

IN THE SUPREME COURT OF SEYCHELLES

KEVIN BARBE
VS
REPUBLIC

Criminal side no: 32 of 2008

Mrs. Amesbury for the Applicant
Ms. Aglae for the Respondent

RULING

Burhan, J

This is an application dated 12th January 2010 filed by learned counsel for the Applicant Kevin Barbe (accused) seeking “leave to appeal out of time” against the final judgment of this court, delivered on the 15th May 2009. The Applicant was convicted for the offence of importation of a controlled drug, an offence punishable under section 29 of the Misuse of Drugs Act Cap 133 and sentenced to a term of 11 years imprisonment.

Learned counsel for the Applicant explaining the delay in filing the said notice of appeal, stated that the Applicant had immediately informed the prison authorities concerned, that he intended to appeal from the conviction through his lawyer and not the prison authorities. However, the attorney who was appearing for the Applicant at the trial had failed to file the said notice of appeal on time, resulting in this application seeking leave to appeal out of time, being filed by his new counsel. In support of her application, a letter dated 10th November 2009 issued by the Deputy Superintendent of Prison was produced by learned counsel, together with the “Statement of Application” of the Applicant Kevin Barbe.

Learned counsel for the Respondent, objected to

the granting of leave to appeal out of time to the Applicant on the following grounds;

a) The Applicant had already filed a notice of appeal on the 18th of November 2009 in the Seychelles Court of Appeal which had been turned down on the grounds that it was out of time.

b) In terms of Rule 17 (1) of the Seychelles Court of Appeal Rules, the Supreme court is not the court to which an application for special leave to appeal should be made.

c) In terms of section 342 of the Criminal Procedure Code a convicted person may appeal to the Court of Appeal.

d) The Supreme Court having entered judgment against the Applicant and having sentenced the accused is *functus officio* and cannot reopen the case.

Article 120 (4) of the Constitution of the Republic of Seychelles reads as follows;

“Subject to this Constitution and any other law, the authority, jurisdiction and power of the Court of Appeal may be exercised as provided in the Rules of the Court of Appeal.”

Rule 18 (1) of the Seychelles Court of Appeal Rules (SCAR) 2005 reads as follows;

“Every appeal shall be brought by notice in writing (hereinafter called “notice of appeal”) which shall be lodged with the Registrar of the Supreme Court within 30 days after the date of the decision appealed against.”

Therefore it is apparent that the said notice of appeal, should have been filed at the first instance, in the Supreme Court in terms of Rule 18 (1) of the SCAR.

Learned counsel for the Respondent also brought it to the attention of court that Rule 16 of the SCAR states;

“Whenever an application maybe made to the court or to the Supreme Court it should normally be made in the first instance to the Supreme Court.”

After receipt of the Notice of Appeal, the Court of Appeal registry issued a letter dated 24th November 2009 informing learned counsel for the Applicant, that as the judgment was delivered on the 15th of May 2009 the Notice of Appeal filed on the 18th of November 2009 was out of time. The letter further states;

“Accordingly your Notice of Appeal can only be considered with leave of the court should it be granted on a requisite application being made.”

Learned counsel for the Applicant, thereafter filed an application seeking leave to appeal out of time. It is to be specifically noted that this application for all purposes is a new application. Learned counsel for the Applicant quite correctly, decided to file the said application seeking leave to appeal out of time before the Supreme Court, as in this instant case the Supreme Court would have to first decide whether to grant leave to appeal out of time, prior to accepting the notice of appeal in terms of Rule 18 (1) and 16 of the SCAR. Therefore the fact that learned counsel filed a

notice of appeal in the registry of the Court of Appeal does not in any way preclude her from coming to the Supreme Court in an application for leave to appeal out of time, which for all purposes is a new application.

For the aforementioned reasons ground (a) urged by learned counsel cannot be accepted.

The other ground raised by learned counsel for the Respondent is that in terms of Rule 17 (1) of the Seychelles Court of Appeal Rules, the Supreme Court is not the court to which an application for special leave to appeal should be made. However one must draw the distinction between a leave to appeal and a special leave to appeal application. Rule 17 (1) of the SCAR refers to the procedure in a special leave to appeal application in Criminal matters and Rule 17 (8) refers to the procedure in special leave to appeal applications in civil matters. Section 12 (2) (c) of the Courts Act, Cap 52, sets out an instance where a special leave to appeal application may be made to the Court of Appeal. When a leave to appeal application from an interlocutory judgment or order in a civil suite has been refused in the first instance by the Supreme Court, then a special leave to appeal application could be made to the Court of Appeal. It follows that a special leave to appeal application to the Court of Appeal could be made after a ruling is made by the Supreme Court, in respect of a leave to appeal application. Therefore this instant application before the Supreme Court for all purposes is a leave to appeal application and not a special leave to appeal application. Hence there is no merit in the

contention of learned counsel for the Respondent that this application before the Supreme Court, is a special leave to appeal application which should have been filed in the Court of Appeal in terms of Rule 17 (1) of the SCAR.

Learned counsel for the Respondent has also contended that in terms of section 342 of the Criminal Procedure Code, a convicted person may appeal to the Court of Appeal and thus all applications should be before the Court of Appeal. This reference is in respect of the court which should hear the appeal emanating from the Supreme Court. The fact that a convicted persons appeal will be heard by the Court of Appeal, does not limit in anyway the filing of the notice of appeal in the Supreme Court in terms of the Court of Appeal Rules. Furthermore learned counsel for the Respondent has mentioned in her submissions that this court was *functus Officio* once it had given the judgment and sentenced the Applicant and thus could not entertain an application of this nature. With regard to the facts and other material circumstances relating to the judgment and the sentence imposed, admittedly this court does become *functus officio* but not so in relation to making orders, not relevant to the facts or other material circumstances contained in the judgment or sentence imposed.

It is pertinent at this stage to distinguish this case from the case of ***Esparon v Republic 1986 SLR 1*** which held that a judge of the Supreme Court has no power to grant leave to appeal. The application for leave to appeal to the Court of Appeal in that case was based on the Court of Appeal Rules of 1978 and Section 329 (1) (b) of

the Criminal Procedure Code which at present stands amended.

The main ground urged by learned counsel for the Applicant, in seeking leave to appeal out of time is that although the intention of the accused from the very outset was to appeal from the said judgment through his lawyer, his lawyer had failed to take the necessary steps before the time prescribed by law. His intention to appeal through his lawyer is borne out in the annexure of the document titled "Statement of Application," forwarded by the prison authorities, which contains a minute mentioning that the appeal is being done by his lawyer. This court is inclined to hold that the Applicant, should not be penalised for an oversight by his lawyer, when there is independent evidence that he did for all purposes intend to, from the very outset appeal against the said conviction.

For the aforementioned reasons, the application made by learned counsel for the Respondent to dismiss the application is declined and leave to appeal out of time is granted.

M. BURHAN
JUDGE

Dated this 1st day of March 2010