

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable

[2020] SCCC 394
CP 13/2019

In the matter between:

PERCY CHANG-TAVE

1st Petitioner

NATASIA CHANG-TAVE

2nd Petitioner

SHARIFA RAOUDY

(All rep. by Mrs. A. Armesbury)

3rd Petitioner

and

THE REPUBLIC/THE STATE

1st Respondent

ATTORNEY GENERAL

*(All rep. by Mr. Chinnasamy together with
Ms. Evelyne Almeida)*

2nd Respondent

Neutral Citation: *Chang-tave Percy & Ors v The Republic & Anor* (CP 13/2019) [2020] SCCC 394 (7 July 2020).

Before: Andre J, Vidot J, Pillay J

Summary: **Criminal procedure: Bail** : refusal of bail and remand in custody : alleged breaches of Articles 16, 18,19, 27 and 31 of the Constitution : international instruments and Constitution support the principle that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances : remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime : correct approach to discrimination under Art 27 : petitioner has to establish that there has been differentiation on a particular ground, if no ground is raised, court not able to assess whether differentiation unfair : petitioners did not raise particular ground : other breaches alleged hinged on Art 27 : docket : trite that judge hearing bail should not consider contents of trial docket : petitioners challenging a practice directive without any reference to its provisions in the petition, or annexing it : court not able to consider constitutionality in this absence.

Heard: 2 March 2020

Delivered: 7 July 2020

ORDER

The following orders are made:

- (a) The Petition fails and is dismissed.
- (b) No order is made as regards costs.

JUDGMENT

ANDRE J (Presiding), VIDOT J, PILLAY J.

Introduction

[1] On 15 November 2019, we delivered a ruling dismissing the preliminary objections raised by the Attorney General on behalf of the State. The matter proceeded to a hearing on the merits. This judgment concerns those merits, and the questions that we have to answer include: (i) whether the petitioners have been unfairly discriminated against in contravention of Article 27 of the Constitution; (ii) whether their rights under Articles 16, 18, 19 and their children’s rights under Article 31 have been breached and (iii) whether disclosing the docket to the trial judge who also hears the bail application can be prejudicial to an accused and contravene their right to be tried by an impartial tribunal.

[2] The three petitioners are Percy Chang-Tave, Natashia Chang-Tave (the Chang-Taves), and Sharifa Raoudy. They filed a petition in terms of Art 46 of the Constitution,¹ claiming that the trial court’s refusal to also grant them bail contravened their rights under Articles 18, 19, 27, and 31 of the Constitution. The claim is filed against the Republic, represented by

¹ The Constitution of the Republic of Seychelles, 1993.

the Attorney General. Ms. Raoudy has been released on bail. But her claim has not been withdrawn and will be considered.

Background

[3] The petitioners were arrested on charges of trafficking in and conspiracy to traffic in a controlled drug weighing 2569 and containing 676.24 grams of heroin in contravention of the Misuse of Drugs Act.² Initially, charges were made against the first two petitioners, the Chang-Taves', and two other accused, Mr. Jude Brigilia and Samantha Celestine. They appeared before the Magistrates' Court in March 2019. In the Magistrates' Court, the respondent made an application in terms of section 101 of the Criminal Procedure Code³ to have them remanded in custody pending the trial. That application was later set aside. They were charged before the Supreme Court on 5 April 2019 with trafficking in a controlled drug weighing 2569 grams and containing 676.24 grams of heroin, and with conspiracy to do so.

[4] On 18 April 2019, the charge sheet was amended to add the third petitioner, Ms. Raoudy. She was charged with conspiracy to import the controlled drug, on the ground that she allegedly agreed with the second petitioner to import the controlled drug.

[5] In the Supreme Court, the State Attorney applied for their remand to custody. The respondent relied on the affidavit of an investigating officer, Laurine Constance. The grounds relied on by the State Attorney included the seriousness of the offense, the quantity of drugs found, the rising danger posed by drugs, that the accused might abscond, and that the accused might interfere with witnesses. The petitioners claim that the affidavit contained details that had not been disclosed to them and were matters pertinent to the

² Misuse of Drugs Act, 1990 (as amended by Act 3 of 2014).

³ The Criminal Procedure Code, 1955 (as amended by Act 4 of 2014).

trial which should not have been placed before the judge hearing the bail. The remand to custody was challenged by the petitioners, as well as by Ms. Samantha Celestine, their co-accused.

[6] On 9 May 2019, Ms. Samantha Celestine made an application requesting that she be released on bail pending the hearing of the trial. One of the grounds of the application was that her and her husband and co-accused Mr. Jude Brigilia have three minor children aged 2, 12 and 14 living with them. Ms. Celestine requested that she be released on bail to enable her to care for her children, who were then under the care of relatives since both she and her husband were remanded in custody.

[7] On the same date, 9 May 2019, Ms. Roady also made an application to be released on bail pending the trial. In her application, she stipulated that she was a 20-year-old mother of two children aged 1 and 4 who were in the care of her stepmother. And further laid out that the grounds relied upon by the State Attorney, namely that she would abscond or interfere with the investigation, were not supported by any evidence, since she voluntarily presented herself to the police and the only evidence alleged against her was a Whatsapp message shown to her, which she had no means to suppress or interfere with.

[8] On 4 June 2019, after the hearing the applications, the Supreme Court, per Burhan J held that “since both parents are in remand this could affect the welfare of the children who are of tender age. Therefore, on compassionate grounds, I would release the second accused Samantha Celestine on bail.” About Ms. Roady, the court held that “she may be having minor children but her partner and other family members are available to take good care of them.” The effect of this was that Mrs Celestine was released on bail, while Ms Roady was remanded in custody.

[9] On 5 June 2019, Mrs. Chang-Tave made an application for her release on bail. She stated that she has two five-year-old sons and was struggling to provide them with a fixed home. Social services have had to intervene since her sister and mother are on treatment for alcohol. She further explained that one of the boys suffers from asthma which requires treatment regularly. And that in her absence, her son's health was in serious jeopardy since is available to administer proper medical care and attention. Since both she and her husband were remanded in custody, her request was to be released on bail on humanitarian and compassionate grounds. In her view, her situation and that of Mrs. Celestine were similar.

[10] On 3 July 2019, the Supreme Court, per Burhan J, held that "considering the seriousness of the offense and the possibility of Mrs. Chang-Tave absconding in the face of multiple serious charges and the reasons contained herein, I proceed to decline the application for bail, and am satisfied that on consideration of all the above facts, substantial grounds exist for her further remand into custody."

[11] It is necessary, at this stage, to set out certain parts of the ruling by Burhan J when refusing the application of Mrs. Chang-Tave. He considered the nature of the charges which she (and the three other accused, except Ms. Roaudy) is faced with, namely trafficking and conspiracy to traffic 2569 grams of heroin. He stated that "Mrs. Chang-Tave and Mr. Chang-Tave have also been charged with conspiracy to import a controlled drug on a different date, in February 2019, indicating [Mrs. Chang-Tave's] repeated involvement in the conspiracy to import controlled drugs into Seychelles. This is further aggravated by the fact that the quantity of controlled drug on Count 1 and Count 2 indicates an element of commercial activity."

