IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2024] (19 August 2024)
SCA CR 02/2024
(Arising in CR 99/2023)

In the matter between

Makavita Liyarage Dilesh — Appellant
(rep. by Mr. Clifford Andre)

and

The Republic — Respondent
(rep. by Mr. Barry Galinoma
Senior State Counsel)

Neutral Citation:	*Dilesh v R* (SCA CR 02/2024) [2024] (Arising in CR 99/2023) (19 August 2024)
Before:	Dr. Twomey-Woods, Robinson, Prof. Tibatemwa-Ekirikubinza, JJA
Summary:	**(1) Court of Appeal — procedure — whether the grounds of appeal are vague or general in terms — whether the mere averment that the sentence imposed is manifestly harsh and excessive constitutes a ground of appeal — *The Court of Appeal Rules 2023, rule 18(7)*** **(2) Fisheries — fishing by foreign fishing vessel in Seychelles waters prohibited without a licence — sentence — whether default order of imprisonment was valid — forfeiture of fishing vessel, fish, fish products, gear or article — *Fisheries Act 2014, sections 11(1), 69, 58(a) & 70 — Maritime Zones Act, 1999, sections 9 & 10, UNCLOS, Article 73(3) — Criminal Procedure Code (Amendment) Act, 2023, section 295*** **(3) *The Court of Appeal erred in Kanapathi v The Republic SCA CR 14/2021 in holding that the order sentencing the appellant to imprisonment in default of payment of the fine as a means of enforcing the fine was not valid. The said holding of the Court of Appeal in the Kanapathi v The Republic SCA CR 14/2021 should not be followed*.**
Heard:	5 August 2024
Delivered:	19 August 2024

ORDER

(i) **Grounds one, two, and three of the appeal stand dismissed.**

(ii) **The appeal is dismissed in its entirety.**

(iii) **I quash the orders of the Sentencing Judge at paragraphs [8] and [9] of the sentence, save for the orders sentencing the Appellant to a fine of 550,000/- rupees and imposing a default sentence of imprisonment for eighteen months.**

(iv) **I uphold the order of the Sentencing Judge sentencing the Appellant to a fine of 550,000/- rupees.**

(v) **I uphold the order of the Sentencing Judge imposing a default sentence of imprisonment for eighteen months.**

(vi) **Given the specific circumstances of the appeal, I order the forfeiture of the fishing vessel *Rankurulla 4* and any gear or article used in the commission of the offence to the Republic of Seychelles under section 70 of the Fisheries Act.**

(vii) **I order that the proceeds of the sale of the fish and fish products seized from the *Rankurulla 4* be forfeited to the Republic.**

JUDGMENT

Robinson JA

(Dr. M. Twomey-Woods, Prof. L. Tibatemwa-Ekirukubinza, JJA concurring)

1. Although Seychelles is internationally recognised for its efforts to conserve and manage its fish stocks and ecosystems for future generations of Seychellois, illegal, unreported, and unregulated fishing threatens to undermine those efforts and devalue its natural endowment.

2. The following excerpt[1] emphasises the seriousness of the issue posed by illegal, unreported, and unregulated fishing to global fisheries—

> *"*[o]*ne of the greatest conservation issues in relation to the world's fisheries at present has been the increased incidence of illegal, unreported, and unregulated (IUU) fishing.* ***The UN (p. 299) General Assembly has characterised IUU fishing as: "[O]ne of the greatest threats to fish stocks and marine ecosystems and [it] continues to have serious and major implications for the conservation and management of ocean resources, as well as the food security and the economies of many States, particularly developing States***[2]***."*** [Emphasis is mine]

[1] "8 Fisheries, From: Judging the Law of the Sea Natalie Klein, Kate Parlett Book content Oxford Scholarly Authorities on International Law [OSAIL] 29 November 2022 9780198853350"

3. It is against this backdrop that I deal with the appeal.

ISSUES FOR DETERMINATION

4. The appeal raises two main issues for determination—

(i) whether grounds one, two, and three of the appeal are vague or general in terms under **rule 18(7) of the Court of Appeal of Seychelles Rules 2023** (hereinafter referred to as *"**The Rules 2023**"*); and

(ii) whether the default order of imprisonment under section 295(1) of the Criminal Procedure Code, as amended, was valid.

THE BACKGROUND

5. The *Rankurulla 4* is a multi-day fishing vessel. Makavita Liyanage Dilesh, the Appellant, a Sri Lankan national, was its master and skipper.

6. The Appellant has been charged with the offence of *"*[f]*ishing without a Foreign Vessel Licence, contrary to **Section 11(1)** read with **Section 69 of the Fisheries Act**, **2014** (Act 20 of 2014) and Punishable under section 58(a) of the said Act"*. The particulars of the said offence read as follows—

> *"Makavita Liyanage Chamel Dilesh, aged 43 years old Sri Lanka national skipper and Master of vessel "Rankurulla 4", which is not licensed or authorised, along with the crew, on the 24th November 2023, at approximately 185 Nautical Miles Southeast of Mahe Island and 40 Nautical Miles East of Coetivy Island, within the Seychelles EEZ, used the said foreign vessel for fishing in Seychelles waters in contravention of the Fisheries Act, 2014".*

7. **Section 58(a) of the Fisheries Act**, **2014**, as amended (hereinafter referred to as the *"Fisheries Act"*), stipulates—

> *"58 Where a foreign fishing vessel that is not licensed in accordance with section 11 is used for fishing or any fishing related activity in Seychelles waters*

[2] "Sustainable Fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and Related Instruments', UNGA Res 69/109 (9 December 2014) UN Doc A/RES/69/109, para 56"

or for sedentary species on the continental shelf, the owner and master each commits an offence is liable on conviction, where the foreign fishing vessel is —

(a) ***of a length overall not exceeding 24 metres, to a fine not less than SCR2,500,000****;"* [Emphasis is mine]

