

IN THE CONSTITUTIONAL COURT OF SEYCHELLES

Reportable

CP 06/2023

In the matter between:

MUKESH VALABHJI

1st Petitioner

LAURA VALABHJI

2nd Petitioner

(rep. by France Bonte/Samantha Aglae)

and

THE REPUBLIC

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

(rep. by Vinsent Perera)

THE ANTI-CORRUPTION COMMISSION

3rd Respondent

(rep. by Edmund Vickers and Michael Skelly)

Neutral Citation: *Valabhji v The Republic & Ors* (CP 06/2023) (12 June 2024)

Before: Burhan J (Presiding), Carolus J and Adeline J.

Summary: Constitutional Challenge in respect of the right to a fair trial – Contravention of Article 19 and Article 27 of the Charter – Unable to have sufficient time to prepare for trial and right to appoint the legal counsel of their choice. Order to stay proceedings pursuant to the outcome of the Constitutional Petition.

Heard: 16 January 2024

Delivered: 12 June 2024

ORDER

The Respondents’ preliminary objections are upheld. Petition dismissed. No order made in respect of costs.

JUDGMENT

BURHAN J (Carolus J, and Adeline J concurring)

[1] The aforementioned Petitioners filed an application in the Constitutional Court pursuant to Article 46 (1) of the Constitution of the Republic of Seychelles (Constitution) seeking the following reliefs as set out in the prayers of the petition that read as follows:

[2] *Whereof the petitioner prays this Honourable Court to:*

- i) Interpret The Charter in line with Article 48 (a) to (d) of the Constitution.*
- ii) 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).*
- iii) To order a stay of proceedings in CR04 of 2022 pending the determination of this Petition.*

AND to:

- a) Declare that the Petitioners' rights above mentioned have been contravened under Articles 19 and 27 of the Charter.*
- b) Declare that the acts and omissions of the 1st respondent and 3rd respondent above-mentioned contravened Articles 19 and 27 of the Charter.*
- c) Make such declaration, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application.*
- d) Make such additional order under the Constitution or as may be prescribed by law to give effect and to enforce the petitioners' fundamental rights.*
- e) Grant any remedy available to the Supreme Court against any person, or authority which is the subject of the application, or which is a party to any proceedings before the Constitutional Court, as the Court considers appropriate.*

- f) *Award a compensation of Seychelles Rupees 1 million, to each of the petitioners for breach of their constitutional rights by each the 1st and 3rd respondents.*
- g) *The cost of this application.*

Background facts

- [3] The Petitioners aver that they were unable to and were not given sufficient time to prepare a defence as envisaged under Article 19 (2) (c) and (d) of the Constitution due to the conduct of the Respondents and the Trial Judge, the Chief Justice in the case of Republic vs Mukesh Valabjhi & others CR No 4 of 2022 (also referred to by the Petitioners as the ‘Weapons case’). They further set out that the 3rd Respondent has restricted all the 1st Petitioner’s bank accounts including accounts held in his name and of the entities in which he has a beneficial interest, both locally and abroad as well as the companies’ accounts that were being used to make payments of legal fees for both Petitioners. The details of the restriction orders moved for by the 3rd Respondent on the accounts held by the 1st and 2nd Petitioners are set out in paragraph 18 of the petition. Further, the aforementioned conduct of the 3rd Respondent and their application for a Restraint Order and the issuing of such Restraint Order by the Court in respect of their properties and its refusal to disburse the legal fees from the Companies’ Accounts, prevented the Petitioners from securing the legal counsel of their choice, and to have the adequate time to prepare their defence.
- [4] The Petitioners further contend that the application of the 3rd Respondent to revoke the Power of Attorney given to one Fahreen Rajan in respect of accounts in the DBS Bank Singapore and the granting of such application by the Court, has caused prejudice to the Petitioners as this has resulted in an indirect freezing of the said account. The Petitioners’ aver that the acts of the 3rd Respondent and the Court, in the Weapons Case, has created great difficulties and has prevented the Petitioners from being able to timely secure legal representation of their choice and to have adequate time for preparation of their defence with Counsel of their choice in respect of the Weapons Case and thereby contravening Article 19 (1), (2) (c) and (d) of the Charter.

