

**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CO 27/2017**

[2018] SCSC 126

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**THE REPUBLIC**

versus

**1. ALBERT ALEXANDER GEERS**

**2. MARY GEERS**

**3. ALBERTUS GEERS**

Accused

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Heard: 7 February 2018

Counsel: Mr. Kumar, Assistant Principal State Counsel for the Republic  
Mr. Derjacques for the accused

Delivered: 7 February 2018

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**RULING**

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**R. Govinden, J**

[1] Notice of Motion for leave to Appeal

Following this Court's decision dated the 22<sup>nd</sup> of January 2018 refusing the Motion which had requested for this trial to be adjourned until the full disposal of the matter arising out of the Petition in the Constitutional Court case No. 10 of 2017, Mr. Derjacques, Learned

Counsel for the Defence has filed a Notice of Motion praying for an order that this Court grant leave to the Applicants to appeal to the Seychelles Court of Appeal against the said interim decision.

[2] The grounds upon which this motion is based is found in the attached affidavit of the first Applicant, Mr. Alexander Geers, in which he averred:

1. That he has a filed a motion to stay and postpone this case which was dismissed on the 22<sup>nd</sup> of January 2018. That the case is continuing and will be heard on the 25<sup>th</sup> and 26<sup>th</sup> of January 2018.
2. He further averred that the case involve a serious charge, namely trafficking in a controlled drug contrary to the Misuse of Drug Act 2016 and that in the meantime, a Petition, namely Petition 10 of 2017 has been filed by one Ralph Volcere in the Constitution Court case and it is proceeding.
3. The deponent further deponed that he desired to appeal and has drafted his grounds of appeal to the Seychelles Court of Appeal's against the interim ruling of this Court dated the 22<sup>nd</sup> of January 2018 and that he has also prepared a motion for urgency for expeditious hearing before the State Court of Appeal.

[3] Mr. Albert Geers further aver that he has a good chance of success before the Seychelles Court of Appeal and should he not be granted leave to proceed on appeal to Seychelles Court of Appeal, he would be prejudiced in his defence and he will not be granted or enjoy a fair hearing and will be deprived of his good chance of success in this trial and may suffer imprisonment without due process and all chances and opportunities available. He further aver that his defence raised real and serious issues with respect to the Misuse of Drugs Act 2016 and that his rights and defence available as per the said law. He finally pray that leave to proceed an appeal to the Seychelles Court of Appeal against the interim ruling of this Court be granted.

[4] Mr. Kumar who appear for the Republic choose not to file a written objection to the application for stay and postponement of trial and submit that he will respond *viva voce* and rely upon settled case law of this jurisdiction.

[5] Submissions

In his submissions Learned Counsel for the Defence, Mr. Anthony Derjacques, submitted that he wish the Court to address the issue of stay and adjournment in pursuant to Section 179 of the Criminal Procedural Code as well as Section 342 (6) of the Criminal Procedural Code. According to him the application for an adjournment under Section 179 will be in pursuant to the pending Constitutional Court Petition and the stay application will be as a result of his prayer to appeal against the said decision to the Court of Appeal. According to Counsel for the Applicant, he has filed a motion and has attached a Notice of Motion that he proposed to lead before the Court of Appeal. The proposed grounds of appeal against this Court's decision is listed in the said Notice of Appeal and reads as follows:

1. The Honourable Judge erred in law in failing to adjourn criminal side No. 27 of 2017.
2. The Honourable Judge erred in law in failing to stay criminal side No. 27 of 2017 in view of the Constitutional Petition No. 10 of 2017 before the proceeding before the Constitutional Court.
3. (The third ground of appeal is not clear and particular and offences). This is admitted by Counsel for the Applicants.
4. The 4<sup>th</sup> ground is that the Honourable Judge erred in failing to hold that the Appellant's Constitutional rights are and will be affected by the Court failing to adjourn the trial in view of the fact that the Constitutional Court will pronounce in Constitutional Court case No. 10 of 2017 on the legality of the charge; the right of the Accused and the present law in Seychelles regarding the Misuse of Drugs Act 2016. And that the failure to adjourn the said Criminal Side No. 21 of 2017 deprive the Appellant of a legal defence, legal excuse and mitigation of the Applicant if the Applicant is convicted by this Court

5. The Honourable Judge erred in failing to take into account the entire full extent of the Misuse of Drugs Act and the legality of ownership, dealing, cultivation and possession created for research, scientific and medical purposes.
6. The relief sought from the Seychelles Court of Appeal is an order setting aside the ruling of the 22<sup>nd</sup> January 2018 before the Supreme Court.