[12] The ruling went on: “on considering the facts contained in the initial affidavit of Laurine Constance date 5 April 2019, it is apparent that [Mr. Jude Brigilia] and [Samantha Celestine (who was released on bail as her child was only two years old)], co-operated with the officers during the search of their house and even showed the officers where the controlled drug was hidden and provided information pertaining the controlled drug. The affidavit does not indicate any co-operation in the investigations on the part of [Mrs. Chang-Tave].

[13] Burhan J thus concluded that Mrs. Chang-Tave faced “more serious charges than any of the other accused” and thus the probability of her absconding and interfering with the witnesses in the face of these serious charges was present. Stating further that “the controlled drug concerned in Count 1 and 2 is a class A controlled drug and the quantity is large. The offense attracts a maximum term of life imprisonment and an indicative minimum term of 20 years imprisonment. The seriousness of the offence is thus apparent. Further, it is averred in the affidavit of agent Laura Constance that this is an aggravated offence on the basis that it was an organised activity by a group of persons and a commercial element exists.”

[14] About Mrs. Chang-Tave’s claim in her application that her sister and mother were alcoholics undergoing treatment, Burhan J stated that there was no medical documentation supporting this averment. And that the prosecution had notified the court that social services had been visiting the children, and no adverse reports had been.

[15] It is a result of this ruling refusing bail that the petitioners turned to this court, alleging that they had been unfairly discriminated against by Burhan J.

The Petition

[16] The petitioners, as mentioned, are the Chang-Taves and Ms. Shafira Raoudy. They submit that their continued detention is unconstitutional and violates their right to liberty under Article 18(1) of the Constitution and other fundamental rights. They allege that the whole docket was disclosed to Burhan J which contained matters that should not have been disclosed to him at the bail stage. This resulted in matters for the criminal trial being considered in the bail application. Thus, their right to have their bail determined by an impartial judge, which is guaranteed in Art 19(1) has been contravened. Further, where the judge who heard the bail and refused it due to consideration of matters relevant to the trial later hears the trial, there is no possibility of a fair trial.

[17] In support of the above submission, they rely on the following factual allegations. The respondent, the Attorney General, applied for their remand into custody based on an affidavit by Laurine Constance, the investigator. The grounds relied upon were those contained in Art 18(7) of the Constitution, namely the seriousness of the offence; substantial grounds for believing that the suspect will fail to appear for the trial or will interfere with the witnesses. The affidavit contained details that had not been disclosed to them. Further, the affidavit contained matters pertinent to the trial which should not have been placed before the judge hearing the bail application. Despite their remand into custody from March, by 5 April 2019, they had still not been served with any documents and were thus unable to effectively challenge the reasons for their remand. Following the amendment of the charge sheet to include the third petitioner, Ms. Roady, the respondent again applied for the petitioners' remand into custody. They were still not able to challenge their denial of bail as no documents had been served on them.

[19] As mentioned, on 9 May 2019, counsel for Mrs. Celestine (their co-accused) moved for her remand on bail. One of the grounds that she relied on was that she had minor children. By this time, the trial judge Burhan J hearing the application had the whole prosecution docket before him. He considered the nature of the charges against Mrs. Celestine, and the first and second petitioners who were all charged with trafficking and conspiracy to traffic. In the petitioners' view, the learned judge rightly observed that these charges attract a minimum term of life imprisonment or 20 years upon conviction. However, they take issue with the judge's consideration of the following: "in the affidavit of Johnny Malvina that this is an aggravated offence on the basis [that] this was an organised activity by a group of persons and a commercial element exists." In their view, this is an aspect that will be proved or disproved at the trial and should not have been placed before the judge at the bail hearing, because it prejudiced their right to be heard by an impartial tribunal under Art 19(1) of the Constitution.

[20] The trial judge also took the welfare of the children of the first two accused, Mr. Jude Brigilia and Mrs. Celestine, who were both remanded in custody with the petitioners, and on compassionate grounds, released Mrs. Celestine on bail. In this regard, the first petitioner, Mr. Chang-Tave alleges that he and Mrs. Celestine are charged with the same offences. He is also sick and both he and his partner, Mrs. Chang-Tave, are in custody. They are both parents of minor children, one of whom requires regular treatment because he suffers from asthma. They both face the same charges as Mr. Brigilia and Mrs. Celestine. By all accounts, they felt they were in the same situation as these two accused. Thus, their children should have received the same consideration as the children of the two accused. In his view, his partner, Mrs. Chang-Tave should also have been granted

bail subject to conditions. The exercise of discretion by Burhan J in favor of the other two accused and not in their favour was arbitrary, and amounted to discrimination in contravention of Art 27 of the Constitution. The article only allows discrimination necessary in a democratic society. This act by Burhan J shows that he is openly biased, and the continued trial against him will violate their right to a fair trial under Article 19(1) of the Constitution.

[21] The third petitioner, Ms. Roady, has the following complaint. She has only been charged with one count of conspiracy under section 16(a) of MODA, in that she allegedly agreed with Mrs. Chang-Tave to import a controlled drug. She faces only this one count, unlike Mrs. Celestine who faces two counts under MODA. Mrs. Celestine has three minor children aged 16, 12, and 4. She, on the other hand, has two minor children aged 4 and 1. In her view, the court's sole consideration was the welfare of Ms. Celestine's children in her release on bail. Even though there were other children's interests, hers and the Chang-Taves'.

[22] Accordingly, the petitioners submit that granting bail only in favor of the wellbeing of Ms. Celestine's children, and not theirs, suppresses their rights under Articles 27, 31(d), and 45 of the Constitution. Under Article 27, they have the right to equal protection of the law including the enjoyment of rights under the Charter without discrimination on any ground, except as is necessary for a democratic society. They further submit that their right to liberty under Art 18 has been infringed and that under Article 19(2), they are innocent until proven guilty. Further, they have a right to a fair hearing before a fair and impartial court and a right to bail under Article 18(7).

[23] In addition to the constitutional submissions, the petitioners also made legal submissions concerning the applicability of the Criminal Procedure Code. They state that where an application for remand in custody is made, it is section 179 of the Code that applies and not section 101. Section 179 of the Code provides that before or during the hearing of any case, it shall be lawful for the court in its discretion to adjourn the hearing at a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime, the court may suffer the accused person to go at large or may commit him to prison, or may release him upon his entering into a recognizance with or without sureties, at the discretion of the court conditioned for his appearance at the time and place to which such hearing or further hearing shall be adjourned.

[24] They submit that at the bail stage, the court's only concern is that they shall appear at their trial and conditions can be imposed to guarantee this. In their view, Article 19(2) states that they are innocent. To deny them bail is equivalent to cruel, inhumane and degrading punishment, in contravention of Article 16 of the Constitution.

[25] They also believe, and submit, that the "Practice Directive" which allows the trial docket to be before the judge hearing the bail application violates their rights under Article 19. They submit that the judge who heard an application to remand to custody will not, despite their oath taken, be able to apply a fresh mind to the trial. They would not be able to be impartial and fair.

