

BRADBURN v GOVERNMENT OF SEYCHELLES
(2013) SLR 33

Renaud, Burhan JJ

26 March 2013

CC 06/2008

F Elizabeth for the petitioners

A Madeleine for the respondents

The judgment of the Court was delivered by BURHAN J

[1] This is an application by the petitioner under art 46(1) of the Constitution of the Republic of Seychelles alleging that his constitutional rights under art 19(1), art 18(3) and art 18(11) have been contravened by the respondents in this case.

[2] The petitioner further claims the following redress and relief in the prayer to the petition:

- a) Make an order declaring that there have been several violations of the petitioner's rights by the acts and omissions of the respondents, their employees, servants or preposee.
- b) Make an order enlarging the petitioner on bail and pending his trial.
- c) Award compensation in favour of the said petitioner for the said violations in the sum of R 50,000.00.

[3] The background facts of the case as admitted by the parties are that the petitioner in this case was arrested and charged with trafficking a controlled drug on 8 March 2008. The petitioner was thereafter remanded to custody and kept in Montagne Possee prison. The trial was fixed for the 21, 22 and 23 January 2009. It is admitted that at present the petitioner has been convicted of the said offence and is serving a term of imprisonment at Montagne Possee prison and therefore the relief sought in prayer (b) ie that the petitioner be released on bail pending trial does not arise.

[4] It is the contention of counsel that the petitioner was remanded to custody on 8 March 2008 and "by the time the case comes up for trial," he would have spent 10 months in prison and therefore the order for his detention pending his trial contravenes his constitutional rights under art 19(1) of the Constitution to have a fair hearing within a reasonable time by an independent and impartial court established by law.

[5] Article 19(1) of the Constitution reads as follows:

Every person charged with an offence has the right unless the charge is

withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law.

[6] It appears the petitioner is complaining not of the fact that the hearing of the case was not within the reasonable time requirement but that his detention pending his trial for a period of 10 months, contravenes his right to have a fair hearing within a reasonable time. It is apparent on a reading of paragraphs 2 and 3 of the petition that the petitioner was detained pending trial in the Montagne Possee prison after being charged and by a remand to custody order of a competent court. On the question of bail, it is settled law that a person produced before court has a right to bail subject to certain permissible derogations contained in arts 18(7)(a)–(f) of the Constitution. The burden of establishing the derogations lies firmly on the shoulders of the prosecution which is seeking a remand to custody order. The law also provides for the accused who are remanded to custody to be produced before court at regular intervals for the remand order to be reviewed if necessary. Further the said remand order made by a trial court is subject to appeal -refer case of *Beeharry v Republic* SCA 11/2009.

[7] The petitioner does not seek to contest the constitutionality of the remand to custody order on the grounds it did not fall within the derogations contained in art 18(7)(a)–(f) but seeks to complain that the order for his detention pending his trial contravenes his constitutional rights under art 19(1) of the Constitution to have a fair hearing within a reasonable time by an independent and impartial court established by law as he would have spent over 10 months in remand. It is the view of this Court that to invoke the jurisdiction of the Constitutional Court in respect of a remand order, the remand to custody order which resulted in the petitioner's detention at Montagne Possee prison must be in contravention of art 18(7) of the Constitution and not of art 19(1) of the Constitution.

[8] The right to have a fair hearing within a reasonable time as envisaged by art 19(1) of the Constitution has been dealt with by this Court in the case of *Sandapin v Government of Seychelles* SC CC 13/2010 which held:

in reviewing compliance with the reasonable time requirement, the Court always begins by determining the starting point (*dies a quo*) and the end (*dies ad quem*) of the period to be considered Basically the court assesses whether the length of proceedings from the starting point to the end in the case before it has been reasonable or not.

[9] In this instant application the petitioner has sought to complain of non-compliance of the reasonable time requirement even prior to the trial being concluded in respect of a period of 10 months. The main ground for his complaint is that the accused has been detained. It is the view of this Court that if the detention is based properly on a remand order by a trial court under the permissible derogations contained in art 18(7)(a)–(f), if dissatisfied with the said order on the grounds that the remand time period is too excessive, the petitioner has an immediate remedy which is a right of appeal to the Seychelles Court of Appeal and move the appellate court on the grounds that the remand period is excessive and that the person be released immediately even prior to

his date of trial. For the aforementioned reasons this Court is of the view that the petitioner cannot seek to complain under art 19(1) that the remand order has resulted in a noncompliance with the reasonable time requirement as required for by this particular article.

