1998.

[2] On 8 June 2018, some twenty-one years later, he brought a petition before the Constitutional Court (CC), a court lower in hierarchy to the CA, in which he claimed that he had suffered a miscarriage of justice as his right to a fair hearing amongst other rights had been violated by his conviction in 1997.

[3] His averments before the CC with regard to the miscarriage of justice were mainly to the effect that the drugs with which he had been convicted of trafficking had been planted on his property prior to his arrest. His allegations were supported by his claims that an uncle of Police Officer Ange Michel who had conducted the search at his premises at Cascade, Mahe on 25 March 1997, had called to his shop the previous day and thus had the opportunity to plant the drugs. Further evidence of planting, he averred, was that the weight of the drugs was known by the police officers before the raid as shown by the amount entered on the application for his detention well before that amount was communicated to them by the government analyst Dr. Gobine on 28 February 1997.

[4] The Respondents submitted that the same matters being raised before the CC had been raised both before the SC in 1997 and CA in 1998 and were dismissed. They claimed that the petition was in violation of the principle of finality in law. Nevertheless, the Respondents produced the trial records and some of the exhibits and submitted that the weight of the drugs was fully explained as was the raid on the shop and the other alleged anomalies and nothing untoward was found by either court.

[5] The CC stated that it did not have jurisdiction to retry a case but that having nevertheless re-examined the issues raised again it could not discern any constitutional matter or arguable point of law of general public importance being raised. It also did not find any breach of any of the Appellant's constitutional rights and in the circumstances dismissed the Appellant's petition. The Appellant appealed this decision on eight grounds most of which were abandoned at the hearing except for the following:

1. The Constitutional Court erred by holding that "Where a constitutional issue in the context of a criminal proceeding is raised, constitutional jurisdiction is not appellate in nature, and the Constitutional Court does not have jurisdiction to retry the case" contrary to the specific provisions of Article 125 (1) (a) and 129 (1) of the Constitution as neither of the two articles preclude the Court from exercising an "appellate jurisdiction" when discharging its constitutional function.
2. The Court erred when it held that the appellant failed to prove alleged irregularities and dismissed the petition when the only thing the Appellant had to

do was to raise a prima facie case and the burden of proving that there had not been a contravention would have had to be discharged by the State where the allegation was against the state.

3. The judgment of the Court violated the Appellant's right under Articles 19 (1) and 19(13) as it was not fair or impartial as pertinent and relevant pieces of material evidence were unexplained and ignored such as the fact that Niloufer Benoiton on 25 February had received exhibits and an analyst report from Dr. Gobine which the same was then returned to Ange Michel on 28 February 10997 and produced as an exhibit on which the Appellant was convicted.

[6] With regard to the first ground of appeal, it is appropriate to reproduce in full the provisions of the Constitution relied on by the Appellant. Articles 125 (1) (a) and 129 provide:

*“125. (1) There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have -  
(a) original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution;”*

*Supreme Court as Constitutional Court*

*129.(1) The jurisdiction and powers of the Supreme Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be exercised by not less than two Judges sitting together.*

*(2) Where two or more Judges sit together for the purposes of clause (1), the most senior of the Judges shall preside.*

*(3) Any reference to the Constitutional Court in this Constitution shall be a reference to the Court sitting under clause (1).*

[7] A close reading of these provisions do not aid our understanding of the submission being made by the Appellant in this ground of appeal. We fail to see their relevance with respect to the Appellant's submission. The provisions of the Constitution cited above describe the powers and jurisdiction of the CC. As a court of original jurisdiction it is vested with the power to hear a case for the first time, as opposed to being a court of appellate jurisdiction with the power to review a lower court's decision.

[8] The CC was therefore right to state that it was not an appellate court sitting over the decision of both the SC and the CA with respect to the case before it. In any case were it to be an appellate court it would still not have the jurisdiction to rehear the facts of the case.