[6] The Learned Counsel for the Applicant also made reference to a new Constitutional Petition filed by the Applicant and produced before this Court. This document shows that Mr. Albert Geers intends to file the suit before the Constitutional Court. The Petition is dated the 25<sup>th</sup> of Januarys 2018. The Petitioner aver in the said petition that the first Accused has lobbied for the medical and scientific used of controlled drugs in the Republic of Seychelles and has been pro-active in many respects in that regards and therefore a purposeful reading of this act especially Section 4(1) and 4(2) would, if Regulations are made under Section 54, provide to him a valid a legitimate defence to the charges against him. He aver that the non- promulgation of the Regulation amounted to a breach of his rights to a fair hearing under Article 19 (7) of the Constitution.

[7] The Learned Counsel for the Applicant also made reference to the Court of Appeal case of Kenneth Steve Esparon v/s the Republic (SCA 1 of 2014). Counsel accepted that the majority decision of the Court in that case is to the effect that an appeal shall not lie against an interlocutory matter to the Court of Appeal from the Supreme Court decision, except if an appeal is against a denial of a bail by the Supreme Court. It is however the submissions of Learned Counsel for the Applicant that there is no binding precedent in Seychelles and that this Court may choose to depart from the decision of the Court of Appeal in the case of Kenneth Esparon v/s The Republic.

[8] The Learned Applicant's Counsel further submitted that there is merits in the case before the Court of Appeal. He submitted that there is a defence under Section 4 of the Misuse of Drugs Act if Regulations are made under Section 54(1). It is Counsel's view that he has a box load of evidence that he would lead before the Court and will be proof of the active involvement of the first Accused in the medical and scientific use of Marijuana.

- [9] Counsel further submitted that there are 3 Court cases pending on the same issue. The Constitutional case; the Seychelles Court of Appeal and the Supreme Court case and that there will be no prejudice to the Republic if this case is stayed. Further he submitted that all the Accuseds passed the test of good behaviour as they have surrendered to the Jurisdiction of this Court on bail.
- [10] Mr. Kumar Learned Assistant Principal State Counsel, for the Republic, strenuously resisted the application for stay of the trial and proceedings in this case. According to the Learned Assistant Principal State Counsel, the Defence could not point out under what provision of the law the Notice of Motion is filed. Mr. Kumar refers to the legal provision of the law regarding appeal to Seychelles Court of Appeal from the Supreme Court. According to him Section 14 of Court's Act deals with appeals in criminal matters and that this section makes reference to the fact that the right of appeal is dealt with under the Criminal Procedural Code.
- [11] In the Criminal Procedural Code, the Learned Counsel refers to Section 342 of the Code, which provides a right of appeal to any persons convicted on a trial held by the Court of Appeal and in Section 342 (1)(a) and 342 (b) on appeal against sentence. According to Mr. Kumar the right of appeal of an accused person is therefore curtailed by law. This right is also curtailed when it comes to the right of the Republic to appeal against an order of acquittal by the Supreme Court.
- [12] Mr. Kumar also made reference to the case of Kenneth Steve Esparon v/s The Republic (SCA 1 of 2017) and submitted that this case law is authority for the proposition that except in appeal matters concerning bail, there is no right of appeal to the Court of Appeal from an interim decision of the Supreme Court. He further submitted that the dissenting Judgment in the case of Kenneth Esparon and Ors v/s the Republic is even more stringent than the majority Judgment, as it does not provide for right of appeal against the interim orders even in respect of an order denying bail by the Supreme Court.