[26] With all these, the petitioners believe they have established a prima facie case that their rights have been violated. These rights include Articles 16, 19, 18, 27, and 31. Their prayers in this court are as follows:

- (i) That this court interpret the Charter in such a way as not to be inconsistent with any international obligations relating to human rights and freedoms, particularly the United Nations Covenant on Civil and Political Rights which Seychelles acceded to in 1992;
- (ii) To interpret the Charter in line with Article 48 (a to d) of the Constitution;
- (iii) To order that this case shall take precedence over other matters before the Supreme Court and be heard as a matter of extreme urgency pursuant to Articles 18(9) and 125(2);
- (iv) To make the following declarations:
 - (a) That the petitioners' rights have been breached;
 - (b) That the acts and omissions of the respondent contravened their rights;
 - (c) To issue such writs and give such directions as it may consider appropriate for enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application;
 - (d) Make such additional order under this Constitution or as may be prescribed by law to give effect and enforce the petitioner's fundamental rights;
 - (e) Grant any remedy available to the Supreme Court against any person or authority as the court considers appropriate;
 - (f) To grant them bail and stay the proceedings until the final determination of this matter;
 - (g) To order that case CR 18/19 is put before another judge after this petition has been finally determined;
 - (h) Costs and interests of the application to be paid by the respondent.

The respondent's case

[27] The respondent answered to the merits of the petition after some of the preliminary objections that it had raised were unsuccessful. It filed a substituted affidavit which was allowed on 3 March 2020.

[28] As mentioned, the petitioners had alleged that the petitioner had an obligation, under Article 31 of the Constitution, to ensure that children of a young age are not separated from their parents, unless judicially recognised permit this. In response, the respondent stipulates that this is countenanced by Article 73 of the Constitution. In terms of this provision, it has to discharge its duties to the best of its abilities.

[29] The respondent disagrees with the petitioners' allegation that a bail application is a constitutional action. In its analysis, bail and remand issues are regulated by the Criminal Procedure Code read with the Constitution. The procedure is thus not solely a constitutional one.

[30] The respondent submits that the bail was denied for lawful reasons, and deny that the petitioners did not have all documentation provided to them at bail. It also states that the petitioners have not provided sufficient legal argument as to why a docket cannot be disclosed before the court in bail proceedings. And further disagrees that the judge hearing a trial and bail contravenes the right to an impartial court, and rejects the petitioners' attempt to advocate for classification of judges into two categories, bail, and trial. It states that no such classification exists in other jurisdictions.

[31] Concerning Burhan J's mentioning the affidavit of Johnny Malvina where reference has been made to an allegation against the petitioners of organised activity, and the petitioners view that this ought not to have been placed before the judge at bail, the respondent stipulates that this ought to have been raised at the bail hearing and is irrelevant to the constitutional petition. It also is of the view that the allegation made that the first two petitioners are in the same position as Ms. Celestine should have been raised at an appeal. The judge, in its view, considered each application on its merits and weighed each.

[32] According to the respondent, Burhan J took into account the following factors in refusing bail: Mrs. Chang-Tave was charged with trafficking and conspiracy to traffic, and conspiracy to import a controlled drug. This latter count is an additional one. In this regard, the respondent states the following. "The learned judge thus finds her to be repeating the offence; that the quantity is commercial; that Natasia Chang-Tave did not cooperate with the police while searching their house unlike the other accused who got bail; that Natasia Chang-Tave faces more serious offences than other accused; there exists a possibility that she will abscond; that she did not attach medical certificate to the effect that her mother and sister are alcoholics and have to undergo treatment." Thus, in its view, "the judge did not discriminate between Samantha Celestine and Natasia Chang-Tave. The two accused are not similarly situated in terms of the charges. Even if they both have children, the differentiation was not arbitrary, it was backed by facts."

[32] It further rebuffs, without any retort, the petitioners' complaints regarding violation of other rights. And further requires the petitioners to prove how their other rights mentioned have been breached. Other allegations are denied on the basis that these are

‘academic’, or irrelevant, or a matter of legal interpretation. The respondent denies the allegation that the “Practice Directive” violates the right to an impartial hearing, and submits that this cannot be brought into this petition because it presents a different matter. It is impermissible, in its view, to bring distinct matters in one petition. Finally, it denies that any alleged rights have been violated or that a prima facie case for breach established, and further denies that the petitioners are entitled to any of the relief sought.

Submissions

[33] The petitioners submit that they have established a prima facie case for a breach of their rights in compliance with Article 46 of the Constitution. In respect of Article 27, they submit that it affords them a right to equal treatment by the court. The law must be impartially applied to all. Derogation from this right is only permissible where it is necessary for a democratic society. Thus, the question is whether the court treated the petitioners and their co-accused, Mrs. Celestine equally when it allowed her release on compassionate grounds, because of their minor children, but refused to do the same for the petitioners. They have shown, in their view that they have been discriminated against. The burden was thus on the State to show that no discrimination took place, and the State had to discharge this burden fully. It could not shift the burden to them. They relied **on Gabby v Dhanjee (2011) SLR** and **Haron Ondicho Sagwe v The Republic CP 07/2014**. They submit that the respondent was required to provide cogent evidence, by affidavit, in response to the allegations, and not shift the burden on them. For this contention, they rely on **Chow v Attorney General & others SCCA 2/2007** and **Dubois & others v Michel & others CP 4/2014**. Affidavits are sworn testimony before a

court, thus, the respondent incorrectly put them to the proof of their evidence. They submit that the respondent has thus failed to establish its burden under Article 46(8).

[34] Concerning the docket, they submit that **R vs Esparon and others (SCA No: 01 of 2014) [2014] SCCA 19 (14 August 2014)** lends support to the view that disclosing the docket to the judge hearing the bail application can be prejudicial to an applicant and interferes with his right to be tried by an impartial court. There, the court reiterated that bail and trial were separate proceedings, which had to be treated separately. The court also highlighted that the reason why two separate files exist for bail and trial is that the trial file may contain previous convictions, which should not be known by the judge hearing the bail application. They submit the respondent has not raised any response to the allegation that the disclosure of the docket to the judge hearing the bail is a violation of Article 19. Thus, this court should accept their view that this practice offends the right to an impartial court. They further submit that this court is empowered, by Article 46(5) to stay the criminal proceedings pending the present case, and any appeals arising.

[36] In its submission, the respondent state that the petitioners have failed, on a balance of probabilities, to establish a prima facie case. They rely on **Aimee v Simeon SCA 7/2000** where the Court of Appeal said prima facie means evidence which is sufficient to establish the matter in issue unless rebutted by evidence to the contrary. Further, it is submitted that Article 46(8) which places the burden on the State does not include the judiciary. Because this would effectively make the judiciary a judge in its case. The judiciary cannot be conceived as a violator of rights when it discharges judicial functions, thus, the order denying bail cannot be construed as a violation.

[37] The respondent further contends that the grant or denial of bail is a matter for the court's discretion. It cites section 179 of the Criminal Procedure Code, which stipulates that it shall be in the court's discretion, before or during the hearing of a case, to release an accused or commit him to prison. In its view, the Constitution recognises the constitutionality of section 179 of the code. When the court decides to deny bail, it takes the allegations made in the affidavits. The court assesses the facts, and the suitability by the court to make this determination was stressed in **Barreau v Republic SCA 7/2011** where it was stipulated that the trial court is best placed to assess how best to secure the accused presence at their trial. The petitioners have failed to show that the judge did not exercise his discretion according to the law.