- [5] Further, the acts of the Trial Judge in fixing a hearing date only 3 weeks from 9 June 2023, and ignoring the fact that he had made the revocation order of the Power of Attorney only minutes before setting the trial date, has prevented the Petitioners from securing the legal counsel of their choice, and prevented them from having adequate time to prepare their defence. The setting of the trial date was done on the assumption that the Petitioners can promptly pay their legal team and have sufficient time for preparation for trial when that was not the case.
- [6] The Petitioners also take offence to the statements made by the Trial Judge “*that the 2nd Petitioner is perfectly capable of defending herself*” and other statements including that the Petitioners now have ‘dollars’ to pay to their lawyers. Further, the Petitioners take offence to the statements made that local lawyers could conduct the hearing without the UK lawyers and the action of the Chief Justice in unilaterally clearing the diary of all Seychelles lawyers involved in the trial of the Weapons Case while disregarding the prior commitment and diaries of the UK lawyers, despite being put on notice of their predicament. The above action contravenes Article 19 (1), (2), (c) and (d) of the Charter and such statements are discriminatory under Article 27, in that the 1st Respondent is attempting to curtail the ambit of the legal representation of their own choice thereby leaving the Petitioners without their lead Counsel and consequently without their Seychelles Counsel at the last hour. This further resulted in the Petitioners not having adequate time to prepare their defence. It is further contended by the Petitioners that the Chief Justice, having granted the Revocation Order and dismissing the Variation Application filed by them, enabled the 3rd Respondent to abuse its authority and failed to safeguard the rights of the Petitioners to a fair trial.
- [7] The 1st and 2nd Respondents filed their preliminary objections to the petition on the 6th November 2023, pursuant to Rule 9 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994 (‘Rules’) and moved that the petition should be dismissed in its entirety as the purported violation of the Petitioners’ rights under Article 19 and 27 of the Constitution have been rendered

moot. Firstly, the Respondents aver that the Petitioners have secured the Counsel of their choice to represent them, and secondly, the legal fees have already been disbursed. Furthermore, the Court may take judicial notice that the hearing of the Weapons Case is currently progressing before the Chief Justice with the active participation of all Counsel and hearing dates have been fixed.

[8] The 1st and 2nd Respondents further contend that the Petitioners failed to mention in their petition, although it is of significance to the alleged claim of violation of fundamental rights that on the first day of the trial of CR 04/2022, the legal representatives of the Petitioners namely Mr. Bonte and Ms. Samantha Aglae withdrew their appearances in accordance with the instructions received from their clients the 1st and 2nd Petitioners. Furthermore, the Petitioners have failed to exhaust alternative remedies for redress as the Chief Justice had issued an order comprehensively addressing their concerns pertaining to legal representation at the inception of the trial and therefore the proper course of action would have been to file an appeal in respect of the said decision to the Court of Appeal.

[9] It is further their submission that the Petitioners have failed to articulate the material facts in a ‘concise’ manner, as stipulated by rule 5 of the Rules and the petition lacks legal merit and exhibits no prospect of success, thus rendering it frivolous and vexatious. It is their contention that there exists neither an actual violation nor a reasonable likelihood of a violation of the Petitioners’ legal rights under Article 19 and 27 of the Constitution.

[10] The 3rd Respondent too raised preliminary objections and moved that the petition be dismissed *in limine* on the following grounds:

1. *The issues raised have been superseded by events – the trial in CR 04 of 2022 is proceeding, the defence lawyers are actively engaged in the trial, and since the trial resumed in August no request for a Stay of the trial has been made.*

2. *Jurisdiction:*

- a) *The matters complained of in the Supreme Court raise factual and legal issues for the trial judge to rule upon (and, if any decision of the Supreme Court is*

amenable to challenge, any such challenge should be taken in the Court of Appeal in the event of conviction).

b) The Petitioners have failed to seek available redress in the Supreme Court as required by article 46 (3) and (4) of the Constitution.

