

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: MA 01 /2017

(arising in CO22/2016)

[2017] SCSC 436

**FRANCIS ERNESTA
BRIAN MOTHE
KEVIN QUATRE
DANNY SULTAN**
Applicants

versus

REPUBLIC

Respondent

Heard: 11 April 2017
Counsel: Mr. C. Andre for applicants
Mr. C. Jayaraj for respondent

Delivered: 03 May 2017

ORDER ON MOTION

Vidot J

[1] This application arises out of Motion supported by affidavits calling for the recusal of Burhan J from Supreme Court Case 22 of 2016, in which the applicants are all accused.

The recusal application is on the basis that Applicants feel that their right to a fair trial by an independent and impartial court as guaranteed under Article 19(1) and their right to innocence until proven guilty laid down in Article 19(2) have been infringed upon.

[2] All the Applicants have been charged with drug related offences in CR22 of 2016. Trial of the case stated on 08th August 2016 and to date a total of about 13 witnesses have testified.

[3] The gist of the Applicants' argument is that on the 03rd March 2017, Judge Burhan asked certain questions and made comments during and after the testimony of a key prosecution witness; Michael Hissen, which suggest that the Learned Judge had "*already made up his mind*" as to the culpability of the Applicants and is therefore impartial and has demonstrated bias vis-a-vis the Applicants.

[4] The Applicants identified 4 instances during and after the recording of Mr. Hissen's testimony which they allege indicate actual and / or perceived bias against them by Burhan J. The excerpts of transcript of proceedings are reproduced herebelow.

i. COURT TO WITNESS

Q. Did you close your eyes during those 5 minutes?

A. I have to blink but that pretty much-

Q. Not blinked or not do not be smart I asked you whether you closed your eyes big difference?

A. No I did not but I was wearing sunglasses on that day

ii. Mr. Chinnasamy (Principal State Couse) to Witness

Q. Out of the 4 who was the person?

A. Number 1 like I said the beard seems more volumized than the person I saw on that day so I will not be able to spot out 100%

COURT TO WITNESS

Q. 100% you cannot tell it is him

A. Yes

iii. COURT TO WITNESS

Q. You had not gone earlier in the boat?

A. Normally no he would not come with us because my parents do not allow him to come to my house and it was only

iv COURT TO WITNESS

Mr. Hissan, you may get down. You are a very lucky person you understand, the Attorney could have easily framed charges against you in this case and you would have ended up being remanded. I suggest you be more careful of your friends than your enemies. You understand and I think your parents understood who your friends were because they did not allow him into the house you just mentioned. You be very careful in future especially when you have a boat. At this stage we take one more witness you not look hungry Mr. Andre?

[5] The Respondent on its part strenuously objected the Motion. Learned Counsel for the Respondent argued that the burden of proving actual or perceived bias is on the Applicants and that they failed to discharge that burden. He described what the Learned Judge said as mere observations and it was merely an advice being made to the witness and that the Judge should not be subject to recusal merely on a subjective opinion of the Applicants. He described these contentious words as being merely innocuous and submitted that the Application is frivolous and totally baseless and that they seek to interfere with the independence of the Judiciary.

[6] Learned Counsel for the Respondent also argued that the application has been filed before the wrong court because it touches on a breach or perceived breach of constitutional rights. Counsel submitted that for that reason a case should have been

instituted before the Constitutional Court. I note that the Respondent did not file a plea in limine litis to challenge jurisdiction. It is this Court's view that at the core of any application for recusal is the desire to ensure fairness and impartiality. It seeks to ensure that a judge sitting on a case remains bound by his oath of office in discharging his functions and does so in a fair and impartial manner. Therefore, the application has been correctly filed before the Supreme Court.

[7] At this point, I wish to place on record that application by the 2nd and 4th Applicants is devoid of merit. That is because the contentious words have no reference to them. The words pertain only to 3rd and possibly the 1st Applicants. However, should this Court rule in favour of the Application, then 2nd and 4th Applicants being co-accused with the 3rd and 4th Applicants will benefit therefrom as the entire case, CO22/2016 will need to be reassigned to another judge.