[38] Concerning the claim that the petitioners have been discriminated against, in contravention of Article 27, the respondent submits that the petitioner has not established any grounds of discrimination to seek redress under this article. The legal and factual basis for denial of the petitioners' bail and allowing Ms. Celestine are distinguishable. The court considered the distinguishing factors, which included the repeated involvement, failure to cooperate, the quantity of the drugs, the seriousness of the offence and possible sentence, and the failure by the petitioners to provide medical evidence supporting the claim that the sister and mother were taking treatment for alcoholism. Accordingly, there was no arbitrariness and consequently, no discrimination.

[39] The respondent relies on **Napolean v The Republic SCC1-2/1997** and **Aimee v Simeon 7/2000 LC 190** for the submission that dissimilar treatment does not necessarily offend the right to equality before the law. And that equal protection of the law is the right to equal treatment in similar circumstances. Thus, in its view, the petitioners have failed to

show that the accused were similarly situated. In its interpretation, Article 27 does not guarantee an absolute right to equal protection. It provides for exceptions necessary in a democratic society. What a democratic society is has been defined in the Constitution. In **Mancienne v Attorney General 18/1996**, it was held that there will be differentiation even in the context of equality.

[40] The respondent also submits that a judicial decision cannot offend the constitutional principle of equality. For this proposition, they rely on the Indian judgement of **Naresh v State of Maharashtra AIR 1967 SC 1**. In that case, it was said that it would be inappropriate to suggest that a decision by a tribunal can be described as being discriminatory. The respondent further cites another Indian judgment, **Chander Alias Chandra v State of U (12 December 1997)** where the court held that parity amongst accused cannot be the sole ground for granting bail when a co-accused reappplies for bail after another has been released. Further developments and other considerations must be taken into account. If both cases are alike, then consistency requires that the latter accused also be released. In this regard, the respondent submits that the petitioners have failed to establish this similarity. In its view, the petitioners have failed to show intentional or purposeful discrimination.

[41] About the petitioners' complaint that the trial docket was placed before Burhan J when hearing the bail, which they say contravenes Article 19, the respondent reiterates that this must be proved, and further that the petitioners have not indicated which "Practice Directive" they refer to, nor have they attached the directive. The petitioners are seeking to establish separate bail and trial judges, which is not provided under the Constitution and the Criminal Procedure Code.

The Law and Analysis

A. Personal liberty in Article 18 is not absolute

[42] Equality is a precious right guaranteed by the Constitution.⁴ Under Article 27, everyone has a right to equal protection of the law. This includes the enjoyment of the rights and freedoms set out in the Charter without discrimination on any ground, except as is necessary in a democratic society.

[43] The Constitution also guarantees a qualified right to personal freedom. In terms of Article 18(1), every person has a right to liberty and security of the person. This is qualified by Article 18(2) which lists many circumstances in terms of which a person's liberty may lawfully be restricted. The very reason for the existence of Article 18(2) is that persons may legitimately and constitutionally be deprived of their liberty in given circumstances.

[44] One of these circumstances, provided in Article 18(2)(b), is detention on reasonable suspicion of having committed or of being about to commit an offence, for investigation or preventing the commission of the offence and of producing, if necessary, the alleged offender before a competent court. It is inherent in the wording of Article 18(2)(b) that the Charter contemplates, and sanctions, the temporary deprivation of liberty required to bring a person suspected of an offence before a court of law.

[45] The nature of this deprivation may, in certain instances, be temporary. This is borne out by Article 18(7). In terms of this provision, a person who is produced before a court shall be released, either unconditionally or upon reasonable conditions, for an appearance at a later date for trial or proceedings preliminary to a trial. The release is favoured, except in certain circumscribed instances. The court may refuse a release having regard to the following circumstances; (a) where the court is a magistrates' court, the offence is one of treason or

⁴ The Constitution of the Republic of Seychelles, 1993.

murder; (b) the seriousness of the offence; (c) there are substantial grounds for believing that the suspect will fail to appear for the trial or will interfere with the witnesses or will otherwise obstruct the course of justice or will commit an offence while on release; (d) there is a necessity to keep the suspect in custody for the suspect's protection or where the suspect is a minor, for the minor's welfare; (e) the suspect is serving a custodial sentence; (f) the suspect has been arrested pursuant to a previous breach of the conditions of release for the same offence.

[46] The Article makes three things plain. The first is that the Constitution explicitly recognises and sanctions that people may be arrested and have their liberty restricted for allegedly having committed offences, and may for that reason be detained in custody. The Constitution itself, therefore, limits the liberty interest protected by Art 18(1).⁵ Personal liberty is not absolute and may be subject to the rights of others and the public interest. (See **Beeharry v R SCA 11/2009** para 20). The second is that notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody either unconditionally or subject to reasonable conditions.⁶ The third basic proposition flows from the second and sets the normative pattern for the law of bail. It is that the criterion for detention must be based on rational grounds listed in Article 18(7). The factors include, as stipulated above, the seriousness of the offence, substantial grounds for believing that the suspect will fail to appear for the trial or will interfere with the witnesses, or will otherwise obstruct the course of justice or will commit an offence while on release. Where these factors do not arise, the constitutional default leans strongly in favour of release.

⁵ S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999) para 6.

⁶ Ibid.

[47] Article 18(7) thus assumes a judicial evaluation of different factors that make up the criterion. The basic objective is what has traditionally been ascribed to the institution of bail, namely, to maximize personal liberty.⁷ A bail hearing is a unique judicial function. The purpose of bail proceedings and that of the trial differ fundamentally.⁸ In a bail application, the inquiry is not concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the considerations and interests of justice lie about bail. The focus at the bail stage is to decide whether the circumstances permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance.⁹ It is a delicate exercise, which requires a careful balancing between the rights and interests of the person and the broader community. See judgment of Msoffe JA in **Francis Ernesta & Ors v R (Criminal Appeal SCA07/2017) [2017] SCCA 24 (11 August 2017)** para 15, supporting this characterization of bail.

B. International and regional instruments on bail and remand in custody

[48] These propositions, regarding the interpretation of liberty rights in the context of detention pending trial, also find support in international and regional documents. Article 48 of the Constitution obliges the Charter to be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall. When interpreting the provision of the Charter, judicial notice must be taken of, inter alia, the international instrument containing these obligations.

⁷ Ibid. See also R vs Esparon and others (SCA No: 01 of 2014) [2014] SCCA 19 (14 August 2014) para 16 onward.

⁸ R vs Esparon and others (SCA No: 01 of 2014) [2014] SCCA 19 (14 August 2014) paras 39 – 41.

⁹ S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999) para 11.

[49] The Universal Declaration of Human Rights (UDHR) is considered the groundwork of international human rights law.¹⁰ The UDHR recognises that all human beings have basic rights and fundamental freedoms and that such freedoms and rights apply to everyone. Further, through the UDHR the international community committed to upholding dignity and justice for all, regardless of people's 'nationality, place of residence, gender, national or ethnic origin, color, religion, language, or any other status'¹¹ As a vulnerable group, detained persons have human rights that are protected under the UDHR, and, like all other human beings, are entitled to their fundamental freedoms. Article 3 of the UDHR guarantees the right 'to life, liberty, and security of the person'. Article 11 provides the right of accused persons to be presumed innocent until proven guilty in accordance with the law, and Article 9 protects against being subjected to arbitrary arrest and/or arbitrary detention.¹² Article 7 guarantees that all are equal before the law, and are entitled without any discrimination to equal protection of the law. Everyone is entitled to equal protection against any discrimination in violation of the declaration.