8. On 16 February 2024, the Appellant pleaded guilty to the offence of illegal fishing. Through an interpreter, the Appellant admitted the following facts as narrated to the trial Court by Counsel for the Respondent—

(i) on 22 November 2023, the officers aboard the Seychelles Coast Guard patrol vessel *Topaz* detected the *Rankurulla 4* inside the Seychelles exclusive economic zone at the approximate position of 185 nautical miles to the southeast of Mahe island and 40 nautical miles to the east of Coetivy island;

(ii) on 24 November 2023 at 12:15 hours, the *Rankurulla 4* was boarded by officers serving in the Seychelles Police Force, accompanied by an interpreter as requested by the Appellant. The police officers searched the *Rankurulla 4* in the presence of the Appellant and the interpreter;

(iii) Sergeant Arnaud seized the following items on board the *Rankurulla 4* during the search, namely *(i)* a *"grey GPS marine navigator with the model number SH-1098", (ii) a "grey GPS marine navigator with the model number SH-1298A manufactured by Shunhang Navigation", (iii)* a *"grey GPS device branded Haiyang Smart 7"; (iv)* a *"black explorer 557 manufactured by North Star"*, and (v) a *"grey GPS device branded Furuno";*

(iv) on 28 November 2023, between 9:30 and 13:45 hours, 184 whole sharks with a total weight of 3532 kilograms, 7 gunny bags and one barrel containing salted catch with a total weight of 214 kilograms, and fishing gears were unloaded from the *Rankurulla 4* in the presence of the Appellant and the interpreter;

(v) the fish and fish products seized from the *Rankurulla 4* were stored in a cold store at the *Providence Fishing Port* under the custody of the Seychelles Fisheries Authority (hereinafter referred to as the *"SFA")*;

(vi) at 15:55 hours on 24 November 2023, the Appellant was arrested and cautioned. During the interview, the Appellant voluntarily admitted to being cognizant of the presence of the *Rankurulla 4* inside the waters of Seychelles.

9. The Appellant was convicted and sentenced on 16 February 2024. After addressing his mind to the *"mitigating factors and proportionality of sentence"* and having regard to the *"public and national interest"*, the Sentencing Judge sentenced the Appellant to a fine of 550,000/- rupees, which the Appellant must pay within sixty days from the date of the sentence. In default of payment of the fine of 550,000/- rupees, the Appellant would face a term of imprisonment of eighteen months.

10. Paragraph [8] of the sentence reads as follows: "*[a]*fter *considering all mitigating factors, I sentenced the Accused as follows: A fine of SR550,000.00 which shall be payable within 60 days from today and in default to a term of 18 months imprisonment".*

11. The Sentencing Judge also made the following orders at paragraph [9] of the sentence—

"(i) [i]*f the fine remains unpaid within the prescribed period, the vessel Rankurulla 4 with all equipment shall be forfeited to the Republic;*

(ii) [i]*n the event that the Accused settles the fine within the 60 days he shall be allowed to leave the jurisdiction on the vessel and if not he shall be repatriated to his country of residence as soon as is practicable".*

THE APPEAL

12. The Appellant has appealed against the sentence on the following grounds —

"1. The learned Judge erred in law and fact in sentencing the Appellant to the following : (a) to a fine of SCR 550,000.

2. The learned Judge erred in law and fact and in sentencing the Appellant to imprisonment in default of paying this fine within 2 months to a term of imprisonment of 2 years. This is harsh and excessive.

3. *The sentence is manifestly excessive and harsh considering the circumstances of this case."*

Grounds one, two, and three of the appeal

Submissions on behalf of the Appellant

13. Ground one of the appeal merely averred that the Sentencing Judge erred in sentencing the Appellant to a fine of 550,000/- rupees.

14. The contention raised in the skeleton heads of argument with respect to ground one was that the fine of 550,000/- rupees imposed by the learned Judge was *harsh and excessive*. Counsel contended that the Appellant is a fisherman with no means to pay such a large amount and the sole breadwinner of his family. I interject to state that according to the charge, the Appellant was in a senior position on board the *Rankurulla 4* as the skipper and master, not as a fisherman, as claimed by Counsel for the Appellant. The Appellant admitted in the trial Court that he was the master and skipper of the *Rankurulla 4*.

15. Counsel for the Appellant also pointed out in his skeleton heads of argument with respect to ground one that the Sentencing Judge did not consider the mitigating factors in arriving at his decision. He claimed that the sentencing Judge did not take into account the fact that the SFA had sold the catch for 55,320/- rupees. Suffice it to state that it is incredible that Counsel for the Appellant made such a submission before this Court. He also contended that the Sentencing Judge erred in not considering that the Appellant had pleaded guilty at the earliest opportunity and had no prior criminal record.

16. Counsel for the Appellant also submitted in his skeleton heads of argument with respect to ground one that the Sentencing Judge erred by failing to adhere to the Court of Appeal guideline decision in **Kanapathi v The Republic SCA CR 14/2021**[3] regarding the appropriate sentence to be imposed on the Appellant. However, Counsel for the Appellant did not provide any submission in support of this proposition. Hence, I find it inappropriate to consider this point without any input from both Counsel.

[3] 19 August 2022

17. Grounds two and three merely averred that the sentence imposed by the Sentencing Judge was manifestly harsh and excessive. However, the argument set out in the skeleton heads of argument concerning these grounds was that the order of imprisonment in default of payment of the fine was unlawful due to its inconsistency with the Fisheries Act and **Article 73(3) of the United Nations Convention on the Law of the Sea** (hereinafter referred to as "***UNCLOS***"). I will address this point even though it was not raised as a ground of appeal as I consider it essential to reexamine the Court of Appeal's determination regarding the validity of a default order of imprisonment in such a case. Under rule 18(9) of The Rules 2023[4], the Court of Appeal, in deciding the appeal, is not confined to the Appellant's grounds of appeal.

