

SUPREME COURT OF SEYCHELLES

Reportable

[2024]

CO 114/2021

In the matter between:

ANTI-CORRUPTION COMMISSION

(rep by Ms M Nelson & Mr M Skelly)

and

MUKESH VALABHJI

(rep. by Mr F Bonte)

1st Accused

SARAH ZARQANI RENE

(rep. by Mr Ryan Laporte)

2nd Accused

Neutral Citation: *The ACCS v Valabhji & Ors* (CO 114/2021) [2024] (19th July 2024)

Summary: Confirmation of amended charges

Before: Govinden CJ

Heard: Written Submissions

Delivered: 19th July 2024

RULING

Background

[1] In April 2023 the Applicant, the Anti-Corruption Commission Seychelles (the ACCS) has filed a Notice of Motion dated 4th April 2023 to amend the existing charges against the 1st Respondent, Mukesh Valabhji, and the 2nd Respondent, Sarah Zarqani Rene by way of preferring the amended, substituted and additional charges. The applicant sought to withdraw the existing charges in Annex A once pleas have been entered to the amended, substituted and additional charges, which were enclosed with the Application as Annex B.

[2] This Court delivered its Ruling dated 22 April 2024 (the Ruling). The orders of the Court were as follows:

- 1) The trial in CR 114 of 2021 is stayed pending the determination of the Constitutional Court in CP 9 of 2022;
- 2) Leave to proceed with counts for offences of money laundering against 1st Respondent (Counts 10; 11; 14; 16; 18; and 22) is subject to the determination of the Constitutional Court in CP 9 of 2022;
- 3) Leave to proceed with counts for offences of money laundering against 2nd Respondent (Counts 12; 13; 15; 17; 19; 20; 21; and 23), being under the same legislation as challenged by the 1st Respondent in CP 9 of 2022 is subject to the determination of the Constitutional Court;
- 4) Leave to proceed is given to the ACCS to file amended count 1;
- 5) Leave is not given to the ACCS to proceed to file the amended charges and to add the additional charges for official corruption (Counts 2-3; 5-9). Leave is not given to proceed to file amended count 4. The ACCS is at liberty to correct the defects in the said charges and file them anew.
- 6) Counts from the existing charge sheet for official corruption, Counts 2 and 5; and conspiracy to launder money contrary to section 3(1)(a) and 3(2)(a), Count 4 are struck out for being defective;
- 7) The existing charges shall remain on the Court's record until the determination of CP 9 of 2022; and the filing of the charges for which leave has been granted together with the corrected amended and additional charges.

Notice of Motion

[3] Following the said Ruling, the ACCS has filed a Notice of Motion dated 2nd of May 2024 for the following orders:

“1. An order that this matter be heard as a matter of urgency.

2. *Amend the existing charges brought against the 1st Respondent and 2nd Respondent by way of preferring the amended, substituted, and additional charges set out in Annex C (exhibit KS/ 3) pursuant to section 187 of the Criminal Procedure Code.*
3. *That leave to proceed is given in respect of proposed amended counts 2, 3, 4, 5, 6, 7, 8 and 9 in the form set out in Annex C.*
4. *That leave to proceed having previously been given in respect of counts 1 and 10 to 23 set out in Annex C, the charges set out in Annex C are to become the consolidated form of charges before the Supreme Court in CR 114/2021.*
5. *Fix a date for pleas to be entered to the charges in Annex C.*
6. *Withdraw the existing charges in Annex A and Annex B after please have been entered by the 1st and 2nd Respondents to the consolidated charges in Annex C.*
7. *Make such further order(s) as the Court shall deem just and proper in all the circumstances of this case.”*

[4] The Notice of Motion is supported by the Affidavit of Kevin Stephenson, an officer and investigator of the ACCS. Officer Stephenson avers that the intention of the Application is to file the proposed amended charges anew, having cured the defects identified in the ruling of this Court dated 22nd April 2024. It is averred that this application will result in a consolidated form of the charges, incorporating all the amended counts which have been subject of ruling. Officer Stephenson avers that the proposed amendments which have been made to the form of the charges are set out in a consolidated form of charges document ‘Annex C – Proposed Consolidate Form of Charges (May 2024)’. Officer Stephenson emphasized in his Affidavit that pursuant to the ruling of 22nd April 2024, leave to prefer counts 1, and 10 to 23 has already been given.