[49] The International Covenant on Civil and Political Rights (ICCPR), which Seychelles ratified in 1992, guarantees the right to liberty and freedom of security and prohibits arbitrary arrest and detention.¹³ No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. To comply with article 9 of the ICCPR, states may not deprive people's liberty in a manner that is not authorised by the law, and where they do deprive a person of liberty this 'must not be

¹⁰ See Madi, Palesa Rose and Mabhenxa, Lubabalo (2018) Possibly unconstitutional? The insistence on verification of address in bail hearings. SA Crime Quarterly, (66), 19-30 at 21.

<https://dx.doi.org/10.17159/2413-3108/2018/v0n66a5710> accessed on 27 April 2020.

¹¹ Ibid, at 22. See Articles 1 to 3 of the UDHR.

¹² Ibid.

¹³ Article 9 of the Convention.

manifestly unproportional, unjust or unpredictable.¹⁴ Article 9(3) of the ICCPR further provides that detention ‘shall not be the “general rule”. It advocates for remand detainees to be released from prisons, subject to conditions, which may include bail money or other types of guarantees.¹⁵ The Human Rights Committee has said that the general rule is subject to the exception where there is a possibility that the accused would abscond, or destroy evidence, influence witnesses or flee.¹⁶ This position is further amplified by the UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) which require that pre-trial detention should only be used as a measure of last resort and should not be longer than necessary.¹⁷ Presiding officers should, as a matter of principle, always consider non-custodial measures, which may include conditions such as periodically visiting the local police station.¹⁸ The selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, the background of the offender, the purposes of sentencing and the rights of victims.¹⁹

[50] Detained persons also have the right to be treated equally, equality being characterised as ‘the most important principle imbuing and inspiring the concept of human rights’.²⁰

Article 26 of the ICCPR provides that everyone is equal before the law and that everyone is equally entitled to the protection of the law. Article 2(1) of the ICCPR prohibits

¹⁴ Madi, Palesa Rose and Mabhenxa, Lubabalo ibid, at 22.

¹⁵ Ibid.

¹⁶ Communication No. 526/1993, M and B Hill v Spain (views adopted on 2 April 1997), in UN doc. GAOR, A/52/40 (vol. II), 17, para 12.3. Ibid.

¹⁷ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), Adopted by General Assembly resolution 45/110 of 14 December 1990, <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>.

¹⁸ Madi, Palesa Rose and Mabhenxa, Lubabalo ibid, at 22.

¹⁹ Article 3.2 of the Tokyo Rules.

²⁰ Madi, Palesa Rose and Mabhenxa, Lubabalo ibid, at 22.

discrimination in the context of all rights and freedoms listed under the ICCPR, including the right to liberty.²¹

[51] At a regional level, the African Charter on Human and Peoples' Rights (the African Charter), to which Seychelles is a party, provides that 'every individual shall have the right to liberty and the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'²² The Charter does not have a specific bail provision, which, it has been argued, weakens its ability to adequately protect the rights of people seeking bail.²³ Nevertheless, it specifically provides that no one may be arbitrarily detained. This is because the Charter recognises the right to be presumed innocent until proved guilty by a competent court or tribunal.²⁴

[52] In addition to Article 6 of the African Charter, the African Commission on Human and Peoples' Rights has established many standards that protect the right to be presumed innocent,²⁵ namely, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.²⁶ Section M1(e) of these Principles provides that States must not keep accused persons in detention unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses, or posing a clear and serious risk to others. Instead, they may be released subject to certain conditions or guarantees, including the payment of bail. The Principles

²¹ Ibid.

²² Article 6 of the Charter.

²³ Madi, Palesa Rose and Mabhenxa, Lubabalo *ibid*, at 23.

²⁴ Article 7(2) of the Charter.

²⁵ Madi, Palesa Rose and Mabhenxa, Lubabalo *ibid*, at 23.

²⁶ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 accessible at <https://www.achpr.org/legalinstruments/detail?id=38>

make special provisions for expectant mothers, and mothers of infants only. It provides that expectant mothers and mothers of infants shall not be kept in custody pending their trial, but their release may be subject to certain conditions or guarantees, including the payment of bail.²⁷

[53] There is also the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, which also encourages States to implement alternative strategies to imprisonment.²⁸ The Plan of Action sets out that remand detention should be a measure of last resort and should be for as short a period as possible.²⁹ In the latter regard, the plan advocates involving community representatives in the bail process.

[54] As to the interpretation of these regional instruments, particularly Article 6 of the African Charter which prohibits arbitrary detention, it has been held that “remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.”³⁰ The court stipulated that liberty is the rule, and detention must be the exception. The most common grounds for a lawful judicial deprivation of liberty that the court identified were the following: a) after conviction by a competent independent and impartial Court of law; b) on reasonable suspicion of having committed an offence or to prevent the person from doing so, and c)

²⁷ Section M1(f).

²⁸ Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, accessible at <https://www.achpr.org/legalinstruments/detail?id=42> .

²⁹ Madi, Palesa Rose and Mabhenxa, Lubabalo *ibid*, at 23.

³⁰ *Dasuki v Federal Republic of Nigeria* (ECW/CCJ/JUD/23/16) [2016] ECOWASCJ 54; (4 October 2016). The court there quoted Communication No 458/1991. *A. W. Mukong v Cameroun* (views adopted on 21 July 1994) UN. doc GAOR A/49/40 (vol. 11) para 9.8, available at <https://africanlii.org/ecowas/judgment/ecowas-community-court-justice/2016/54-0> .

to prevent a person from fleeing. All these situations and circumstances must be established by cogent, convincing, credible, and unequivocal evidence.³¹

[55] It has also been held, by the African Commission, that detention carried out by states based on discrimination amounts to the arbitrary deprivation of an accused's right to liberty and, consequently, is a violation of article 6 of the African Charter.³² This case concerned the arrests and detentions by the Rwandan Government based on grounds of ethnic origin alone. Arbitrariness thus includes elements of inappropriateness injustice, lack of predictability, and due process.³³

[56] These international and regional instruments protect many rights of persons who have been arrested and detained, which include: the right to freedom and security of the person (this includes the right not to be deprived of freedom arbitrarily or without just cause); the right to be released from detention if the interests of justice permit; the right to not be unfairly discriminated against directly or indirectly, based on any grounds.

[57] In sum, these instruments and their interpretation accord with what the Constitution envisions in respect of persons detained on suspicion of offences. Article 18 guarantees a qualified right to liberty and security of the person, which may be restricted through arrest and detention on suspicion of a crime. Notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody either unconditionally or subject to reasonable conditions. They may also be detained pending their trial. The criterion for continued detention must be based on rational grounds. These

³¹ Ibid.

