

SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC
CM 121/2022

In the matter between:

THE REPUBLIC
(rep. by George Thachett)

Applicant

and

FAIZ ALI MUBARAK
(rep. by Shakeel Mohammed)

Accused

Neutral Citation: *Republic v Mubarak* (CM 121/2022) [2023] SCSC (27 January 2023)
Before: Burhan J
Summary: Motion for leave to appeal to the COA against the Order delivered on the 26/08/22 in CR 60/2021 SCSC 733.
Heard: 24th November 2022
Delivered: 27 January 2023

ORDER

Application for leave to appeal and stay of proceedings declined.

RULING

BURHAN J

[1] By way of Notice of Motion dated 14th September 2022, learned Counsel Mr. Shakeel Mohamed moved this Court for leave to appeal to the Seychelles Court of Appeal against the Order delivered on the 26th of August 2022 in CR 60/2021 by this Court, declining the application for recusal of the Presiding Trial Judge in Criminal Case 60/2021.

[2] The said motion was supported by an affidavit from his client the first accused, Mr. Faiz Ali Mubarak. The affidavit sets out in detail, the grounds relied on in appeal, in respect of

the Ruling of the Trial Court dated 23 August 2022 made by the Chief Justice and also the Order of this Court dated 26th August 2022, in declining the application for recusal.

[3] This Court will proceed to deal with matters relating to the application in respect of the Order of this Court dated 26th August 2022. The main grounds of appeal in relation to this Order as set out in paragraph 18 of the affidavit to the Notice of Motion are:

a) *That the Learned Honourable Judge erred in law when coming to the conclusion that “a fair minded and informed observer having considered all the circumstances peculiar to this case, would not come to the conclusion that there was a real possibility of the Learned Presiding Judge being biased”.*

b) *That the Learned Judge failed properly to apply the tests and legal principles in connection to applications for recusal.*

c) *That the Learned Judge should not have listened to the application when he was made aware that the Learned Chief Justice has delivered a ruling in this matter as regards the request for recusal.*

[4] In his affidavit the first accused at paragraph 19, also moves that the proceedings be stayed pending appeal. He further states that since the motion for recusal goes to the heart of the need for a fair trial, guaranteed under the Constitution, the continued hearing of the case against him before the decision of the Court of Appeal is given, would deprive him of his constitutional rights to a fair trial.

[5] I will first deal with the application for leave to appeal set out in his Notice of Motion referred to in paragraph 1 herein. As per the Applicant’s submissions, the Application is made under Section 12 (2) of the Courts Act, which reads as follows:

S12 (2) (a) In civil matters no appeal shall lie as of right –

- (i) from any interlocutory judgment or order of the Supreme Court; or*
- (ii) from any final judgment or order of the Supreme Court where the only subject matter of the appeal has a monetary value and that value does not exceed ten thousand rupees.*

(b) In any such cases as aforesaid the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal.

(c) Should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, the Court of Appeal may grant special leave to appeal.

[6] When one peruses Section 12 of the Courts Act, it clearly states “*In civil matters...*”. It is clear that ‘leave to appeal’ procedure exists only in civil matters. The main suit against the first accused Faiz Mubarak in this instant case, is a criminal case containing numerous charges against him under the Misuse of Drugs Act. Therefore, it is the view of this Court that Section 12 (2) of the Courts Act has no relevance or application to this case as the ancillary application is arising from a criminal case and not a civil suit.

[7] Further Section 14 of the Courts Act clearly states that “*Appeals from decisions of the Supreme Court in criminal matters shall be governed by the Criminal Procedure Code and by any other law now in force or to be enacted.*”

[8] Section 342 (1) of the Criminal Procedure Code (CPC) states:

(1) Any person convicted on a trial held by the Supreme Court may appeal to the Court of Appeal –

(a) against his conviction other than on a conviction based on the person’s own plea of guilty –

(i) on any ground of appeal whenever the penalty awarded shall exceed six months’ imprisonment or one thousand rupees;

(ii) on any ground of appeal which involves a question of law alone;

(iii) with the leave of such Court of Appeal or upon a certificate of the Judge who tried him that it is a fit case for appeal on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact or on any other ground which appears to the Court to be a sufficient ground of appeal;

(b) against the sentence passed on his conviction with the leave of such Court of Appeal, unless the sentence is one fixed by law.

[9] Section 342(6) of the Criminal Procedure Code states:

“Except as is otherwise provided by in this section an appeal shall not lie against an acquittal, conviction, decision, declaration, decree, direction, order, writ or sentence passed by the Supreme Court.”

[10] Therefore, this section very clearly prohibits appeal in any other circumstance other than the circumstances provided for in Section 342 (1) of the CPC.

[11] Therefore, I am inclined to agree with learned Counsel for the Respondent that the Application for leave to appeal cannot be considered by this Court as the provision is applicable only in the hearing of civil matters. The case law relied on by learned Counsel are all related to civil matters. The application for leave to appeal is thus declined.

[12] The next issue is the application for grant of a stay pending appeal. As the leave to appeal application has been declined the stay of proceedings application fails. I also observe that the Hon Chief Justice hearing the main trial, has already considered an application for stay of proceedings which has also been made, at the same time, before this Court and dismissed the application for stay of proceedings before him by Ruling dated 8th November 2023 (*Faiz Ali Mubarak v R (CM 120/22) [2022] SCSC 970 (8th November 2022)*), on the basis the application was unsubstantiated and an abuse of process.

[13] I am of the view that a stay of proceedings application cannot be decided by a court hearing an ancillary application of recusal. It is the Trial Judge hearing the main case who should decide this issue. The application for stay is accordingly declined.

Signed, dated and delivered at Ile du Port on 27 January 2023

Burhan J