[5] At paragraphs 9-26 of the Affidavit Officer Stephenson avers the details of the changes in the amended counts to reflect the changes required to cure the defects identified by the Ruling of this Court. The Changes can be summarized as follows.

Change 1 – Counts 2, 3, 5, 6, 7, 8 & 9 – addition of “(a)” to the Statement of Offence

[6] In accordance with this Court's Order at [156], the proposed count have been amended to specify that the 1st Respondent is charged under Section 91(a) of the Penal Code.

Change 2 – Counts 2, 3, 5, 6, 7, 8 & 9 – removal of title “Official Corruption” from Statement of Offence and replacement with “Corruptly obtaining property while employed in public service”

[7] In accordance with this Court's Order at [156] and [148], the offence is now referred to as “*corruptly obtaining property while employed in public service*” reflecting the language used in Section 91 of the Penal Code.

Change 3 – Counts 5, 6, 7, 8 & 9 – removal of “a benefit” from the Particulars of Offence

[8] The particulars of offence and statement of offence now specify that what was alleged to have been obtained corruptly was property (rather than a benefit). Reference to “*a benefit*” is accordingly removed from the particulars of charges as the phrase is redundant, and the property, which is alleged to have been corruptly obtained, is specified in each count. It is averred that money and shares come within the wide definition of property contained in section 5 of the Penal Code (*‘Property’ includes anything animate or inanimate capable of being the subject of ownership*).

Change 4 – Count 4 – removal of “Conspiracy to Money Launder” from the Statement of Offence and replacement with “Money Laundering”.

[9] The Affidavit refers to paragraph [169]-[170] of the Ruling. It is averred that Count 4 has been changed to allege an offence of money laundering rather than conspiracy to commit money laundering. The particulars of offence state that the offence is committed when the defendant conspired with another to commit the offence of money laundering reflecting the statutory language of section 3(2)(a).

Change 5 – Count 4 – removal of “agreed” from the Particulars of Offence and replacement with “conspired”.

[10] It is averred that in view of Change 4, the word “*conspiracy*” no longer appears in the statement of offence and the particulars have been amended to include the word

“conspired” rather than “agreed”, to provide clarity as to the nature of the allegation and as the word “conspires” is used in the statutory provision.

Change 6 – Count 4 – removal of “Section 3(1)(a) and” from the Statement of Offence

- [11] Affidavit refers to paragraph [176] of the Ruling and Officer Stephenson avers that count 4 has been amended to remove reference to section 3(1)(a) and that statement of offence is now put solely under section 3(2)(a), which matched the particulars and alleges that the 1st Respondent conspired to launder money.

Change 7 – Counts 2-10, 12, 13, 20-23 – removal of the abbreviation “s.” from the Particulars of Offence and replacement with “section”

- [12] It is averred that the change is purely cosmetic change replacing abbreviation “s.” with “section”.

Change 8 – Count 10 – removal of “official” from the Particulars of Offence an replacement with “while employed in public service”.

- [13] It is averred that count 10 previously alleged that the predicate criminality was ‘official corruption’. In order to be consistent with the Ruling at [148] to [156] as set out in changes 2 and 3, Particulars of Offence was amended in order to plead ‘corruption while employed in public service’ in place of ‘official corruption’. It is averred that this cures the defect identified in the use of the marginal note to section 91 of the Penal Code to describe the alleged offence and is consistent with the proposed amendment made to count 9.