³² ACHPR, *Organisation Contre la Torture and Others v Rwanda*, Communications 27/89, 46/91, 49/91, and 99/93, decision adopted during the 20th Ordinary Session, October 1996, para 28. Accessible at http://www.worldcourts.com/achpr/eng/decisions/1996.10_OMCT_v_Rwanda.htm.

³³ *Dasuki v Federal Republic of Nigeria* *ibid*.

grounds include the seriousness of the offence, substantial grounds for believing that the suspect will fail to appear for the trial or will interfere with the witnesses, or will otherwise obstruct the course of justice or will commit an offence while on release. When these grounds are present, there is a rational basis to further detain. In their absence, a person may be granted bail unconditionally, or subject to conditions. This approach aligns with the universally recognised presumption of innocence until proven guilty, which is recognised in Article 19(2)(a) of the Constitution. And the principle that detainees do not forfeit certain rights by virtue of being detained, such as the right to dignity (Article 16), equality (27), and fair criminal processes (19), to name a few. (See **R vs Esparon and others (SCA No: 01 of 2014) [2014] SCCA 19 (14 August 2014)** para 19.)

C. The Criminal Procedure Code

[58] These basic principles are also established in the legislative provisions governing remand to detention or release before the Supreme Court. In the Criminal Procedure Code of Seychelles, bail is dealt with in two different parts. First, section 100 of the Code contains the right, under certain circumstances, to be released from detention unless remanded in custody. In terms of section 101, an application may be made to the court to hold a suspect in custody on remand. An application of this nature has to be made before the court, and has to be on affidavit. The application has to state the nature of the offence for which the suspect has been arrested or detained; the general nature of the evidence on which the suspect was arrested or detained; what inquiries relating to the offence have been made by the police and what further inquiries are proposed by the police; and the reasons for

believing the continued holding of the suspect to be necessary for any further inquiries.³⁴

A copy of this application has to be served on a suspect. A court, after hearing the application, will either release the person concerned with or without conditions or remand them in custody.

[59] The circumstances which militate in favour of remand in custody mirror those in Article 18(7) of the Constitution, namely; (a) where the court is a magistrate's court, the offence for which the suspect was arrested or is being detained is treason or murder; (b) the seriousness of the offence for which the suspect was arrested or is being detained; (c) there are substantial grounds for believing that the suspect will fail to appear for trial or will interfere with witnesses or will otherwise obstruct the course of justice or will commit an offence while on release; (d) there is a necessity to keep the suspect in custody for the suspect's protection or, where the suspect is a minor, for the suspect's welfare; (e) the suspect is serving a custodial sentence; (f) the suspect has been arrested pursuant to a previous breach of the condition of release for the same offence. These are provided in section 101(5).

[60] The remainder of section 101, it seems, requires that a remand in custody may be extended on application, but, may not exceed 30 days. (Section 101(7) and (8)).

[61] The second provision appears in section 179, in respect of summary proceedings. In terms of this provision, a court may before or during a hearing, adjourn a hearing to a specified time, and in the interim, release the accused person or commit him to prison. A release during the adjournment may be subject to the presentation of sureties, or without, or conditional. Where the accused person has not been released and is instead committed to

³⁴ Section 101(2) of the Code.

prison during the adjournment, the provision requires that adjournment not exceed fifteen clear days.

[62] We can surmise from this legislative scheme, that where a court determines remand of detained persons, either in custody or on bail, the same considerations apply. Namely, how serious the charge is, the likelihood of interference with the investigation, the possibility of absconding, etc. The default, where these factors are not present, is to release the person on bail. Where they are not released, they may only be kept for a specific period. With the option to extend the initial period. These factors provide a rational basis for the court to decide whether to release or commit to prison.

[63] This approach is trite. For instance, **Beeharry v R (2008-2009) SCAR 41** supports the position that generally, courts should tend toward upholding the right to liberty while ensuring that accused persons turn up at their trial and not interfere with the administration of justice unless the factors listed in Article 18(7) arise. Pre-trial detention, including detention through trial, is an exceptional measure of the very last resort in a democratic society founded on the rule of law as the Republic of Seychelles is. **Beeharry** and the recent **Brioche v R (SCA 20/2015) [2015] SCCA 46 (17 December 2015)** para 1, both remind us that:

“Pre-trial detention, including detention through trial, is an exceptional measure of the very last resort in a democratic society founded on the rule of law as the Republic of Seychelles is. The legal system in law as well as in practice should shift to this paradigm. And where it does not, the judicial system should ensure that it does so. Even then, the duration of this exceptional measure should be as limited in time as possible. It is the joint responsibility of the law enforcement authorities, the Office of the Attorney-General, the Bar and the Courts to jealously guard this

citadel of freedom of the individual from which flows the exercise of all other freedoms of our democratic society.”

[64] Regarding the period of remand in custody, the Court of Appeal in **Beeharry v R** laid down that a “reasonable period” is permissible. Relying on the jurisprudence of the UNHRC, the court determined that what constitutes a reasonable period is a matter of assessment of each particular case. (para 40 of **Beeharry**, following the approach in **Filastre v Bolivia Communication no 336/1988 (UNHRC)**).

[65] We can also conclude, from all the above, that even where a court, after assessment of the person’s circumstances, and taking the exceptional circumstances provided both in the Constitution (Article 18(7)) and the Criminal Procedure Code into account, orders that the accused person be remanded to prison, such person does not lose their fundamental rights. Including the right to equality, so generously captured in Article 27 of the Constitution. Detained persons, whatever their charge, have a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground, except as is necessary for a democratic society. This is why the Court of Appeal was at pains to lay out the guidelines it did in **Beeharry**, para 46.

D. The correct approach where discrimination in terms of Art 27 is alleged

[66] It was mentioned earlier in the judgment that unfair discrimination may occur where detention is ordered based on the grounds of ethnic origin. The pejorative meaning of “discrimination” relates to the unequal treatment of people “based on attributes and characteristics attaching to them”.³⁵ Thus the detention based on ethnic origin was found to constitute an arbitrary deprivation of an accused’s right to liberty and, consequently, in

³⁵ *Harksen v Lane NO and Others (CCT9/97)* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997) para 48.

violation of article 6 of the African Charter.³⁶ Arbitrariness includes elements of inappropriateness injustice, lack of predictability, and due process.³⁷ Unlike the African Charter, other aforementioned international instruments, and the constitutions of other jurisdictions,³⁸ our Constitution does not have a list of prohibited grounds of discrimination. For instance, the UNDHR prohibits discrimination on the grounds of race, color, sex, language, religion, political or other opinions, national or social origin, property, birth, or another status. (Art 2). The same grounds are mirrored in the International Covenant on Civil and Political Rights and 2(1) and 26)³⁹ and the African Charter on Human and Peoples' Rights, 1981 (Articles 2 and 3). This is not an exhaustive list. All forms of discrimination are prohibited.

