CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2022] SCSC 2
CP 5/2021

In the matter between:

SINDU CLIFF PAREKH **Petitioner**

(*rep. Alexia G. Amesbury*)

And

THE REPUBLIC **1st Respondent**

(*rep. George T. Thachett & Corrine Rose*)

ATTORNEY GENERAL **2nd Respondent**

(*rep. George T. Thachett & Corrine Rose*)

Neutral Citation:	*Parekh v The Republic and Anor* (CP 5/2021) [2022] SCCC 2. 26 April 2022
Before:	Govinden CJ, Dodin J, Esparon J
Summary:	Preliminary Objection; failure to disclose prosecution docket in time; dismissal of objection; disclosure effected, rendering the Petition infructuous
Heard:	15th February 2022
Delivered:	26th April 2022

RULING

GOVINDEN CJ; DODIN J; ESPARON J

Introduction

1. This is an application made under article 46 (1) of the Constitution of the Republic of Seychelles and it raises the Constitutional validity of section 179 of the Criminal Procedure Code (the *CPC*); and questions the timing of disclosure materials that need to be given to the defence during the course of a criminal prosecution in order for the procedure to be constitutionally compliant.

2. The petitioner stands accused with the offence of procuring another to commit the offence of murder, contrary to section 193 of the Penal Code, as read together with sections 22 (d) and 24 of the Penal Code, and punishable under section 194 of the same. The petitioner was arrested on 24 September 2021, and eventually charged with the offence on 20 October 2021 and remanded in custody. He filed his application on the 12th of November 2021.

The Petition

3. The court has been at pain in gauging the cause of action in this application given the way that it has been drafted. Nevertheless, after painstakingly reading the petition we consider that the petitioner raises three constitutional matters to be determined by the court.

    i. First, it is his averments that the petition matter must be heard as a matter of urgency, flowing from art. 18 (9) and art. 125 (2) of the Constitution.

    ii. Second, the petitioner avers that in order to enjoy the right to have adequate time to prepare a defence, as envisaged under art. 19 (2) (c) of the Constitution, the docket in the criminal matter against the petitioner should have been disclosed to him on the day he was charged with the

offence. According to him failure to disclose this docket to the accused in this manner is an infringement on the right to have adequate time to prepare a defence.

iii. Third, the petitioner challenges the constitutionality of section 179 of the Criminal Procedure Code (CPC). In particular, the petitioner avers that the term *'commit to prison'* in this provision is unconstitutional as it implies that the Court will be committing the accused to 'serve a prison term', and a violation of art. 18(1); art. 18 (7) and art. 19 (2) (a) of the Constitution.

4. The Petitioner finally prays that the alleged constitutional contravention be remedied by way of orders of this court which should include an order of releasing him on bail and a declaration that s.179 of the CPC is inconsistent with the Constitution and that it be struck down.

The Preliminary objections

5. The Respondent in exercise of the right granted to it by virtue of Rule 9 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules (*the Constitutional Court Rules*) has raised four preliminary objections to the petition, which are as follows:

5.1 First, that the petitioner is time barred by prescription as set out in Rule 4 (1) (c) Constitutional Court Rules.

5.2 Second, it is averred that the petitioner should have exercised the right of appeal to the Court of Appeal instead of filing the application to this court.

5.3 Third, it averred that the petitioner has no cause of action because there is no violation and unlikely that one will arise and that the constitutional questions raised by the petitioner have been previously settled by the court.

5.4 Fourth, it is averred that the relief sought by the petitioner, i.e. access to the docket by the prosecution, has become infructuous as the disclosure of documents has been made.

6. The Petitioner was heard both through his written submissions filed by his counsel and *viva voce* before the court, in which his counsel staunchly objected to the preliminary objections raised. Learned counsel for the Respondent was also heard.

7. We have meticulously considered the submissions of all parties in favour of and against the preliminary objections raised in the light of the different legal provisions and constitutional provisions in issue and the pronouncement of both this court and the Seychelles Court of Appeal of issue left for our determination and we have unanimously come to the following conclusions.

Analysis and determination

8. The first preliminary objection is outright frivolous, as the petitioner was charged on the 20th of October 2021 and he instituted action in this case on the 12th of November 2021. In other words, he petitioned this court within one month from being charged whilst Rule 4 (1) (a) of the Constitutional Court Rules provides that a petition shall be brought within three months from the rise of the constitutional cause of action. Subject to what we hold below, we are of the view that the duty to disclose starts to run from the time that an accused is charged. Corollary to this right is a duty for the prosecution to disclose from that time. Accordingly, though he might have been too precipitous in his attempt to prosecute his

right here, we are of the view that the Petitioner properly filed his petition in time. Hence we dismissed the first objection.