[9] With respect to the particular issues being raised in this case, the CC did have the power to hear a constitutional petition alleging a miscarriage of justice arising from the breach of the Appellant's constitutional rights. What it sought to do was to explain that two previous courts, including the apex court, tasked with examining the alleged anomalies and discrepancies did not find them substantiated and in any case after it examined the same was of the view that taken individually or cumulatively they did not amount to material irregularities that would have affected the final verdict. The CC added that the right to a fair hearing under section 19 of the Constitution included both a procedural and substantive aspect which must be safeguarded at all times. As regards, the substantive element - unequal treatment, discrimination, unfair trial - were matters all courts had to guard against and the CA as the apex court bore the heaviest burden in the protection of the rule of law and constitutional freedoms especially where the rights of accused persons charged with criminal offences were concerned. It did not find that the SC or CA had failed in any of these duties.

[10] The ground as raised is therefore all the more perplexing as, as we have said, the CC out of an abundance of caution re-examined the alleged anomalies and irregularities previously raised and found that they were unsubstantiated.

[11] The thrust of the CC's statement referred to by the Appellant (and clearly misunderstood by him) is an acknowledgment by the CC that its role of granting constitutional relief is circumscribed by the availability or the obtention of the same relief at the appellate court. In the present matter, the complaints being made had been addressed on appeal and the CC, a lower court, could not try again in fresh proceedings what had not been achieved in the appellate court. It was so to speak addressing the issue of the Appellant having a second bite at the cherry.

[12] This same issue was dealt with by this court in *D'Offay v Louise and Ors* SCAR (2008-2009) 123 in which the CA found that the right to a fair hearing must be balanced with the need for finality of judgement. *D'Offay* went further in establishing that a conviction cannot be challenged on constitutional grounds if it had been upheld by a final judgement of the Court of Appeal except in very special circumstances.

[13] In the South African case of *Boesak v The State* / g) 2001 (1) South African Law Reports (Official Gazette) 912 (CC) / h) 2001 (1) Butterworths Constitutional Law Reports 36, the South African Constitutional Court had to consider an application for leave to appeal against a decision of the Supreme Court of Appeal in which the Applicant had lost his appeal against convictions for fraud and theft. The Court stated:

*“There is a need for finality in criminal matters. The structure of the Constitution suggests clearly that finality should be achieved by the SCA unless a constitutional matter arises. Disagreement with the SCA's assessment of the facts is not sufficient to constitute a breach of the right to a fair trial...*

*16 ... Unless there is some separate constitutional issue raised therefore, no constitutional right is engaged when an appellant merely disputes the findings of fact made by the SCA. It is not suggested by the applicant that the SCA applied some other standard; the contention is that in its evaluation of the evidence the SCA reached incorrect conclusions and convicted when it ought to have had a reasonable doubt concerning his guilt. That is no violation of the applicant's right to be presumed innocent. The question whether evidence is sufficient to justify a finding of guilt*

*beyond reasonable doubt is not, for the reasons given above, a constitutional matter.”*

[14] Similarly, in *Siméon v Republic* (2003) SCAR 127, the Court of Appeal held that where the Appellant in addressing the Court on a breach of his right to a fair hearing, tried to reopen issues that had already been canvassed on appeal:

*“[5] This, we are afraid, she cannot do, i.e. have another bite at the cherry and review on its merits a decision of the Seychelles Court of Appeal on account of public policy considerations. If the appellant were allowed to have a review on its merits a decision of the Seychelles Court of Appeal -*

*a) he would in effect be criticising a decision of the Seychelles Court of Appeal to its face and, what is worse, allowing the Constitutional Court, a subordinate court to the Court of Appeal, to review on its merits a decision of the Court of Appeal which, it must be stressed, is the final Court of Appeal of Seychelles; ·*

*b) he would be opening the floodgates to other unsuccessful appellants and, in so doing, seriously compromising the fundamental principle of the finality of judgments of the Seychelles Court of Appeal.*

*[6] This petition, which claims in essence that the appellant was denied his constitutional right of hearing before the Seychelles Court of Appeal, cannot be sustained, given that it is clear from the record that the appellant’s counsel had all the latitude in the course of various sittings of the Court to put forward all the arguments that could be advanced on behalf of her client. What she cannot do now is to rehearse the same arguments or adduce further arguments on a review of the merits of the decision of the Seychelles Court of Appeal which is, it should be underlined again, the highest Court, and the final Court of Appeal, of the land.”*

[15] *D’Offay* was even more explicit. Fernando JA cited the Botswanan case of *Kobedi v The State* [2005] 2 B.L.R. 76, CA, and the Privy Council cases of *Maharaj v Attorney General of Trinidad and Tobago* (No 2) (1978) 2 All ER 670 (PC), *Chokolingo v Attorney*

*General of Trinidad and Tobago* (1981) 1 All ER 244, *Hinds v Attorney General and Another* (2002) 4 LRC 287( PC) for the proposition that there can be no collateral challenge to a conviction based on constitutional grounds where the conviction has been upheld by a final judgment of the Court of Appeal.