Objections

- [14] Both Respondents object to the Motion and ask for its dismissal.

The 1st Respondent’s Affidavit

- [15] The 1st Respondent filed Affidavit in reply dated 12th June 2024. Firstly, the 1st Respondent avers that the Notice of Motion is defective since section 187 of the CPC does not provide for ‘consolidation’ of charges and this procedure is unknown to our laws. Secondly, the 1st Respondent avers that the Notice of Motion is further defective and an abuse of process resulting in a confusing situation for him for the following

reasons specified in paragraphs 13(a) -13(g) of the Affidavit. The reasons averred by the 1st Respondent summarized as follows:

- (a) the ACCS misrepresented in their Application that leave to amend counts 10, 11, 14, 16, and 22 was granted by the Ruling dated 22nd April 2024. The Ruling means that no leave to amend the said counts can be given until the Constitutional Court has found the proposed charges to be lawful; and thereafter leave must still be obtained. Therefore, Notice of Motion has no grounds to seek to amend the charges so as to include the said counts. Leave cannot be given until and unless the Constitutional Court decides the question in CP9/2022 against the 1st Respondent.
- (b) due to the present Notice of Motion, the 1st Respondent has applied for another stay of CP9 of 2022.
- (c) Notice of Motion produces multiplicity of actions as it is seeking an order to amend Second Charges by replacing them with the Consolidated Charges, whilst the application to amend the Second Charges by replacing them with the Third Charges is partly pending due to pending determination of the CP9/2022.
- (d) it is seeking an order to withdraw the Second Charges and the Third Charges only once the 1st Respondent has pleaded to the Consolidated Charges; which is per se unconstitutional and unknown to our laws since there cannot be more than one set of charges against a defendant at any one time in respect of the same offences.
- (e) the Third Charges do not lie as charges against the 1st Respondent and until the partially determined application in respect of the said Third Charges have been withdrawn, a fourth amended charges cannot be filed.
- (f) the Notice of Motion is in breach of the 1st Respondent's right to a fair hearing under Article 19 of the Constitution: (i) as an accused person must be informed of the charges against in order to take the plea and prepare defence; and Consolidated Charges is contrary to Article 19; (ii) Kevin Stephenson has

averred in the affidavit that investigation is still ongoing anticipating further amendments.

(g) the Notice of Motion is a breach of right to equal protection under Article 27 of the Constitution as the 1st Respondent is not aware of any accused person who has been faced with amended charges over amended charges, or to enter a plea over temporary Consolidated Charges when determination of the lawfulness of the pending charges is still before the trial judge and the Constitutional Court.

[16] The 1st Respondent further avers that the present Notice of Motion has resulted in the same scenario as arose with respect to the Third Charges as the stay of the CP9/2022 has to be sought by the 1st Respondent again since the ACCS has brought further amendment while the 1st Respondent is in the midst of challenging the Second Charges; and Consolidated Charges are similar if not identical terms to the issue raised in CP9/2022. It is further averred that continuous filing of amended charges upon amended charges is frivolous and vexatious, an abuse of process, and a waste of the Courts' and the 1st Respondent's time and resources intended to frustrate the 1st Respondent.

[17] The 1st Respondent avers further or alternatively that the Notice of Motion should be refused on the basis that it is fatally procedurally inapposite for the following reasons:

- (a) there are good reasons to believe that Consolidated Charges are not the final form which will be advanced at trial.
- (b) it is absurd to seek to amend the charges in respect of the counts before the Constitutional Court before the Court has reached a decision, such that the ACCS is seeking permission to bring charges which it knows may be unlawful.
- (c) the ACCS' investigation is continuing and the ACCS will seek to amend the charges again in the future.
- (d) the 1st Respondent's statements relating to the inappropriateness of these charges being instituted against him at this time apply redoubled in respect of

the ACCS' suggestion that the 1st Respondent be required to plead to the same.