18. The Appellant's position on this issue is elaborated at paragraph [59] hereof. It is noteworthy that Counsel for the Respondent has also addressed this issue in his skeleton heads of argument.

Submissions on behalf of the Respondent

19. In his skeleton heads of argument, with respect to ground one, Counsel for the Respondent argued *inter alia* that simply averring that the sentence imposed was harsh and excessive did not constitute a ground of appeal. He argued that the Appellant should have provided specific details regarding why he believed the sentence imposed by the Sentencing Judge to be harsh and excessive. He cited the authority of **Cedras v Republic SCA CR 38/2014 [2017] SCCA 3**[5] in support of his submissions.

20. Despite his contention outlined at paragraph [19] hereof, Counsel for the Respondent submitted that the Appellant could not contend that the fine imposed by the Sentencing Judge was harsh and excessive as it was significantly lower than the penalty prescribed under section 58(a) of the Fisheries Act for this specific offence under section 11(1) of the same Act.

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[4] *"(9) Nothwithstanding the foregoing provisions, the Court in deciding the appeal shall not be confined to the ground set forth by the appellant —*

Provided that the Court shall not, if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."

[5] 20 April 2017

21. The submission of Counsel for the Respondent concerning the issue of whether the default order of imprisonment in this case was valid is outlined at paragraph [60] hereof.

Analysis of the contentions of the parties

Whether grounds one, two and three of the appeal are vague or general in terms under rule 18(7) of The Rules 2023

22. The issue for determination with respect to ground one is whether simply averring that the Sentencing Judge erred in sentencing the Appellant to a fine of 550,000/- rupees constitutes a valid ground of appeal under rule 18(7) of The Rules 2023.

23. With respect to grounds two and three of the appeal, the issue for determination is whether simply averring that the sentence was manifestly harsh and excessive can amount to grounds of appeal under rule 18(7) of The Rules 2023.

24. I address the issue of whether merely averring that the sentence was manifestly harsh and excessive can constitute a valid ground of appeal under rule 18(7) of The Rules 2023. In **Meme and Anor v The Republic SCA CR 19/2019**[6], the Court of Appeal applied its earlier decisions of **Florine v The Republic SCA CR 7/2009**[7] and **Cedras**, in which it held that merely averring that the sentence was harsh and excessive did not amount to a valid ground of appeal. In **Cedras**, the Court of Appeal held —

> "…***harsh and excessive is not a ground of appeal*** *but an area of the law in which the trial court reigns supreme.* ***Harsh and excessive cannot be implied without elaborative specificity****. It is not a reason to disturb the sentence imposed by the trial Court".* [Emphasis is mine]

25. The Court of Appeal's holding in **Meme** is also consistent with its earlier holding in **N. Redekar v The Republic SCA 04/09**, in which it held —

> *"[43] …**to merely aver that a sentence is harsh and excessive does not amount to a ground of appeal** inasmuch as just the appreciation of facts is an area where the trial judge reigns supreme except where his appreciation of facts may prove to be perverse, **a sentence pronounced by a trial judge may not be upset except***

[6] 21 August 2020
[7] 8 May 2009

where the penalty he imposes is either wrong in law, wrong in principle or manifestly harsh and excessive*".* [Emphasis is mine]

26. In **Meme**, the Court of Appeal, in line with its earlier decision in **Cedras** held: *"the appellant has to specify in what way the sentence imposed is harsh and excessive."* : see also **Suki v The Republic SCA CR 10/2019**[8] and **Marie Celine Quatre v The Republic SCA No.2 of 2006**[9].

27. In the decisions mentioned above, though **The Seychelles Court of Appeal Rules 2005** (hereinafter referred to as "***The Rules 2005***"), which were in operation before being repealed and replaced by The Rules 2023, were not explicitly cited, it is evident that the decisions were based on rule 18(7)[10] of The Rules 2005. Rule 18(7) of The Rules 2023 has modified rule 18(7) of The Rules 2005. Although I am considering the issue at hand under The Rules 2023, I will refer to The Rules 2005 because the decisions made under The Rules 2005 are applicable in context of the issue at hand. While the cases pertain to civil matters, the principles derived from them with respect to the issue at hand apply to this criminal appeal.

28. During the hearing of the appeal, the Court invited Counsel for the Appellant to address the issue of whether the grounds of appeal ran afoul of rule 18(7) of The Rules 2023 by being vague or general in terms. Counsel for the Appellant failed to provide the Court with any reliable submissions on this point.

29. I now reproduce rule 18(3), (7), (8) and (10) of The Rules 2023, which is relevant to the point under consideration —

> *"(3) Every appeal shall be brought by notice in writing (hereinafter called "the notice of appeal") by the appellant which shall be lodged with the Registrar of the Supreme Court within thirty days of the decision appealed against…*
>
> …

[8] 21 August 2020
[9] 29 November 2006
[10] Rule 18(7) of The Rules 2005 stipulates: ***"no ground of appeal which is vague or general in terms shall be entertained save the general ground that the verdict is unsafe or that the decision is unreasonable or cannot be supported by the evidence"****.* [Emphasis supplied]

(7) ***No ground of appeal which is vague or general in terms shall be entertained, such as, that the verdict is unsafe or that the decision is unreasonable or cannot be supported by the evidence***.

(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.