[13] According to Learned Counsel if there is an error in an interlocutory order of the Supreme Court the recourse will be for addressing the error on an appeal against the final order of the Supreme Court upon conviction.

[14] In reply, Mr. Derjacques, submitted that any error in an interim ruling concerning a Constitutional Right of freedom will give a right of appeal to the Court of Appeal from the Supreme Court.

[15] The Court has fully consider the submissions of Counsels in this case and has scrutinised the affidavit of the Applicant and the Notice of Motion and its Attachments. Having done so, I have come to the following determination:

1. First of all, regarding the new Constitutional Petition filed by the Applicant on the 25<sup>th</sup> of January 2018, followed the impugned decision in this matter. Which was made on the 22<sup>nd</sup> of January 2018. The Petition of the first Accused is therefore filed after the impugned decision. Accordingly, the Petition of the first Applicant has no relevance to this application for stay of trial in this case. The only Petition that is relevant is that of the CC10 of 2018, as filed by Mr. Ralph Volcere, which was used by the Applicants to ground their application for stay of proceedings in this case. Counsel for the Applicant has acknowledge this fact during the course of his submission. This is the case as this Court was not referred to and was hence not privy of this decision when it made the decisions being appealed against.
2. Secondly, the right of appeal of an Accused person from a decision of the Supreme Court to the Court of Appeal is first and foremost set out in the Constitution. Article 120 (2) provides as follows:
  1. *“Except as this Constitution or an Act otherwise provide there shall be right of appeal to the Court of appeal from a judgment, direction, declaration, decree, writ or order of the Supreme Court”.*
  2. Hence, the right of Appeal under the Constitution can never be curtailed unless it is curtailed by the Constitution itself or an Act. Articles of the Constitution, besides Article 120 (2), does not further curtailed that right of appeal. However, an Act does so. The Act

is the Criminal Procedural Code. Section 342 of the Criminal Procedural Code it creates a right of appeal to the Court of Appeal by a person convicted before the Supreme Court other than a conviction based on a guilty plea and against sentence passed on his conviction with leave of the Court of Appeal, unless the sentence is one fixed in law.

[16] I would however subscribed to the decision of the Seychelles Court of Appeal in the case of Kenneth Steve Esparon v/s The Republic. Where at paragraph 38 of majority decision it held *“from the moment the Supreme Court takes a decision one way or another it is appealable as a final decision in its own right to the Court of Appeal”*. Further at paragraph 36 the Court of Appeal further held *“for the Court of Appeal to deny itself appellate competence to hear appeals from any judgment, direction, decision, declaration, decree, writ or order of the Supreme Court will create a dark hole in our Democracy. On such an important matter as liberty of the citizen from which flows so many of his other freedoms and liberties”*. Hence, I hold that contrary to the submissions of both Counsel the case of Kenneth Steve Esparon is authority for the proposition that the right of appeal exist against an order of the Supreme Court to the Court of Appeal such as this one.

[17] Having find that there is right of appeal I also find that however under Rule 53 of the Seychelles Court of Appeal Rules *“An appeal shall not operate as a stay of execution of proceedings under the decision appealed from unless the Supreme Court or the Court of Appeal so ordered subject to such terms as it may goes”*.

[18] Hence a stay of proceedings is not automatic. It has to be applied for and justified. The jurisdiction of this Court to grant a stay of proceeding pending an appeal to the Seychelles Court of Appeal, as rightly pointed out by the Learned Counsel for the Applicant, is found in Section 179 of the Criminal Procedural Code. This provision grants to this Court a discretion to adjourn any trial to a certain time and place then to be appointed and in the meantime to set conditions for the reappearance of the parties. This to my mind includes the adjournment of a criminal matter and for the accused person to be release on bail pending the determination of the Court of Appeal of the order made by this Court.

[19] It is important, however, to look at the outline of the general principle that is applicable when this Court exercise its discretion to stay proceedings in criminal matters. Whilst understandably a stay of proceeding falls within the discretion of Court, the practice and procedure of this Court has built certain principles that needs to be complied and followed from which this Court will not depart from except where the party invoking the exercising of the discretion of the Court has establish clear and compellable reasons in support of this departure.