[67] If an applicant is alleging discrimination, the onus is on the respondent to prove that the discrimination was fair. (Article 46(8) of the Constitution). But the initial allegation of discrimination has to be established by the applicant/petitioner. They must establish the basis upon which they allege they are being discriminated against. For example, in **Mancienne v The Attorney General (1996-1997) SCAR 163**, it was alleged by the petitioner that the legislation immunizing only a particular class of investors from prosecution in certain instances, unfairly discriminated against those class of investors that were not granted immunity. The basis of the alleged discrimination was the classification of investors in terms of the extent of their investment. In **Aimee v Simeon CA7/2000**, the petitioners had impugned the statutory differentiation for instituting action

³⁶ ACHPR, *Organisation Contre la Torture and Others v Rwanda*, Communications 27/89, 46/91, 49/91, and 99/93, decision adopted during the 20th Ordinary Session, October 1996, para 28. Accessible at http://www.worldcourts.com/achpr/eng/decisions/1996.10_OMCT_v_Rwanda.htm.

³⁷ *Dasuki v Federal Republic of Nigeria* *ibid*.

³⁸ For instance, South Africa has listed prohibited grounds under s 9 of the Constitution, Act 108 of 1996.

³⁹ They are also included in the International Covenant on Economic, Social and Cultural Rights, 1966, International Convention on the Elimination of All Forms of Racial Discrimination, 1965, the Convention on the Rights of the Child, 1989 – to name a few.

against public officers and none public officers. The basis for the alleged discrimination was the position of public officers over none public officers. Recently in **President Faure & Ors v Amesbury & Anor (Constitutional Appeal SCA CL 07/2018) [2019] SCCA 3 (10 May 2019)**, the petitioner impugned the statutory restriction, based on her position as a politician, to be eligible for Commissioner in the Human Rights Commission vis a vis none political candidates. The basis for the alleged discrimination was her status as a political candidate.

[68] To borrow from Egonda-Ntende CJ in **Brioché & Ors v Attorney-General & Anor (CP 6/2013) [2013] SCCC 2 (22 October 2013)**;

“Equal protection is often invoked in respect of a person or groups of people who are denied certain rights and freedoms in preference to other persons *on some clear ground as the basis for different treatment*. The ordinary grounds of discrimination being race, gender, sex, religion, colour, age, disability, or any other ground. Contravention of Art 27 would have to be linked not only to a denial of a right or freedom under the charter to the petitioners which another similarly situated person or persons are allowed to enjoy on account of ground such as race, gender, sex, religion, colour, age, political or other opinion or persuasion, language, ethnicity, national or social group or any other recognisable ground.” (own emphasis.)

[69] **Brioché** makes clear how Art 27 should be invoked. There must be a clear ground as the basis for the different treatment. It may be on ordinary grounds, such as race, sex, colour, age, etc. It may also be on any other recognisable grounds. Like economic status in **Mancienne**, or political status in **Amesbury**. It is not enough to allege, without more, that A was treated differently from B, and that this was unfair. What is required is a cogent claim that stipulates the basis upon which A was treated differently, for instance,

because they are younger (a listed ground) or have more money (an unlisted ground), and that this was unfair. It is well established, in Article 46(8) of the Constitution and the jurisprudence of this court that an applicant who makes an allegation of a breach of rights under the Charter has to establish 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.

[70] Ordinarily, an allegation of discrimination occurs within the context of executive action or a legislative provision. A claim is made that particular action by the executive or a provision in the legislature distinguishes, unfairly, between two or more categories of persons or groups of persons on a specified or unspecified ground. But such an allegation may, notionally, also be made in respect of an action by the judiciary in the context of judgment. For instance, where the court exercises unfair judgment toward foreigners or someone who is HIV positive, because of these statuses, such judgment may be impugned by invoking Article 27.

[71] Article 27 has a two-staged approach. The petitioner has to establish that there is a ground (for example, race) or an analogous ground (for example, lower social class) upon which they have been discriminated against. And second, that the discrimination is unfair. In some jurisdictions, where a claim is made in respect of differentiation on a listed ground, there is a presumption that there is discrimination and the onus is on the respondent to prove that the discrimination was fair. If discrimination is not based on the listed grounds, a claimant relying on an unlisted classification is required to prove that they were adversely affected by the particular distinction and the distinction is unfair. The claimant will have to show that the differentiation has the potential to impair his or her

fundamental dignity, a burden that is not easy to prove.⁴⁰ There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.⁴¹ From this, we can surmise that not all differential treatment qualifies as unfair discrimination for purposes of Article 27. The right to equality needs to be interpreted and understood in its social and historical context. The right to be free from unfair discrimination, for example, must be understood against the legacy of deep social inequality.⁴²

[72] Once the petitioner has established the categorization as explained above, the burden is on the respondent to prove that the differentiation is fair. Over two decades ago, **Mancienne v The Attorney General (1996-1997) SCAR 163** laid down the test to establish whether a categorization is fair. There, the Court of Appeal established that some differential treatment is necessary for a democratic society, but different treatment must have a reasonable basis and be founded on clear differentia. The differentia must have a rational relationship to the purpose of the different treatments. In testing the rational relationship, a court must employ an objective test to determine whether there is a real possibility that the differential treatment may have met the purpose. Different treatment must achieve a desirable constitutional objective or desirable social purpose. This should not be determined on a subjective moral basis. It is enough that it is not a remote or merely fanciful possibility that the differential treatment will affect the

⁴⁰ This is the position in South Africa. See *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997) from para 40. See also Anne Smith *Equality constitutional adjudication in South Africa* (Chapter 14 Vol 2) [2014] AHRLJ 30 accessible at <http://www.saflii.org/za/journals/AHRLJ/2014/30.html#pgfId-1135556>.

⁴¹ *Harksen v Lane NO and Others* *ibid* para 46.

⁴² *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para 25.

purpose. The different treatment must only be to the extent necessary to fulfil the purpose. “Necessary” should be understood in the mitigated, not the absolute sense. Lastly, the measure should be proportionate to the purpose. Proportionality is not to be measured on a fine mathematical scale. Neither is it purely subjective.

[73] The above test is only conducted after a petitioner has satisfied the court that particular conduct or a provision discriminates on a particular listed or unlisted ground. The court then has to consider whether the conduct or a provision differentiates between people or categories of people. If so, whether the differentiation bears a rational connection to a legitimate government purpose. If it does not then there is a violation of Article 27. Even if it does bear a rational connection, it might nevertheless amount to discrimination. This is where less restrictive means are available to achieve the object.

Application

Have the petitioners satisfied the test in Article 27?

[74] Applying the above test to the facts of the present case, it is clear that the petitioners have not satisfied the first leg of the inquiry. They have not been able to establish the grounds (listed or unlisted) in terms of which they claim they have been discriminated against. As mentioned, it is not sufficient for purposes of Article 27(1) merely to allege that you have been treated differently. A petitioner must show that you have been treated differently based on a particular attribute. In this case, the petitioners have stated that they have been treated differently, but they have not stated what the basis of the different treatment was, and why based on this distinct categorisation, this was unfair. For example, if they claimed that they were being treated differently based on their marital status, or their age, or the like, they would have satisfied the first step. Thus, the court would have had to

determine whether there was such differentiation and whether this differentiation was unfair discrimination on the ground alleged. But the petitioners have done no more than allege that they were treated differently. This does not adequately satisfy the purport of Article 27. This means that the court does not need to go into the assessment enunciated in **Mancienne**, namely, the rationality of differentiation. That test is only done once the first leg has been satisfied. Since that did not happen here, the petitioners have failed to establish discrimination under Article 27.