(10) *A notice of appeal shall be substantially in the form B in the First Schedule in criminal appeals and in the form C in civil appeals. In the event of failure to comply with sub-rules (1) (2) and (3) and the failure to state the address of the respondent in the notice of appeal or make an application under sub-rule 4 of rule 9 where it is deemed necessary, the appeal shall be deemed not to have been filed within the prescribed time*

Provided that, notwithstanding that the provisions contained in sub-rules (2) or (3) or (7) of this rule have not been strictly complied with, the Court may, in the interest of justice and for good and sufficient cause shown, entertain an appeal if satisfied that the intending appellant has exhibited a clear intention to appeal to the Court against the decision of the Court below." [Emphasis supplied]

30. In **Commercial House One (Seychelles) Ltd v Eden Island Development Company Ltd and Anor (SCA29/2023)**[11], decided under rule 18(7) of The Rules 2023, the Court of Appeal recalled its holding in **Petrescu v lllescu (SCA 22/2021)**[12] that Rule 18(7) of The Rules 2005 requires the appellant to formulate grounds of appeal in a concise, clear, and felicitous manner. In **Commercial House One (Seychelles) Ltd**, the Court of Appeal recalled its holding *that: "*[a] *ground of appeal that only sets out the findings of fact and conclusions of law to which an appellant is objecting would be a vague ground of appeal. ...a ground of appeal should also set forth precisely the basis on which the appellant is objecting. This is because the purpose of sub-rule 18(7) is to give fair notice to both the respondent and Court of Appeal of the points that would be raised in the appeal"* (at paragraph 98 of the judgment).

[11] 3 May 2024
[12] 26 April 2023

31. In **Commercial House One (Seychelles) Ltd**, the Court of Appeal, in reaching its decision, also quoted with approval the remarks made by the Court of Appeal in England in **Ferguson v Whitbread & Co plc 1996 SLT 659**. Specifically, the Court cited the remarks of Lord President Hope, at page 659L, concerning certain grounds of appeal —

> *"[10]* […] *the preparation of the grounds of appeal, which is required to be lodged as a step in the process, should never be regarded as a mere formality.* ***The purpose of the rule, which is a simple example of case management, is to give notice to the parties and the Court of the points to be argued. Specification of the grounds enables the parties to direct their argument, and their preparation for it, to the points which are truly at issue****".* [Emphasis is mine]

32. In **Meme**, **Suki**, **Cedras** and **Florine** cited above, the Court of Appeal held that simply averring that the sentence imposed was harsh and excessive was not a ground of appeal. The Court held that the appellant is required to specify how the sentence imposed was harsh and excessive. I hold the view that these holdings of the Court of Appeal are consistent with rule 18(7), which requires that a ground of appeal should also set forth precisely the basis on which the appellant is objecting. In light of what I have stated at paragraphs [43] and [44] hereof, I hold the view that the Appellant in this case was required to specify or particularise how the sentence imposed was manifestly harsh and excessive.

33. The Court of Appeal consistently upholds the strict enforcement of rule 18(7), refusing to entertain grounds of appeal that are not formulated in a concise, clear, and felicitous manner: see, for example, **Commercial House One (Seychelles) Ltd**, **Mountain View Investment Pty Ltd v Pomeroy (SCA 4 of 2022)**[13]; **Salameh v North Island Company Limited SCA5/2022**[14]; **Elmasry and Anor v Hua Sun SCA 28/2019**[15]; **Chetty v Esther SCA 44/2020**[16] and **Cedric Petit v Marguita Bonte SCA No. 11/2003**[17]. These decisions hold that the Court has the duty, rather than the discretion, to strike out grounds of appeal that run afoul of rule 18(7).

[13] 25 August 2023
[14] 16 December 2022
[15] 17 December 2021
[16] 13 May 2021
[17] 20 May 2005

34. For the reasons stated above, I conclude that the second and third grounds of the appeal were vague or general in terms under rule 18(7) of The Rules 2023 and, hence, did not constitute valid grounds of appeal.

35. Regarding ground one, I hold that averring that the Sentencing Judge erred in sentencing the Appellant to a fine of 550,000/- rupees did not constitute a valid ground of appeal under rule 18(7) of The Rules 2023. The common thread running through the above-mentioned decisions is that a ground of appeal should also set forth precisely the basis on which the appellant is objecting.

36. It is noted that the **proviso to rule 18(10) of The Rules 2023** stipulates in part that the Court of Appeal may consider a ground of appeal that ***"does not strictly comply"*** with rule 18(7) of The Rules 2023, in the interest of justice and for good cause shown. Suffice it to state that the Appellant did not invoke the proviso in this case.

37. For the reasons stated above, as the Appellant has failed to comply with rule 18(7) of The Rules 2023, I am duty-bound to strike out grounds one, two, and three of the appeal.

38. Hence, grounds one, two, and three stand dismissed.

39. Before leaving these three grounds, I would like to draw attention to the recurring trend observed in this Court, where the preparation of grounds of appeal is considered a mere formality.

40. Despite the Court of Appeal′s repeated requests for Counsel to follow the rules in preparing grounds of appeal, there is a widespread disregard for these requests. This is evident in the frequent filing of notices of appeal that fail to meet the requirements of rule 18(7). Counsel who is unsure about preparing grounds of appeal should refer to the numerous decisions of the Court for guidance.

41. Counsel should take note of the Court's directive. The Court has consistently upheld the strict enforcement of rule 18(7), refusing to entertain grounds of appeal that are not formulated in a concise, clear, and felicitous manner.

Whether the order sentencing the Appellant to a fine of 550,000 rupees was manifestly harsh and excessive

42. The question of whether the penalty imposed by the Sentencing Judge under section 58(a) of the Fisheries Act was manifestly harsh and excessive does not require consideration as I have dismissed the three grounds of appeal on the basis that they violated rule 18(7) of The Rules 2023. However, due to the frequency of such cases of illegal fishing, I have chosen to consider this issue in passing. I will not disturb the order made by the Sentencing Judge imposing a fine of 550,000/- rupees.

43. Fernando, President of the Court of Appeal, in **Uwaoma v The Republic SCA CR05/2023**[18], stated that a sentence may appear to be harsh, but may not be manifestly harsh and excessive. In the case of **Uwaoma**, the Appellant had appealed against the sentence on the ground that it was harsh.

44. In **N. Redekar**, Domah JA stated that**:** *"43 ... a sentence pronounced by a trial judge may not be upset except where the penalty he imposes is either wrong in law, wrong in principle or manifestly harsh and excessive*".