[16] The only qualification to this principle is as explained by Lord Bingham in *Hinds* referring to Lord Diplock in *Chokoilingo* that:

*“It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the constitution be an effective instrument. But Lord Diplock’s salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, not an additional means where such a challenge has been made and rejected...”*

[17] The present case is on all fours with *D’Offay* and the Privy Council cases mentioned above. The Appellant’s complaint was one which should have been pursued both at trial and at appeal; his appeal having failed he should not be allowed in fresh proceedings under article 19 of the Constitution to challenge the same said things. He did not raise any fresh evidence or any specific issue that had not already been heard.

[18] This ground fails. As the ground of appeal has been dismissed the whole appeal would ordinarily have been disposed of as the other grounds would at this stage be purely academic. However, in order to clarify some important issues of law and for the sake of completeness we have addressed the two other grounds of appeal raised.

[19] In respect of the second ground of appeal, Counsel for the Appellant has submitted that the CC placed the burden of proving a contravention of his rights on him when in fact this should have been the duty of the state once he had established a *prima facie* case to prove the irregularities he complained of.

[20] Article 46 of the Constitution, so far as relevant, provides:

*"46 (1) A person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission may, subject to this article, apply to the Constitutional Court for redress.*

...

*(8) Where in an application under clause (1) ... the person alleging the contravention or risk of contravention establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State. [...]" (emphasis added).*

[21] The words *prima facie* in this context refers to the standard of proof under which a party need only present enough evidence to create a rebuttable presumption that the matter averred is true. Numerous cases have established that these provisions establish that an aggrieved party has merely to allege a contravention of the Constitution to establish a prima facie case (*Mancienne* Civil Appeal no. 15 of 1996, *Morin v Minister for Land Use* (2005) *Michel v Dhanjee* (2012) SLR 258).

[22] However, the aggrieved party must still establish a *prima facie* case. In *Michel v Dhanjee* (supra) the Court of Appeal stated in this regard:

*"The clear and concise test to be applied to decide if a prima facie case is made out as contained in the provisions stated above may be summarised thus:*

*(a) there is a contravention or likely to be a contravention of the Constitution*

*(b) the person has a personal interest that is being or likely to be affected by the contravention (in other words he has locus standi in judicio to seek redress)*

*(c) the person whose interest is likely to be affected by the contravention cannot obtain redress for the contravention under any other law*

*(d) the question raised by the petitioner is not frivolous or vexatious."*

*Then and only then can the case proceed to hearing. This test is of significant importance with the purpose of establishing if the petitioner has a bona fide argument for relief. "*

[23] In the present case, the Appellant set out in his affidavit before the CC several alleged irregularities in his SC trial which he submitted were also not addressed by the



CA. His grievance before this court was that the CA shifted the burden of proving these inconsistencies onto him. This allegation however is not borne out by the proceedings and decision of the CC.

[24] First, it must be pointed out that the Respondent meticulously adduced evidence by producing the trial proceedings and some exhibits to explain the alleged irregularities and to show that the matters had been addressed by both courts.