[8] Counsels relied on **Porter v Magill [2002] 2 AC 375** which is cited in **Government of Seychelles & The Attorney General v Seychelles National Party & Others SCA 03 & 04/2014**, that establishes the test to be followed in deciding on the issue of bias, actual or perceived, which is if “ a fair minded and informed observer, having considered the facts would conclude that there was a real possibility of bias. The test which is an objective one, is to ascertain “*all the circumstances bearing on the suggestion that the Judge was (or could be) biased, the court must itself decide whether the circumstances would lead a fair-minded informed observer to conclude that there was a real possibility that the tribunal was biased*”. The fundamental principle is that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case arising out of friendship with the parties and extends further to any real possibility that a judge will approach a case with a closed mind or, with anything but an objective view, in other words, with a real possibility that in some way he might have pre-judged the case. The Applicants contention is more aligned with the latter part of this fundamental principle.

[9] The matter for consideration is whether the words expressed by the Learned Burhan J during the course of the trial is so extreme or unbalanced that it would throw doubts that

he will try the issues with an objective judicial mind. If any reasonable doubt exists, then the matter should be ruled in favour of disqualification; see **Summers v Fairclough Homes Ltd. [2012] 1 WLR 2004**. However, as held in **Government of Seychelles & The Attorney General v Seychelles National Party & Others** (supra) an application for disqualification should not be based on flimsy and imaginary grounds.

[10] In **Secretary of State for the Home Department v AF (No.2) 1WLR 2528**, the English Court of Appeal stated that the court must ask itself whether “*the judge might have been (or be) influenced for or against one or other party for reason extraneous to the legal or factual merits of the case.*” So, was Burhan J influenced by reasons extraneous to the legal and factual merits of the case? In making that assessment, I have not only looked at the evidence of Mr. Hissen, but briefly perused evidence of 12 witnesses that testified before him. In the case of the first 3 instances of alleged bias, as listed in paragraph 4 above, taken individually and collectively, this court cannot concur with Counsel for the Applicants that there was overt or perceived act of bias by the Judge. The first instance of alleged bias was merely a case of the Judge finding that the witness was being evasive in his answer and possibly cocky, asked him not to be smart. It is something that judges advice clients about often and is not intended to prejudice any party to litigation. The second instance of alleged bias is relevant to the 1st Applicant, Mr. Ernesta. Judge Burhan, was merely seeking clarification and the answer that he received, if anything is beneficial to that Applicant and the Judge will not be permitted to evaluate that piece of evidence in a way that is prejudicial to him. As regards the third instance of alleged bias, I find that the Judge was merely asking a genuine question seeking clarification. The fact that the Applicants, particularly Mr. Quatre is unhappy with the answer given, does not make it legitimate for him to allege bias by the Judge. In all these 3 instances I am not convinced that the Burhan J was influenced by reasons extraneous to the legal and factual merits of the case and the allegations of actual or perceived bias is misconceived.

[11] I now turn to the 4th instance when the Learned Judge expressed certain comments after Mr. Hissen had completed his testimony. I consider most of what was said as being factual. It is a fact that Mr. Hissen could have been charged together with the Applicants in case CR22 of 16. Similarly, it is part of the former’s testimony that his parents refused

him to allow the 3rd Applicant whom he considered to be a trusted friend, to come to their house. This was a fact that was not challenged at all in cross-examination. The Learned Judge also advised the witness to be careful in choosing his friends which the Applicants argue is tantamount to the judge forming adverse opinions about the 3rd Applicant. In a trial, a judge continually evaluates credibility of witnesses and evidence adduced and continually formulates tentative opinions about the facts in issue. It is inconceivable that a judge, a human being, being presented with such evidence, will not begin to take a stance and formulate an opinion. The disputed inferences in my opinion are akin to a conclusion of fact which does not necessarily extend to a conclusion of law as to the Applicants' guilt.

[12] With respect to Burhan J, I find that it was imprudent to have expressed his reaction and opinion during the trial which the Applicants have interpreted as prejudgment constituting bias. This Court however finds that the comments by Burhan J were not based on reasons extraneous to the legal or factual merits of the case. In **Secretary of State for the Home Department v AF** (supra) the court had found that "*the mere circumstance that the judge reached conclusions of fact which are adverse to a party of itself leads to the conclusion that there is appearance of bias*". I believe that the same applies to the case. I find that in applying the objective test referred to above I don't find that there should exist any reasonable apprehension or suspicion on the part of a fair minded and informed observer or member of the public that the judge was being impartial in the given facts and circumstances of the case. I find that the Applicants have not established that Burhan J had preconceived opinion about them, particularly Mr. Quatre. It is only after evidence was adduced that he started to formulate an opinion. Therefore, I don't consider Burhan J's comments to amount to bias that would have warranted his disqualification from the case.

[13] The Motion for Recusal is accordingly denied.

Signed, dated and delivered at Ile du Port on 03 May 2017

M. Vidot
Judge of the Supreme Court