45. The Seychellois Court of Appeal applies the established rationales of sentencing, namely deterrence, prevention, rehabilitation, and reformation, as well as the principle of proportionality of sentencing: see, for example, the **Uwaoma** case.

46. I recall the view expressed by Fernando, President of the Court of Appeal, in **Uwaoma**, which is consistent with the view expressed by the Court of Appeal in **Suki**, that —

> *" … a court in passing sentence is not bound to give a sentence on the basis of what another court has given in an earlier case, merely to ensure uniformity with earlier cases, but, may consider them. If that be the case a sentencing Judge will be left with little discretion in sentencing. It is to be noted that the facts and circumstances and the aggravating and mitigating factors of each case are not identical".*

47. In **Marengo v R SCA CR29/2018**[19], the Court of Appeal held: *"sentencing is a discretionary power exercisable by the Court. It involves human deliberation of the*

[18] 18 December 2023
[19] 22 August 2019

appropriate sentence to be imposed for a particular offence in the circumstances of the case; it is not the mere administration of a common formula, standard or remedy".

48. The case of **Suki** held that while the requirement for consistency in sentencing is one of the underpinning principles of equality before the law and helps to determine an appropriate sentence, in the final analysis, each case must be decided on its own merits because no two cases are identical. The case of **Suki** stated that consistency is achieved by applying the relevant legal principles.

49. In **Osama Casime & Hifa Casime v R SCA07 & 08/2019**, the Court of Appeal stated that: *"*[s]*entences in and of themselves do not delimit the exercise of discretion and are not binding precedents. The sentencing exercise is not merely the imposition of a number in a previous decision presenting similar circumstances of the cases".*

50. Upon careful consideration of the penalty imposed by the Sentencing Judge, I hold the view that it was not manifestly harsh and excessive by any stretch of the imagination. My reasoning is as follows. Other than the Appellant's early plea of guilty, there is no evidence to support the matters raised in mitigation by the Appellant before the trial Court. For example, while the Appellant may be a first-time offender in Seychelles, there are no criminal records of the Appellant in Sri Lanka or elsewhere to substantiate whether he is indeed a first-time offender.

51. I also hold the view that the Appellant's family circumstances, even if they are as stated, should not serve as justifications for committing the offence. The Appellant should have considered his family circumstances before engaging in criminal activities. According to the record of appeal, the *Rankurulla 4* was registered and had a fishing licence at the time of interception. However, instead of fishing in the area where the *Rankurulla 4* was licenced, the Appellant deliberately chose to fish inside the exclusive economic zone of Seychelles, an area for which the *Rankurulla 4*, a foreign fishing vessel, did not have a fishing licence, taking the risk of apprehension for commercial gain.

52. With regards to the sentencing principles applied by the Seychellois Court, it appeared that the Sentencing Judge took into account *inter alia* the principle of proportionality

when determining the sentence. However, there is a lack of clarity regarding how the Sentencing Judge applied this principle, particularly in light of the specific facts and circumstances of this case, the sentence prescribed for this specific offence under section 58(a) of the Fisheries Act, and the absence of evidence supporting the mitigating factors. Furthermore, it is unclear whether the Sentencing Judge took into account any aggravating factors in this case. It would be inappropriate for me to examine this matter without any input from both Counsel.

53. I now turn to the case of **The Republic v Mawalla Kattadilage Padmasiri CO 45/2024**[20], referred to the Court by Counsel for the Appellant to support his proposition that the fine imposed by the Sentencing Judge was harsh and excessive.

54. The background of **The Republic v Mawalla Kattadilage Padmasiri** may be stated shortly as follows. The accused, Mawalla Kattadilage Padmasiri, a Sri Lankan national, was the skipper and master of the foreign fishing vessel *(FV) Sampath 16.* The *(FV) Sampath 16* was apprehended while fishing inside the exclusive economic zone of Seychelles without a foreign vessel licence. The accused was charged with the offence of fishing without a foreign vessel licence, contrary to section 11(1) read with section 69 of the Fisheries Act. The Sentencing Judge imposed a fine of 400,000 rupees under section 58(a) of the Fisheries Act. I observe that no order for imprisonment in default was made in **The Republic v Mawalla Kattadilage Padmasiri CO 45/2024**.

55. Upon thorough examination of the judgment, I find that there was no justification for the sentence of 400,000 rupees imposed on the accused, who occupied a senior position on the *(FV) Sampath 16.* Besides the accused′s early plea of guilty early on, there is an essential absence of evidence supporting the other mitigating factors presented before the trial court. I could continue elaborating at length. In sum, I hold the view that this case does not provide any insight into whether the fine imposed in the present appeal was manifestly harsh and excessive.

56. I bring to the attention of Counsel that **rule 31(6) of The Rules 2023** expressly empowers the Court of Appeal to vary the sentence imposed by the Sentencing Judge. The said rule

[20] 27 June 2024

31(6) stipulates: *"*[i]*n the case of an appeal against both conviction and sentence or only against conviction or sentence, the Court may vary the sentence by either decreasing or increasing the same, where it finds that the sentence imposed by the Supreme Court is either excessive or inadequate given the specific circumstances of the appeal."*

57. However, in this case, as mentioned above, I will not disturb the order made by the Sentencing Judge imposing a fine of 550,000/- rupees.