[25] Subsequently, the CC relying on the Canadian authority of *R v Khan* 2001 SCC 86 (CanLII), [2001] 3 SCR 823, stated that in determining whether an irregularity amounted to a miscarriage of justice with regard to an accused's fair trial rights the Court would be mindful of the following:

1. *“Whether the irregularity was severe enough to render the trial unfair or create the appearance of unfairness*
2. *Whether the irregularity pertained to a question that was central to the case against the accused. An irregularity that is related to a central point of the case is more likely to be fatal than one concerning a mere peripheral point.*
3. *Whether the irregularity or cumulative effect of several irregularities had an effect on the final verdict*
4. *Whether the irregularity may have been remedied, in full or in part, at the trial.*
5. *The attitude of defence counsel if and when he was confronted with the irregularity may have an impact. If defence counsel had an opportunity to object to the irregularity and failed to do so, this militates in favour of finding that the trial was not unfair.”*

[26] After analysing the evidence against these guidelines, the Court found that there was no prejudice caused to the Appellant nor any resulting miscarriage of justice. In this respect it found that both the SC and the CA had considered the same issues again being raised before it and although it did not have to re-examine these issues, it did so and came to the same conclusion as the previous courts. It stated:

*“[30] ...the Petitioner has failed to cogently raise a constitutional issue and it cannot*

*be said that a miscarriage of justice had occurred. The right to a fair hearing has been facilitated, and the case has been argued in the Supreme Court and the Court of Appeal, and we have been unable to discern a constitutional violation” ...*

[27] Contrary to what the Appellant is alleging in this ground of appeal, it is clear from the excerpt above that the CC is stating that no prima facie case of any alleged violation of the Appellant’s constitutional right was made out at all by the Appellant as it was wont to. This ground of appeal also has no merit and is dismissed.

[28] With regard to the third ground of appeal, a serious allegation was made that the CC was “not fair or impartial as pertinent and relevant pieces of material evidence were unexplained and ignored.” This necessitated an anxious scrutiny on our part to examine if those material pieces of evidence referred to were indeed not taken into account by the CC.

[29] We find that the CC reviewed all the material irregularities alleged. It found in particular that one of the discrepancies alleged by the Appellant relating to the weight of the drugs arose from the Appellant’s failure in simple arithmetic, namely that in adding up the different weights of the packets of drugs it had not been taken into account the fact that one gram contained 1000 milligrams and not 100 milligrams. Hence 103g 50 mg from one packet added to 288g and 790 mg in a second packet amounted to 391g and 840 mg and not 393 g and 29 mg as proposed by Counsel for the Appellant.

[30] With respect to the alleged anomaly in the analyst’s report regarding 200g of cannabis resin handed to Police Officer Niloufer Benoiton and not added to the amount of drugs with which the Appellant had been charged, the Respondents submitted that this related to drugs retrieved on the same day outside the Appellant’s shop from one Jules Sophie and with which the Appellant had not been charged. The Court found that there was nothing sinister in this regard contrary to what the Appellant was alleging. Police Officer Niloufer Benoiton was not called as the drug handed to her had no bearing on the Appellant’s case.

[31] With respect to the raid on the shop, they submitted that there was no evidence that the drugs had been planted beforehand. As regards the allegation that the weight of the drugs was known to the police officers before the raid, they averred that this was not borne out by the evidence as the averments in the affidavits of Police Officer Payet and ASP Mousbé dated 26 February 1997 and 28 February 1997 respectively containing the amount of the drugs was made from information given to them by the analyst who stated in his report that he received the drugs on 26 February 1997.

[32] With regard to the alleged discrepancies in the weight of the drugs with which the Appellant was convicted they directed the Court's attention to the evidence of several prosecution witness regarding the same which established clearly that the weight of the drugs was obtained from the government analyst and that the information relayed to them by phone and later in writing was entered wrongly on the charge sheet and later corrected.

[33] We are therefore not of the view that any matters canvased by the Appellant were not considered by the CC. If anything the Court seemed to have gone to great lengths to examine every minutia of evidence before making a decision.

[34] The Appellant finally refers to the Ombudsman's report in this matter. At the outset we have to point out that the Ombudsman did not choose to be a party to these proceedings. Her report is limited to whatever information was available to her and certainly does not seem to have included the evidence that was before the CC. Her findings therefore have little or no value and certainly does not help the case of the Appellant.

[35] In view of our finding above, this appeal is dismissed in its entirety.

M. Twomey (J.A)

**I concur:.**

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A.Fernando (J.A)

**I concur:.**

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L. Tibatemwa-Ekirikubinza (J.A)

Signed, dated and delivered at Ile du Port on 17 December 2019