(e) the ACCS suggestion that the Notice of Motion should be heard on an urgent basis is irrational and abusive.

The 2nd Respondent's Affidavit

- [18] The 2nd Respondent filed an Affidavit in reply dated 14th June 2024. She avers that the Application has no foundation or substance, does not sustain in law; is bad in law and ought to be dismissed as the ACCS does not the power nor jurisdiction for substitution of charges, which is also the subject of a Constitutional Petition CP9/2022. It is further averred that the Affidavit in support of the application is incurably defective and is fatal to the Application. Further, the 2nd Respondent avers that the Application is an abuse of process and the ACCS is using the Courts' procedures in an unjustifiably oppressive manner to the respondents affecting their rights to a fair trial. The ACCS made it clear that they are still investigating the case and, thus, more of such motion for amendment will come.
- [19] The 2nd Respondent further avers that as per Ruling of 22nd April 2024, the case has been stayed pending the determination in CP9/2022.
- [20] It is further averred that the Applicant is seeking 'consolidation' of charges, which is not provided for under section 187 of the CPC and therefore the Application is defective.
- [21] The 2nd Respondent avers that the Application is an abuse of process and made in a confusing manner since the ACCS is misrepresenting the findings in the Ruling of 22nd April 2024. It is averred that as per the Ruling, leave to amend counts 12, 13, 15, 17, 21, and 23 are subject to the determination of the Constitutional Court contrary to Affidavit of the Applicant which avers that leave has been granted. According to the 2nd Respondent, the Ruling of 22nd April 2024 means that no leave can be given until the Constitutional Court has found the proposed charges to be lawful and leave must still be obtained thereafter. It is therefore averred that the Applicant has no grounds to seek to amend the charges so as to include counts which are under determination of the Constitutional Court.

- [22] The 2nd Respondent further avers that amending the charges for the fourth time is an abuse of process. It is averred that continuous filing of amended charges over amended charges is frivolous and vexatious and a waste of the Courts' time, whilst possibly also incurring contempt of the Court noting the unambiguous terms of the Ruling in respect of the Third Charges.
- [23] With regards to the Affidavit of the Applicant, the 2nd Respondent avers that it is defective as averments are prolix, confusing and ambiguous; there are no exhibited evidence to support averments therein and the allegations of ongoing investigation and acquisition of further material.
- [24] It is further averred that notwithstanding the inappropriateness for filing of these charges it is equally so in relation to a proposition of requiring the 2nd Respondent to take the plea at this juncture.
- [25] Further, the 2nd Respondent avers that there is no evidence to substantiate the need for urgency in this matter.
- [26] The 2nd Respondent further avers that the Honourable Court should set an example in upholding the principles of fundamental human rights be defending the rights of accused persons as enshrined in the Constitution read with international obligations as per Article 48 of the Constitution. On the basis of the above, the 2nd Respondent asks the Court to dismiss the Motion.

Determination

- [27] It is pertinent to note and clarify at this point that according to the order of this Court dated 22nd April 2024 leave in relation to Counts 10 to 23 is subject to determination of the Constitutional Court. Therefore, averments of the Applicant that the leave has been granted in relation to these counts is incorrect.
- [28] Upon perusal of Annex C – Proposed Consolidated Form of Changes (May 2024) it is the finding of this Court that save as for ‘cosmetic change’ of abbreviation “s.” to “*section*” (Change 7) and replacing reference to predicate criminally from “*official corruption*” (Change 8) to “*corruption while employed in public office*” no further changes has been proposed in Counts 10-23. Save for these changes proposed, Counts 10-23 in Annex C

are the same as in Annex B, which contains proposed amended charges that were already subject to the determination of this Court in Ruling of 22nd April 2024. Leave to amend these Counts is still subject to decision in CP9/2022.