The other allegations of breach

[75] The crux of the petitioners' claim was that there had been discrimination against them. This was not established. The question now remains whether the remainder of their complaints have to be determined. Recall that they have alleged violation of other rights, like dignity, the rights of their children, and fairness of process under Article 19. Once it has been determined that there was no discrimination established, the other complaints of breach fall flat, because these allegations are based on what they viewed as discrimination. This means the rest of the complaints of the breach also fail. However, should this be insufficient, then the rest of the complaints of breach fail for the reasons provided below.

[76] The petitioners complained that denying them bail was equivalent to cruel, inhumane, and degrading punishment, in contravention of Article 16 of the Constitution and their liberty rights under Article 18. In terms of Article 18(7) of the Constitution, bail may be denied. It is within the purview of the court to exercise deny bail where, inter alia, the offence is serious, there are substantial grounds to believe the accused person will fail to appear for trial or will interfere with the investigation. This approach is not new, or

unique to Seychelles. Yes, international instruments, as mentioned above urge states to release trial awaiting accused persons in some instances. The default is to favour liberty over-incarceration, and this is based upon the principle that an accused person is presumed innocent until proven guilty. But the exception to this rule is that an accused person may be held in custody where, inter alia, there is a serious likelihood of interference with the investigation, possibility of absconding, the offence is serious, etc. It is clear from the judgment of Burhan J that these factors rested heavily against the petitioners. There is no basis for the allegation that Articles 16 and 18 have been infringed.

[77] The petitioners have also complained that Articles 31(d) of the Constitution has been breached. Article 31 safeguards the special position of children and young persons as a vulnerable group. In terms of Article 31(d), the State has undertaken not to separate children of a young age from their children, except in exceptional and judicially recognised circumstances. It is permissible to separate children from their parents under judicially recognised circumstances. The refusal of bail is a judicially recognised circumstance. The special position that children have, and the duty by the state to safeguard this, cannot be interpreted to mean the law should not take its course. Of course, where children have been separated under judicially recognised circumstances, the court has to satisfy itself that the children are under appropriate care. Their best interest is primary. The court must consider the child's best interest when the decision to remand a parent in custody is made. This is what Article 31 requires. A failure to do so could breach a child's rights under Article 31. In this instance, the petitioners have complained that their children are currently in the care of family members who have an alcohol addiction. The respondent complained

that the petitioners had not produced medical evidence. The court found that there was no medical documentation supporting the averments. It is unclear what kind of medical reports the court had in mind. Nevertheless, the court also took into account that the prosecution had notified it that social services had been visiting the children and no adverse reports had been made. From this, it seems the court did take the children's best interest into account. It follows that no breach of Article 31(d) has occurred. Separation of a child in judicial circumstances is not a breach of Article 31. It may be a breach where a court has not assessed and satisfied itself that the children have been placed in adequate alternative care. But this is not the case presented here. The complaint that Article 31(d) has been infringed must fail.

[78] As a result the petitioners have failed to establish that their rights under Articles 16, 18, and 27 have been breached. And that their children's rights under Article 31 have been breached.

[79] It is necessary to deal, very briefly, with the petitioners' complaint that their right to a fair trial has been breached. This allegation of a breach goes hand in hand with their challenge of the "Practice Directive" which permits the whole docket to be seized before the judge hearing the bail. They have alleged that the full docket should not be disclosed to the judge at the bail stage, as this may result in matters for the criminal trial being considered in the bail application. They say that this impacts the impartiality of the judge, thus contravening their fair trial rights guaranteed in Article 19(1). Further, where the judge who heard the bail and refused it, due to their consideration of matters relevant to the trial later hears the trial, there is no possibility of a fair trial. The respondent's countered this allegation as follows. First, it stated that the petitioners had not referred to

the “practice directive” they seek to impugn, or attached it to the petition. Second, that the petitioners are in effect proposing the introduction of a regime where judges operate separately, as either bail or trial judges. Such a regime was not supported in other jurisdictions, and in its view, was not required in Seychelles.

[80] The petitioners have relied on **R v Esparon and others (SCA No: 01 of 2014) [2014] SCCA 19 (14 August 2014)**, specifically para 47, which established that disclosing the full docket to the judge hearing the bail application can be prejudicial to an applicant. There, the court reiterated that bail and trial were separate proceedings, which had to be treated separately. The court also highlighted that the reason why two separate files exist for bail and trial is that the trial file may contain previous convictions, which should not be known by the judge hearing the bail application. **Esparon** is a judgment of the Court of Appeal, and this court considers itself bound by this settled law.

[81] However, this court is presented with a practical difficulty. It is asked to declare unconstitutionally, a “Practice Directive” which permits the whole docket to seize before the judge hearing the bail, without any reference in the petition to the particular directive, and without it being annexed to the petition. The court has not been referred to any provisions in the Criminal Procedure Code dealing with this matter. All the court has, is a bald allegation in the petition. So what can the court do?

[82] Under our legal order, all law derives its force from the Constitution and is subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control. The law of criminal procedure is no exception. Courts have a constitutional duty to develop procedures in criminal law, including the principles which underlie them, to bring it in line with values that underpin our

Constitution.⁴³ **Esparon** has already sought to develop the criminal procedure relating to bail in a manner that better accords with the Constitution. In the absence of the impugned “practice directive”, this court cannot make a declaration that such a “practice directive” is unconstitutional. Furthermore, **Esparon** has already settled the law in this regard.

[83] It is settled law that bail and trial are separate proceedings, and should be treated as such. Thus, where bail is determined, only the bail proceedings must be held before the judge. Importantly, in **Esparon** it was mentioned that in some jurisdictions, the bail and trial may be heard by separate judges. But it was not suggested there that this was a universal standard, and thus should be the standard in Seychelles. The court did not suggest this, because it appreciated that in some cases, an accused person may have to request bail from the trial judge when the hearing is taking too long. What is important is that a judge, when hearing a bail, must impartially apply the law considering what is placed before him in the bail proceedings only.

[84] Thus, the petitioners' complaint that the “Practice Directive” which permits the whole docket to be held before the judge hearing the bail, without any reference in the petition to the particular directive, and without it being annexed to the petition fails. However, the Court of Appeal has already settled the legal position regarding bail dockets in **R vs Esparon and others (SCA No: 01 of 2014) [2014] SCCA 19 (14 August 2014)**, specifically para 47. This court aligns itself with that finding on this issue.

[85] The result of this is that the petitioners have failed to establish that their rights under Article 19 have been infringed.

⁴³ See *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007) para 35.

[86] It is worth reminding courts that when remand in custody or on bail is at issue, guidance must be sought from the Constitution, the Criminal Procedure Code, and the standards proposed in relevant international and regional instruments. Where deviations are made in favour of some accused persons, it still must be done with reference to the Constitution, and all the mentioned instruments. Remand into custody should be done carefully, equitably, and with great guidance of the relevant legal instruments.

Conclusion

[87] For the reasons provided, the petition fails.

[88] In the result, this Court orders as follows:

- (i) The petition fails and is dismissed; and
- (ii) No order is made as regards costs.

Signed dated and delivered at Ile du Port on the 7th day of July 2020

ANDRE J

VIDOT J

PILLAY J