Whether the default order of imprisonment was valid

Submissions on behalf of the Appellant

58. I now determine whether the default order of imprisonment in this case was valid.

59. To support his contention, as outlined at paragraph [17] hereof, that the order of imprisonment in default of payment of the fine of 550,000/- rupees was unlawful because it was inconsistent with section 58(a) of the Fisheries Act and Article 73(3) of UNCLOS, Counsel for the Appellant relied on this Court's holding in the **Kanapathi** case. In the **Kanapathi** case, the Court held: *"*[t]*he prohibition against imprisonment in the provision in Article 73(3)* [UNCLOS] *is explicit and may well explain why no such penalties is contained in the Fisheries Act 2014. **A term of imprisonment remains imprisonment even when it arises in default of the non-payment of a fine**"*. [Emphasis is mine]

Submissions on behalf of the Respondent

60. Counsel for the Respondent in his counter submissions contended that the Sentencing Judge had made an order for the payment of a fine of 550,000/- rupees under section 58(a) of the Fisheries Act. He contended that the decision of the Sentencing Judge to order imprisonment in default of payment of the fine, as a means of enforcing the fine, is not prohibited by the Criminal Procedure Code and Article 73(3) of UNCLOS. He relied on the authority of **Chelsea Tan Yan Qi and Public Prosecutor [2022] SGHC 275** to support his submission.

61. At this point, I want to highlight my concern regarding the Court of Appeal's decision in the **Kanapathi** case, specifically with respect to the holding that: *"*[a] *term of imprisonment remains imprisonment even when it arises in default of the non-payment of a fine"*. I will address this concern when discussing the issue of whether the default order of imprisonment was valid. The Sentencing Judge in this case did not give any reason for not applying the said holding in the **Kanapathi** case.

Analysis of the contentions of the parties

62. I now determine whether there is any conflict between the application of the relevant provisions of the written law of Seychelles and Article 73(3) of UNCLOS. I set out briefly the legal framework under the written law of Seychelles and UNCLOS.

63. UNCLOS was opened for signature on 10 December 1982 and entered into force on 16 November 1994. Seychelles ratified UNCLOS on 16 September 1991, and it entered into force for Seychelles on 16 November 1994. Article 73 of UNCLOS addresses the enforcement of laws and regulations of coastal States. In "**The M/V "SAIGA" CASE (SAINT VINCENT AND THE GRENADINES V GUINEA) List of cases : No. 1**[21] **PROMPT RELEASE JUDGMENT OF 4 DECEMBER 1997**", the International Tribunal of the Law of the Sea (hereinafter referred to as *"**ITLOS**"*) stated[22]:*"… Article 73 is part of a group of provisions of the Convention (articles 61 to 73) which develop in detail the rule in article 56 as far as sovereign rights for the purpose of exploring, conserving and managing the living resources of the exclusive economic zone are concerned"*.

64. Article 73(1) of UNCLOS stipulates: *"*[t]*he coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."* Article 73(3) of UNCLOS is the provision under consideration. It stipulates: *"**Coastal State penalties for violations***

[21] PROMPT RELEASE JUDGMENT OF 4 DECEMBER 1997 (ITLOS has compulsory jurisdiction over a request for the prompt release of vessels and crews)
[22] [at paragraph [66]]

***of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment**."* [Emphasis is mine]. I state at this point that no agreement in accordance with Article 73(3) of UNCLOS was presented to the trial Court.

65. **Section 10 of the Maritime Zones Act**, **1999**, **(Act No. 2 of 1999)** (hereinafter referred to as the *"**Maritime Zones Act**"*) deals with the rights and jurisdicton of Seychelles as a coastal State in relation to the exclusive economic zone, as defined in section 9[23] of the same Act. Under section 10(1) of the Maritime Zones Act, Seychelles has, and has always had, in relation to the exclusive economic zone, the *"**sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources**, **whether living** or non-living of the seabed of the zone and the subsoil of and superjacent waters to the seabed …;"*. [Emphasis is mine]

66. I have considered section 24[24] of the Maritime Zones Act which, upon initial examination, appears to have enacted Article 73(3) of UNCLOS. However, upon closer examination of section 24 of the same Act, it is evident that this is not the case. Section 24(1) of the Maritime Zones Act applies to a foreign ship that has contravened the Maritime Zones Act or a written law enforceable under the same Act, or is involved in an activity that is prejudicial to the peace, good order or security of Seychelles in terms of section 17 of the same Act.

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[23] The exclusive economic zone is defined under section 9 of the Maritime Zones Act, as follows: *"*[s]*ubject to any Order made under section 13(2) with respect to the delimitation of the exclusive economic zone, **the exclusive economic zone of Seychelles comprises the areas beyond and adjacent to the territorial sea, having as their seaward limit, a line measured seaward every point of which is at a distance of 200 nautical miles from the nearest point on the baselines**."* [Emphasis is mine]

[24] *"24(1) Subject to subsection (2), **where a foreign ship has contravened this Act or a written law which is enforceable under this Act** or is involved in an activity which is prejudicial to the peace, good order or security of Seychelles in terms of section 17, each of the operator, captain, person in charge of the ship and members of the crew of the ship who participated in the contravention or activity is guilty of an offence and liable on conviction to a fine of R500,000 and imprisonment for 10 years.*

*(2) **Unless an agreement to which the Republic of Seychelles and the foreign state where the ship is registered so provides, a court shall not, under subsection (1), impose a term of imprisonment on the operator, captain, person in charge or members of the crew of a ship in respect of an offence relating to the contravention of the fisheries laws of Seychelles**."* [Emphasis is mine]

67. I now turn to section 295 of the Criminal Procedure Code which deals with the limit of imprisonment in default. **Section 295(1) of the Criminal Procedure Code stipulates *inter alia* that no sentence of imprisonment in default of payment of a fine and costs shall exceed two years**. Section 292(2) of the Criminal Procedure Code stipulates that when imprisonment is imposed in lieu of the payment of fine and costs, such imprisonment shall be reckoned in the first instance as imprisonment in lieu of the fine and then in lieu of the costs …". I address these provisions below.