3. The following ground are time-barred: at paragraphs:

a) 59.4 (alleged contravention January 2022)

b) 59.5 (alleged contravention January 2022)

c) 60.1 (Restriction Notices issued December 2021, extended September 2022)

d) 60.2 (Restriction Notices issued December 2021, extended September 2022).

4. The pleadings are not sufficiently clear or concise, and do not sufficiently particularise the alleged contravention; for example, the alleged particulars set out in paragraph 60 fail to reflect the alleged contraventions in paragraph 59.

5. The grounds are not maintainable in law and/or there is no realistic chance of success.

6. The petition should be dismissed in limine as being vexatious – the Constitutional Court should not be misused by the petitioners as a forum serially to litigate disputed matters of fact and law that should properly be considered by the Supreme Court (and, if appropriate, the Court of Appeal).

Legal Analysis

[11] We will first deal with the common objection raised by the Respondents that the main issues in this case have been superseded by events in that, the trial in CR 04 of 2022 is proceeding, the defence lawyers are actively engaged in the trial, and since the trial resumed in August no request for a stay of the trial has been made. It is apparent from the submissions that the Petitioners are now not seeking a stay of the trial in the Weapons Case nor are they denying that Counsel from the UK are now appearing for them and

conducting the defence case for both Petitioners. It is the considered view of this Court that the Petitioners cannot now seek to complain of unfair trial in the Weapons Case as the main ground of failure to have legal representation of their choice is at present non-existent. If any witnesses have been taken in the absence of their Attorneys, they are not precluded from making an application to have the witnesses recalled for further cross-examination by Counsel.

[12] In Republic v Estico (51 of 2006) [2008] SCSC 67 it was held that:

“Generally, our law expressly sanctions the procedure to have a witness who has already given evidence recalled to give additional evidence. This could either be on the Court’s own motion, or on the application of the prosecution or defence.”

[13] The primary relief sought in the petition dated the 16th of June 2023, as contained in the prayer was a stay of the proceedings in the Weapons Case that is currently being heard by the Chief Justice. This is based on the argument that in general terms, Article 19 (2) of the Constitution has been contravened and that the Petitioners were without adequate facilities in the form of their preferable representations to prepare and act in their defence. In these circumstances, the argument is that they have a right to be defended by the legal practitioner of their own choice. The 3rd Respondent made the point in writing and again made the point orally that events have superseded that raised in the petition dated June 2023. We are inclined to agree with the 3rd Respondent on this issue.

[14] Further as correctly pointed out by the 1st and 2nd Respondent, the Chief Justice in the Weapons Case, clearly addressed the issue of the right to legal representation, as currently argued by the Petitioners in this petition. The Chief Justice had issued a detailed and comprehensive order addressing the concerns of the Petitioners pertaining to legal representation during the course of the trial. It would be pertinent at this stage to refer to Article 46(7) of the Constitution which gives an opportunity to a party, to seek a referral to the Constitutional Court when a constitutional question arises during the course of any proceedings in a court.

[15] Article 46 (7) of the Constitution reads as follows:

“Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.”

[16] The current Petition before the court was brought on the 06 June 2023 and was done so with a direct application to the Constitutional Court in terms of Article 46 (1) of the Constitution and not by a referral as per Article 46 (7) of the Constitution, as mentioned above, even though it is alleged by the Petitioners that the contraventions occurred during the course of the trial.

[17] In the matter of Rodomir Prus & Ors v Government of Seychelles & Anor 2020 SCCC 885 (Prus Case) it was held that the imputation of Article 46(7) read with Rule 10 of the Constitutional Court Rules, is that where a question of breach or possible breach of a constitutional right arises in a court other than the Constitutional Court or Court of Appeal, such a question has to reach the Constitutional Court indirectly, using a referral from that court. The Court further held that:

“[14] It is our view that the implication of Article 46 (7) read with Rule 10, is that in the instance that a question of breach or possible breach that is not frivolous or vexatious or has already been settled arises in a Court other than the Constitutional Court or Court of Appeal, such a question has to reach the Constitutional Court indirectly, by means of a referral from that Court. The appropriate route to access the Constitutional Court in these circumstances is indirectly, by way of a referral. This is clearly what Art 46 (7) seeks to do. It creates a mechanism to allow access to this Court. This process should be used when the proceedings to which the constitutional question relate are already before a different Court or tribunal.”