9. The second preliminary objection suffers from the same fate as the first one. A person who feels that he is aggrieved by an alleged constitutional contravention that arises out of the proceedings in a criminal prosecution, such as in this case, has three choices. First, he can appeal to the Seychelles Court of Appeal against the said decision. Second, he can file a constitutional petition under art. 46 (1) of the Constitution. Third and finally, he can apply to the trial court to refer the matter to this court for determination under art. 46 (7) of the Constitution.

10. It would be up to that person to decide which of the three options he prefers and will choose the one that favours his case the most and the one that will withstand less legal hurdles and constitutional objections. Appealing to the Seychelles Court of Appeal is hence optional, and therefore we find no merits in the argument by the Respondents that in this instance, the Petitioner should have appealed instead of petitioning this court.

11. Having considered the above objections and submissions made by both the Petitioner and Respondents, this court is of the view that there are only three issues of substance left for its determination.

    11.1 First, does section 179 of the CPC, both in terms of its substance and language, infringe on three rights present in the right to liberty and the Right to fair Hearing in the Constitution, which are:

        i. The right to be presumed innocent under art. 19 (2) (a);
        ii. The right to liberty under art. 18 (1); and
        iii. The right to bail envisaged under art. 18 (7).

    11.2 Second, does the failure to provide a docket on the day the accused is charged, a violation of the right to have adequate time to prepare a defence envisaged under art. 19 (2) (c) of the Constitution.

11.3 Third, if the prosecution docket has been disclosed, has the petition become otiose as a result of disclosure having been effected prior to this hearing.

12. Does section 179 of the CPC, both in terms of its substance and language infringe on Article 19 (2) (a), 18 (1) and 18 (7) of the Constitution, being rights present in the right to liberty and the right to Fair Hearing in the Constitution? Counsel for the petitioner submits in the affirmative and the respondent in the negative.

13. Having considered her submissions, it appears to us that counsel for the Petitioner is using the literal rule of interpretation of this provision. She is seeking to give a literal interpretation to the expression *"commit to prison"*. Literally, the first impression does appear to convey the meaning that the accused is committed to prison under a Warrant of Commitment of the court. However, when we apply this literal rule, we find that it brings about an absurd meaning to section 179 of the CPC, which could not have been the intention of the legislature (see, M Sanson, *Statutory* Interpretation (2016) 2nd Edition, Oxford University Press p. 10). It appears that the petitioner cherry picks the words 'commit to prison' without considering the context of the wording. Below is an extract of the whole provision:

> **"Adjournment.**
>
> 179. **Before or during the hearing of any case**, it shall be lawful for the court in its discretion to adjourn the hearing to 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 **[1]** the court may suffer the accused person to go at large; or **[2] may commit him to prison**; or **[3]** 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:

Provided that, if the accused person **has been committed to prison, no such adjournment shall be for more than fifteen clear days**, the day following that on which the adjournment is made being counted as the first day." (bolded, and numbered for own emphasis)

14. Section 179 of the CPC operates in the context of its whole provision, which includes the term 'before or during the hearing of any case'. This alone reminds us that whichever of the three actions the courts may apply, it is in the context of either before a hearing or during the hearing of a criminal matter that the actions are operative and not at the end of the trial. As such, 'commit to prison' in this provision cannot be said to be an action that is equivalent to sentencing, which comes at the end of a hearing. Rather, it speaks to remanding into custody, where bail has not been awarded.

15. To further support this interpretation, S.179 of the CPC has a proviso to it, which provides that should 'commit to prison' be the case, the adjournment cannot be for more than 15 days. This shows how 'commit to prison' in s.179 has no permanence to it.

16. It is admitted that the wording of s.179 of the CPC is in 'archaic English'. This is not peculiar to the CPC alone, but some of the laws which are in operation today. Without a doubt, the modernisation of the laws may need to occur in order to do away with old English. Notwithstanding these *drafting incongruities* of the English language, the Constitution of Seychelles remains the necessary torch useful for the courts to interpret the law. It guarantees an accused's right to a fair trial, and it goes without saying that the Court cannot have a person serve a prison sentence before they are in fact convicted. At the same time, an accused may be refused bail when the court considers the circumstances listed in art. 18(7) of the Constitution. Where this is the case, the accused is remanded into custody in terms of s.179 of the CPC. Accordingly, we apply a purposive interpretation to the provisions given the absurd result of a literal interpretation of the text, the ultimate purpose

of this section being the legalisation of post indictment detention of an accused person and its regular judicial supervision.