[20] In order to able the Court to exercise its discretion and powers to grant an application for stay of proceedings, the following principles are applicable:

- a. Firstly, the appeal must be competent and arguable on its merits. When an appeal is frivolous and vexatious and an abuse process of this Court or has no overwhelming chance of success, the Court will decline jurisdiction.
- b. Secondly, the interlocutory order following the application for a stay should be able to finally dispose the case.
- c. Thirdly, another important factor is preservation of the res. Where the res will be destroyed, damaged, annihilated before the matter is fully dispose of the Court will grant the stay.
- d. Another consideration is the factor of hardship. The Court will be reluctant to grant an application for stay of proceeding, if it will cause great hardship than if the application was refused.
- e. Lastly, where there is a substantial question of law to be adjudicated at the hearing of the appeal.

[21] In applying the principles to the facts of this case I find as follows:

1. I consider the appeal to be frivolous and vexatious and has no overwhelming chance of success before the Court of appeal. This appeal is an interlocutory appeal against this Court decision dated the 22<sup>nd</sup> of July 2017. In that decision I made it clear as to why this



Court decision cannot be stayed pending the determination of Constitutional Court, Petition No. 10 of 2018.

[22] First and foremost, I held that any Regulation to be made under Section 54 would not be made retroactively to legitimise criminal acts committed prior to the enactment of the Regulations under Section 54. Looking at the facts of the case so far, it is clear that the first Accused was not dealing in a controlled drug in a way that will lead this Court, for the time being to conclude that it was for scientific or medical purposes. It is also evident that Section 54 of the Misuse of Drug Act does not give the Minister powers to make Regulations to apply retrospectively. For Regulations to be made retroactive the enabling provision must expressly provide for the retroactive application of the Regulation. Section 54 does not do so. Moreover, Section 31 and 71 of the Interpretation and General Clauses Act prevents a change in an enactment or statute or making of a Regulation from affecting the previous operation of a previous statute or Regulation. Hence all criminal prosecution prior to effected would remain effective and operative.

[23] I also ruled that the power to enact Regulation by the executive arm of Government is a matter for the executive discretion. The time for enactment of this Regulation will be depend on the policy of the executive and the exercise of it discretion. The reason for the publication of this Regulation will depend on the policy of the Executive arm of Government. I found that the exception to this rule that the Regulations is a *sine qua non* condition for the operation of the Act is not applicable in this case and that the second exception that it is required for the operation of a right and freedom is also not applicable.

[24] Furthermore, and at any rate I held that the first Accused should not have allegedly cultivated and traffic in the controlled drug prior to the enactment of the Regulation and then expect that it will be given legal immunity. He should have instead lobby for the Regulations to be enacted and then carry out the different acts that he thought would be legitimate.

[25] For these reasons I considered that the appeal to the Seychelles Court of Appeal against the decision that I made has no over whelming chance of success.

[26] At rate, and further I find that the balance of hardship favours the Republic in this case. If an interlocutory appeal is allowed to proceed against the impugned decisions, this case would have to be adjourned, either *sine die* or with a long date. A case which has seen the leading of vital and important exhibits which is being relied upon by the Prosecution in respect of the several charges laid before this Court. This Court will have no control over the time that this appeal will take and be fully disposed of by the Court of Appeal. In the meantime the suspension of this case would affect the possibly the testimonies of the several witnesses of the Republic and the nature and physical state of the evidence standards. I note that the Accused has a right to a fair hearing within reasonable time in pursuant to Article 19 of the Constitution and this may also be affected. Bearing in mind all these factors I am of the view that it will cause great hardship to the Prosecution if the appeal is allowed to proceed in this case. Especially, when the facts show that this appeal has no overwhelming chance of success. Accordingly, I will dismiss this application applying for leave to appeal to the Seychelles Court of Appeal as prayed for in the Notice of Motion dated the 22<sup>nd</sup> of January 2017. I rule accordingly.

Signed, dated and delivered at Ile du Port on 7 February 2018



R. Govinden, J  
**Judge of the Supreme Court**