[18] Further in the Prus Case, the Court importantly emphasised the purpose and operation of Article 46 (7) and held:

“[16] When a question has been referred to this Court, the main proceedings to which the question relate is halted. It is paused to allow this Court to determine the question. In this way, the Court is prevented from making a final determination on legislation or an act that is unconstitutional. The importance of this cannot be refuted. The system envisaged in Article 46 (7) of the Constitution is there to ensure that as far as possible, Courts create constitutional harmony in addressing disputes. Sidestepping this process in our view causes rehashing the same issues in multifarious forms and rehashing of the same issues in multifarious forums.”

[19] It is clear from the above that this matter has not been correctly brought before this Court and as a result, this Court is now ‘*rehashing*’ the same issue that was already raised in the Weapons Case and that was decided on by the Chief Justice. With regard to the Respondents’ contention that the action is time barred we are inclined to disagree as the trial is still ongoing.

[20] In respect of whether the application is vexatious or frivolous as raised by the 1st and 2nd Respondents, the Court must take cognisance that the Petitioners recently applied to this Court for the stay of the current proceedings. In the Kenyan case of Kivanga Estate Ltd versus National Bank of Kenya Ltd Civil Appeal No. 217 of 2015, the Court held that:

“An action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense.”

[21] The Court agrees with the 1st and 2nd Respondent that the current application before this Court is frivolous and vexatious and that the matter was adequately decided on by the Chief Justice in the ruling given on the 3rd of July 2023. This matter was in fact decided on after this action was already instituted by the Petitioners in this Court, further reaffirming that the due process of the Courts in Seychelles was not adhered to. In Gomme v Maurel & Anor (SCA 06 of 2010) [2012] SCCA 28 the Court correctly highlighted that *“the proper adherence to the rule of law in a democratic society enjoins one to ensure that one is debarred from rehashing the same issue in multifarious forms.”*

- [22] The Petitioners are claiming that several orders given by the Trial Court and other Courts in respect of their financial accounts are unconstitutional as it impeded their right to have funds to retain lawyers of their choice. The Petitioners do not claim that the said orders were arbitrary in nature or given without an opportunity of being heard. The said orders emanate from courts of competent jurisdiction after due process has been adhered to. The fact that the 1st Petitioner's finances have been restricted or restrained by legal orders which are unpalatable to the Petitioners does not make the orders unconstitutional when the law provides for such orders to be made. The argument that the said orders restricted their ability to retain lawyers of their choice is unacceptable as up to date the said orders restricting their finances, have not been set aside in appeal or have been declared null and void.
- [23] Further, it is the considered view of this Court that the numerous comments made by the Trial Judge have been taken out of context in order to bolster a finding that at this stage, the Petitioners have an arguable case before the Constitutional Court. (Prea v Speaker of National Assembly and Anor (9 of 2011) [2011] SCCC 8). The fact they do not have an arguable case is even admitted by the Petitioners in their application for a stay of proceedings, wherein they admit that when filing this petition, they were not currently in a position to fully articulate and substantiate the full extent of the prejudice and contraventions.
- [24] It is also to be observed that the Petitioners have been represented in CR 04 of 2022 by Senior Counsel from the Seychelles bar, who all of a sudden for reasons best known to the Petitioners decided to suddenly withdraw their appearances, but now continue once again to be part of the respected legal teams in the Petitioners' cases. For all the aforementioned reasons, we determine that there is no arguable breach of the Constitution as the trial had commenced in July 2023 after their arrest on 18 November 2021, thereby giving the Petitioners ample time to prepare their defence according to the budget/finances available to them.

[25] The Respondents' preliminary objections are therefore upheld, and the application is dismissed. No order is made in respect of costs.

Signed, dated, and delivered at Ile du Port on 12 June 2024

**M Burhan J
(Presiding)**

E Carolus J

B Adeline J