17. Based on the above, the violation of the right to liberty under art. 18 (1) cannot be sustained in this case because s.179 of the CPC is not committing a person to serve a prison term. It is instead, providing the criminal justice system of Seychelles with the avenue to remand accused persons into custody before or during trial.

18. Moreover, the argument that there is a violation of the right to bail under art. 18 (7) cannot be upheld as the right to liberty is not absolute. In this case, it is the argument of the Respondent that s.179 of the CPC has to be read with art. 18 of the Constitution. This argument is sustained by this court. Accordingly, the Accused has to prove that the Republic has not been able to show that one constitutional exception to liberty is applicable in this case. These constitutional exceptions are articulated as follows:

> "**18.** (7) A person who is produced before a court **shall be released, either unconditionally or upon reasonable conditions, for appearance at a later date for trial or for proceedings** preliminary to a trial except where the court, having regard to the following circumstances, determines otherwise-
>
> (a) where the court is a magistrates' court, the offence is one of treason or 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 own 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." (Own emphasis added).

19. For the sake of this petition we would repeat what might seem to be the obvious. The right to bail is the Rule and detention in custody before sentence is the exception. The prosecution in this case has laid a foundational basis for it to be granted its application for remand under art. 18 (7) (b) and (c). This being the case, the accused had to lay the evidential basis to be released on bail. In this case there are two basis that has been brought forward namely that the prosecution bears the legal burden of giving to the defence the prosecution docket on the day that the accused is charged and the fact that Section 179 of the CPC is unconstitutional in its wording. The grounds which have been adduced by the prosecution on a prima facie as the basis for remand has not been rebutted or sought to be disproved by the accused.

20. Accordingly, this court cannot make a finding on possible infringements of art. 18 of the Constitution.

21. The second question that we need to answer is, does the failure to provide a docket on the day the accused is charged, a violation of the right to have adequate time to prepare a defence envisaged under art. 19 (2) (c) of the Constitution? Counsel for the petitioner answers this in the affirmative.

22. Counsel for the petitioner submits that the prosecution is in violation of the accused's right to have adequate time to prepare his defence because they failed to share the docket on the same day the accused was charged with the offence. This matter lies at the heart of disclosure.

23. We note that the CPC under s.247 (2) provides that the prosecution is supposed to disclose, at least 14 days prior to trial, 'notice of the names and address, or the designations, of all witnesses for the prosecution and the substance of the evidence they are expected to give'. Thus, s.247 (2) of the CPC creates a statutory duty for the prosecution to disclose some materials to the accused, at least 14 days prior to the commencement of trial.

24. Disclosure is important in criminal matters, as it forms part of the right to a fair trial. It also forms part of the general adversarial nature of criminal proceedings within the Seychelles' legal landscape.

25. A landmark judgment that increased the content of the disclosure obligation by the Republic from substance of the evidence to the actual copy of the evidence is the case of *R v Bernard Georges Constitutional Case No. 2 of 1998.* The Constitutional Court explained disclosure and its extent as provided by art. 19 (2) (c) of the Constitution. Allear CJ (as he was then), Bwana J came to their conclusions following a detailed analysis of different case law from Anglo-American jurisdictions, which he found to be similar to Seychelles' legal system. First, Bwana J was of the view that there is a need for not only a liberal interpretation of the Constitution, but also a purposive approach in interpreting the rights envisaged therein. With this, it was concluded that art. 19 (2)(c) as read together with the right to a fair trial creates an obligation, on part of the prosecution, to disclose to the accused all the evidence which it intends to bring forward to make its case and any other evidence that may be in favour of the accused. This includes both oral, documentary and all evidence as contained in the police docket.

26. Similarly, Alleear CJ opined that non-disclosure is inappropriate and cannot stand closer constitutional scrutiny of art. 19 of the 1993 Constitution. While acknowledging that the newer and more democratically correct practice is disclosure, Alleear CJ ensured to remind us that disclosure does

> *"...not entail a requirement that everything must be disclosed in every case. The extent of disclosure is subject to the powers of review of the trial court. For instance, where the charge or charges relate to a simple offence, that*

is, the case involves no complexities of law and or facts and where there is no reasonable prospect of imprisonment and the accused can easily rebut the charge there is no requirement to furnish the statements of the prosecution witnesses and their names." (supra at p. 16).