[10] It is apparent that though the aforementioned alleged contravention is mentioned in his petition, counsel for the petitioner has not sought to further elaborate or submit on this matter in his submissions.

[11] The other contravention complained of by the petitioner is in respect of art 18(3) of the Constitution. Article 18(3) reads:

A person who is arrested or detained has a right to be informed at the time of arrest or detention or as soon as is reasonably practicable thereafter in, as far as is practicable, a language that the person understands of the reason for the arrest or detention, a right to remain silent, a right to be defended by a legal practitioner of the person's choice and, in the case of a minor, a right to communicate with the parent or the guardian.

[12] In this alleged contravention too, other than a reference to it in the petition, counsel for the petitioner has not sought to elaborate further in his submissions on this issue. Be that as it may, the trial Court has concluded the trial in this instant case and counsel for the petitioner has not brought to the notice of this Court that a finding has been made by the trial Court, that the petitioner had not been informed of his constitutional rights under art 18(3) at the time of his arrest. In the absence of such a finding by a trial court we see no merit in this alleged contravention.

[13] Counsel for the petitioner further contends that whilst in custody at the Montagne Possee prison, he was treated as convicted prisoner and was not kept away from convicted persons in contravention of his constitutional rights under art 18(11) of the Constitution.

[14] Article 18(11) reads as follows:

A person who has not been convicted of an offence if kept or confined in a prison or place of detention, shall not be treated as a convicted person and shall be kept away from any convicted person.

[15] Persons placed in remand custody, sometimes referred to as remandees or detainees, are those persons who have not yet been sentenced and held in custody prior and during their trial on criminal charges. Persons in remand custody are persons who have been refused bail or are unable or unwilling to meet the conditions set out in the bail bond. The difference between sentenced and remanded persons is referred to in the United Nations International Covenant on Civil and Political Rights (ICCPR).

[17] Article 10 of the Covenant reads as follows:

1 All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2 (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall all be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3 The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

[16] Accommodating persons in remand separately from sentenced prisoners and minimizing the restrictions on these remandees are standards set by the United Nations. Therefore persons held in remand custody unlike convicted prisoners should be treated with the minimum of restrictions that still enable prisoner safety, good order, security and management of the prison. It is for this reason that our Constitution too embodies art 18(11).

[17] It is to be noted that art 18(12) and 18(13) of our Constitution read as follows:

Article 18(12) of the Constitution

An offender or a suspect who is a minor and who is kept in lawful custody or detention shall be kept separately from any adult offender or suspect.

[18] Article 18(13) reads as follows:

A female offender or suspect who is kept in lawful custody or detention shall be kept separately from any male offender or suspect.

[19] One would observe that while art 18(11) contains the words "kept away", arts 18(12) and 18(13) include the words "kept separately". When one considers the affidavit of David Viojen of Montagne Possee on behalf of the respondents, it is apparent that the cells of the remand prisons are located on the first floor while those of the convicted prisoners are located on the second floor. Further it is stated that the petitioner has had his meals with the other remandees and not with the convicted prisoners. He further states all activities of the remandees were done separately to that of the convicted prisoners. We see no reason to disbelieve the averments contained in the said affidavit. We are satisfied that these facts indicate that steps are being taken to ensure that the remandees are being "kept away" from the other convicted prisoners. For the aforementioned reasons we find no merit in the alleged infringement of the petitioner's rights. However we recommend that in order to prevent further allegations being made, it would be ideal if the remandees are located for all purposes in a different building or at a separate location altogether.

[20] Counsel for the petitioner also referred to the fact that s 29 of the Second Schedule of the Misuse of Drugs Act contravenes art 119(2) of the Constitution. However we note that this matter has not been raised in his petition and would be ultra petita as no relief

has been claimed in the prayer of the petition. We see no reason to decide once again this issue as it has already been decided by the highest forum in the Seychelles in the case of *Poonoo v Republic* SCA 38/2010.

[21] For the aforementioned reasons we see no merit in the allegations made by the petitioner and proceed to dismiss the said petition. No order is made in respect of costs.