68. I did not express my opinion on the issue of whether there is any conflict between the application of the relevant provisions of the written law of Seychelles and Article 73(3) of UNCLOS in the **Kanapathi** case due to the lack of reliable submissions from the parties involved. I was uncertain about whether Seychelles had enacted Article 73(3) of UNCLOS through legislation. It is now evident that Article 73(3) of UNCLOS has not been enacted. The discussion regarding whether Article 73(3) of UNCLOS has been enacted is expected to be settled following the passing of the **Fisheries and Aquaculture Bill**, **2023 (Bill No. 23 of 2023)** into law. Clause 173 of the same Bill provides —

> *"Imprisonment of non-nationals*
>
> *173. Where an offence under this Act is committed in the Exclusive Economic Zone of Seychelles by a person who is a national of another State and is associated with a vessel that is not registered in Seychelles, penalties shall not include imprisonment or any form of corporal punishment in the absence of any agreement to the contrary between Seychelles and the State concerned".*

69. Twomey-Woods JA in the **Kanapathi** case opined that the Legislature had taken into account Article 73(3) of UNCLOS with respect to the sentencing provisions under the Fisheries Act. Twomey-Woods JA did not state that the Legislature had enacted Article 73(3) of UNCLOS. The opinion of Twomey-Woods JA is undoubtedly valid. My reasoning is as follows.

70. In exercising its sovereign rights to manage and conserve the living resources of the exclusive economic zone in terms of section 10 of the Maritime Zones Act, Seychelles is entitled to adopt laws and regulations that are consistent with UNCLOS and such laws and regulations may address the matters listed in Article 64(2) of UNCLOS: (**Articles**

56(1[25]) and 62(4[26]) of UNCLOS). Section 58 of the Fisheries Act imposes only fines on people involved in using a foreign fishing vessel for fishing or any fishing-related activity in Seychelles waters or for sedentary species on the continental shelf without a licence granted by the SFA; imprisonment is not an available punishment. There is evidently no inconsistency between the application of section 58 of the Fisheries Act and Article 73(3) of UNCLOS. This aligns with the **long title of the Maritime Zones Act**, which indicates the general purposes of the Act to be to *"provide for the determination of the Maritime Zones of Seychelles in accordance with the United Nations Law of the Sea Convention and for other matters connected therewith".*

71. Twomey-Woods JA adopted the same approach as the Court of Appeal in its earlier decision of **Warnakulasuriya Fernando v The Republic SCA CR 12/2000**[27] **(**Ayoola (President), Silungwe & De Silva, JJA).

72. Warnakulasuriya Fernando, a Sri Lankan national, was the master of the fishing vessel *"Torrington"*, which was also Sri Lankan. He was charged with five counts of unauthorised fishing in the exclusive economic zone of Seychelles, contrary to section 24(1) of the Fisheries Act. Counsel for Warnakulasuriya Fernando contended that the sentences of imprisonment imposed under counts 1 to 5 were unlawful, null and void and that, as such, they should be quashed. It has been argued that since Seychelles has ratified UNCLOS, it's domestic laws have been subject to it, and in the event of any conflict, UNCLOS takes precedence over the law of Seychelles. It has also been argued that

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[25] *"56(1) In the exclusive economic zone, the coastal State has:*

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
(i) the establishment and use of artificial islands, installations and structures;
(ii) marine scientific research;
(iii) the protection and preservation of the marine environment;
(c) other rights and duties provided for in this Convention."

[26] *"(62) …*
*4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State**. These laws and regulations shall be consistent with this Convention and may relate, inter alia, to the following:"*** [Emphasis is mine]

[27] 2 November 2000

Article 73(3) of UNCLOS specifically states that penalties for violations of the fisheries laws and regulations made under UNCLOS may not include imprisonment.

73. In the **Warnakulasuriya Fernando** case, the Court held, *inter alia*, that: *"***[a]** ***reading of section 24(1) of the Act shows that it makes no provision for imprisonment***. ***Hence***, ***the Fisheries Act does not fall foul of the convention***.*"* [Emphasis is mine]. I will return to this case when addressing the validity of the order of imprisonment in default of payment of the fine.

74. I have not come across any case in international law that has specifically dealt with breaches of Article 73(3) of UNCLOS. In **The "Monte Confurco" case**[28] **(Seychelles v. France) List of cases: No. 6, Application for Prompt Release** (hereinafter referred to as the ***"Monte Confourco case")***, ITLOS recalled its holding in the **Camouco Case**[29], that in proceedings under article 292 of UNCLOS, submissions concerning the alleged violations of Article 73(3) and 73(4) of UNCLOS are not admissible. In the **Monte Confurco case**, Seychelles, the flag State of the *Monte Confurco*, contended that the placement of its master under court supervision constitutes a de facto detention and a grave violation of his personal rights, contrary to Article 73(3) of UNCLOS.

75. For the reasons stated above, I accept the submission of Counsel for the Appellant that the order made by the Sentencing Judge imposing the sentence of a fine under section 58(a) of the Fisheries Act is consistent with UNCLOS. The penalty is a monetary fine, not imprisonment.

76. However, the question of whether imprisonment could be used to enforce the fine against the Appellant is a distinct matter. Counsel for the Appellant argued that the order of imprisonment in default is contrary to Article 73(3) of UNCLOS and must be declared null. I now examine this point.

77. Section **295(2) of the Criminal Procedure Code** makes it clear *inter alia* that when imprisonment is imposed in lieu of the payment of fine, such imprisonment shall be reckoned in the first instance as imprisonment in lieu of the fine.

[28] **International Tribunal For The Law Of The Sea Year 2000 18 December 2000**
[29] (Panama v. France), Prompt Release)

78. **Tan Yan Qi Chelsea**[30], held: *"*[a]*n in-default imprisonment term "is not to be taken as a proxy for the punishment imposed for the original offence". It serves a distinct purpose, namely, to deter an offender from evading payment of the fine…".*

79. In **Aruli v Mitchell**[31] the full Court of Western Australia considered the question of whether imprisonment could be used to enforce a fine against a foreign fisher.