27. Bwana J similarly emphasised on limitations, which according to him, are drawn from art. 28 (2) of the Constitution. However, both Amerasinghe J and Alleear CJ disagreed. In the learned judges' view, art. 28 in its entirety has no relevancy in disclosure matters. Amerasinghe J further opined that the limitation on extent of disclosure is drawn from art. 19 (10) of the Constitution.

28. Bwana J drew in on and upheld the elaboration by Counsel for the Applicant that the prosecution may refuse disclosure if the information sought may lead to:

    i. The identity of informers being revealed;
    ii. State secrets being revealed;
    iii. Witness intimidation;
    iv. Breach of privilege communication;
    v. Interference with continuing investigations.

29. In addition to the above, Bwana J also drew in on the *Shabalala and Others v Attorney-General of the Transvaal and Another (CCT23/94) [1995] ZACC 12; 1995 (12) BCLR 1593; 1996 (1) SA 725 (29 November 1995)* that each case must be treated with due regard to its particular circumstances. These circumstances include where the offence was committed, the nature of the offence, societal reaction and the prevailing situation in the country or area.

30. Another pertinent point raised by the learned judges, is the need to have regard for the context and practicalities of Seychelles vis-à-vis disclosure requirements in criminal matters. While other similar jurisdictions favour the abstract or blanket disclosure, it may

not be practical in Seychelles given its small population and the dangers this poses towards witnesses who may end up being victimised.

31. In the Georges case learned judges were also cautious to remind us that that the prosecution cannot be allowed to be the judge in his or her own course, leaving matters of disclosure to their discretion. As such, parties are encouraged to agree on the specificities of disclosure. Where they fail to do so, the trial judge will need to resolve this, taking into account (i) the complexity of the case and (ii) other dictates of justice. In the former, the more complex the case, the greater need for disclosure.

32. The constitutional case of *R v Bernard Georges* can therefore be summarised as follows:

- Disclosure is important and required under the 1993 constitutional dispensation;
- Parties must agree on disclosure, and where they fail to do so, the trial judge must intervene and make pronouncements on disclosure.
- The extent of disclosure is subject to limitations set out in art. 19 (10) (per Amerasinghe J) and art. 28 (2) (per Bwana J)

33. This case however left the issue of timing of disclosure of prosecution materials wide open, with the judges being not unanimous on this issue, which is central in this case. We note however, that giving these information is very important to the defence. They need it in order to gauge the strength of case that Republic has against them. Accordingly, the substance of the prosecution case must be made available to the defence before the accused pleads to the charge as the information. We are of the view that the information consist of *"facilities to prepare a defence"* to the charge in terms of Art. 19 (2) (c) of the Constitution. It is beneficial for the accused to know the nature of and extent of evidence against him or her, in order to not only plead as necessary, and also to prepare the best defence possible to those charges.

34. However, disclosure is also a continuing and on-going obligation. There are certain cases that due to the complexity of the facts of the case, the totality of the prosecution docket would not have been disclosed before the accused is asked to plead, though the substance of the case should have been. In these cases, the rest of the evidence can be disclosed subsequently, with the proviso that the prosecution should not be at liberty to lead evidence in the trial that has not been disclosed. Moreover, the court should be allowed to pronounce on the impact of the late disclosure on the justice of the case on a case by case basis, which should include allowing the accused to plead anew, if necessary.

35. To put the above into context, we draw in on what the Supreme Court pronounced in *ACCS v Valabhji and Ors (CO114/2021) [2022] SCSC 287.* The court affirmed that disclosure is a continuing and ongoing obligation, especially in complex cases. The Anti-Corruption Commission of Seychelles filed a Notice of Motion requesting the court to set out a timetable for disclosure of documents. It was considered particularly necessary to do so in order for the accused to enjoy their right to have adequate time to prepare for their defence. As such, the proposed timetable was set out, bearing in mind the accused's right to be tried within a reasonable time and the complexities of the case.

36. For these reasons we do not agree with the Petitioner's argument that there is an absolute right of the defence to be given the disclosure material on the date that the accused was charged.

37. On the final point, we note that both sides in this case have admitted that disclosure of prosecution materials has been effected as submitted by the 1st Respondent. The disclosure has also been effected five months prior to the date set for the trial. Accordingly, we are of the view that in this case, the Republic has complied with its obligation to give to the defence adequate facilities to prepare its defence and take the plea to the charge.

Final determination

38. For these reasons we uphold the Respondents 4th preliminary objection and we dismiss the Petition on this basis.

39. The petition is hereby dismissed.

Signed, dated and delivered at Ile du Port on this day of April 2022

Govinden CJ | Dodin J | Esparon J