80. The case concerned an appeal against the sentence by three Indonesian fishermen who had pleaded guilty to offences under sections 10(1) and 100(1) of the Fisheries Management Act, 1991. The magistrate imposing sentence at first instance had ordered the appellants to pay substantial fines, with default terms of imprisonment to be served in the event that the fines were not paid. The magistrate relied on section 58 of the Sentencing Act, 1995, which stipulates that a court may order an offender to be imprisoned until a fine is paid.

81. In the **Aruli** case, one of the grounds of appeal was that the order of imprisonment under the state sentencing legislation was invalid because it was in conflict with Article 73(3) of UNCLOS. It has been argued *inter alia* that Article 73(3) of UNCLOS had been incorporated into the domestic law of Australia..

82. Murray J delivered the main judgment with which Kennedy and Pidgeon JJ agreed. Murray J stated that simply ratifying UNCLOS did not import its provisions into Australian domestic law. He also stated that even if Article 73 had been incorporated into Australian domestic law, there was no inconsistency between its terms (that imprisonment should not be imposed) and the use of imprisonment in default of payment of a fine.

83. Murray J held that the magistrate was correct to be guided by a previous statement of principle by Pidgeon J in **Arifin v Ostle**[32] that —

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[30] A case in the General Division of the High Court of the Republic of Singapore. [A decision having persuasive authority]

[31] (unreported, Supreme Court of Western Australia, Full Court, Kennedy, Pidgeon and Murray JJ, 31 March 1999) [A decision having persuasive authority]

[32]Unreported, Supreme Court of Western Australia, Full Court, Pidgeon, Franklyn and Walsh JJ, 18 June 1991.

> *"**where the only option open is a fine and where the option such as a bond is otherwise excluded by the facts of the case, then the fine must reflect the gravity of the offence and must be imposed even though it is known that the defendant will serve a default term by reason of his not being permitted to be in the jurisdiction in order to pay the fine by other means*** [**Arifin v Ostle]**. [Emphasis is mine]

84. Murray J clarified —

> *"The penalty is the monetary penalty. The enforcement of its payment may be avoided by paying the penalty. In that way it is demonstrated that any imprisonment suffered is not by way of the imposition of a penalty but by way of the ordinary process of providing sanctions to enforce compliance with the law."*

85. I now turn to the case of **Warnakulasuriya Fernando**, in which the Court of Appeal took the approach that the default order of imprisonment made under the Criminal Procedure Code was not contrary to UNCLOS. The Court of Appeal reasoned as follows —

> *"However, the trial court imposed sentences of imprisonment in default of payment of fines. Although no reference was made to statutory provisions for such sentences, it is probable that these were derived from section 294, as read with section 295(1), of the Criminal Procedure Code (Cap 54), which provides for a sentence of imprisonment in default of payment of a fine. This is apparently the context in which the appeal against sentence is made. **A question that readily comes to mind is whether such provisions offend against those of the convention. Our response is in the negative for the reason that a default sentence of imprisonment is by its very nature not a direct sentence**. **Further, an imposition of a sentence of a fine which cannot be enforced would be meaningless and could, therefore, not have been in the contemplation of the legislature, particularly in a case such as the instant one where no warrant of distress can effectively or meaningfully be levied against the convict, pursuant to section 297 of the Criminal Procedure Code….*** [Emphasis is mine]

86. I agree with the determination of the Court of Appeal in the **Warnakulasuriya Fernando** case, which is in agreement with the determination of Muray J in the **Aruli** case. **Section 295(2) of the Criminal Procedure Code** makes it clear that ***"imprisonment is imposed in lieu of the payment of fine"***. It is my opinion that the framers of UNCLOS did not envisage for Coastal States to impose sentences of fines without the capacity to enforce them. In that regard, I accept the submission of Counsel for the Respondent that there is no conflict between the application to this case of section

295 of the Criminal Procedure Code and Article 73(3) of UNCLOS. Consequently, I hold that the order of imprisonment of eighteen months in default of payment of the fine of 550,000/- rupees imposed by the Sentencing Judge was valid.

87. In the final analysis, after thoroughly reviewing the Court's decision in the **Kanapathi** case, I hold that the Court of Appeal erred in holding that the order of imprisonment in default of payment of the fine as a means of enforcing the fine was not valid. The said holding of the Court of Appeal in the **Kanapathi** case should not be followed. In this regard, I conclude that the argument raised by Counsel for the Appellant is misconceived.

88. Apart from the orders sentencing the Appellant to pay a fine of 550,000/- rupees and imprisonment for eighteen months in default of payment of the fine, the remaining orders regarding the consequences for non-payment of the fine set out at paragraphs [8] and [9] of the sentence, repeated at paragraphs [10] and [11] hereof lack clarity.

89. Hence, I quash the orders of the Sentencing Judge at paragraphs [8] and [9] of the sentence, save for the orders sentencing the Appellant to a fine of 550,000/- rupees and imposing a default sentence of imprisonment for eighteen months.

ORDERS

90. Grounds one, two, and three of the appeal stand dismissed.

91. The appeal is dismissed in its entirety.

92. I quash the orders of the Sentencing Judge at paragraphs [8] and [9] of the sentence, save for the orders sentencing the Appellant to a fine of 550,000/- rupees and imposing a default sentence of imprisonment for eighteen months.

93. I uphold the order of the Sentencing Judge sentencing the Appellant to a fine of 550,000/- rupees.

94. I uphold the order of the Sentencing Judge imposing a default sentence of imprisonment for eighteen months.

95. Given the specific circumstances of the appeal, I order the forfeiture of the fishing vessel *Rankurulla 4* and any gear or article used in the commission of the offence to the Republic of Seychelles under section 70 of the Fisheries Act.

96. I order that the proceeds of the sale of the fish and fish products seized from the Rankurulla 4 be forfeited to the Republic.

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F. Robinson JA

I concur: _____

Dr. M. Twomey-Woods JA

I concur: _____

Dr. L.Tibatemwa-Ekirikubinza JA

Signed, dated, and delivered at Ile du Port on 19 August 2024.