- [29] With regards to the rest of the amendments to the Counts, upon perusal of Annex B and C, it is the finding of this Court that the Applicant has cured the defects identified by the Ruling of 22nd April 2024. Counts 2-3; 5-9 which were for “*official corruption*” now refer to offence of “*corruptly obtaining property while employed in public service*” and specify the subsection (a) of section 91 of the Penal Code under which the 1st Respondent is proposed to be charged (Changes 1 and 2). This is in accordance with the Ruling of 22nd April 2024. Change 3, removal of “*a benefit*” from the Particulars of Offence in Counts 5, 6, 7, 8 & 9 (since reference is already made to ‘obtaining property’) follows from the Changes 1 and 2 and in the view of this Court, does not cause prejudice to the 1st Respondent.
- [30] Changes 4-6 in relation to Count 4, “Conspiracy to Money Launder”, are also in accordance with the Ruling of 22nd April 2024. The Applicant specifies that the 1st Respondent is proposed to be charged under section 3(2)(a) as opposed to both sections 3(1)(a) and 3(2)(a) of the Anti-Money Laundering Act 1996. Reference to offence as “*money laundering*” instead of “*conspiracy to money launder*”; and replacing “*agreed*” with “*conspired*” in the Particulars of Offence is in accordance with the relevant statutory provisions and Ruling of 22nd April 2024.
- [31] The Ruling specified that the ACCS were at liberty to correct the defects in Counts 2-9, which they did in the present Application. In respect of Counts 2-9 in Annex C, amendment is merely curing the defects of Counts 2-9 of Annex B proposed amended charges. This Court finds that such amendment to cure the defects is not prejudicial to the Respondents, can be made without injustice and therefore is in accordance with section 187 of the CPC. Further, this Notice of Motion is brought following the Ruling of 22nd April 2024, this Court does not find that at this stage and in these circumstances there is any abuse of process. Leave to amend Counts 2-9 in the form set out in Annex C therefore is granted.
- [32] Consequently, leave was granted to amend Count 1 in Annex B proposed amended charges by the Ruling of 22nd April 2024. Leave is now granted to amend Counts 2-9 in

the form set out in Annex C. In relation to Counts 10-23 of Annex B, leave is still subject to the decision of the Constitutional Court in CP9/2022.

[33] This Court observes that Counts 1, 10-23 of Annex B are the same as in Annex C, except the minor abovementioned changes in Counts 10-23, which do not relate to substance of the Count. Therefore, this Court finds that Annex C (“Consolidated Charges”) contains proposed amended Count 1, for which leave to amend was granted; Counts 2-9 have cured defects previously identified in counts 2-9 from Annex B by this Court in Ruling of 22nd April 2024; and Counts 10-23, for which leave to amend is still subject to decision of the Constitutional Court in CP9/2022.

[34] Consequently, this Court deems it just and proper in all the circumstances of this case to substitute proposed amended charges contained in Annex B, which were before the determination of this Court in Ruling of 22nd April 2024, with the proposed amended charges contained in Annex C of the present Motion, which cured the defects identified by this Court.

[35] Following the above determinations and those of Ruling of 22nd April, this Court makes the following orders:

- (1) The trial in CR 114 of 2021 is stayed pending the determination of the Constitutional Court in CP 9 of 2022;
- (2) Leave to proceed with counts for offences of money laundering against 1st Respondent (Counts 10; 11; 14; 16; 18; and 22 in the form set out in Annex C) is subject to the determination of the Constitutional Court in CP 9 of 2022;
- (3) Leave to proceed with counts for offences of money laundering against 2nd Respondent (Counts 12; 13; 15; 17; 19; 20; 21; and 23 in the form set out in Annex C), being under the same legislation as challenged by the 1st Respondent in CP 9 of 2022 is subject to the determination of the Constitutional Court;
- (4) Leave to proceed is given to the ACCS to file amended counts 1-9 in the form set out in Annex C ‘Proposed Consolidated Form of Charges’ (May 2024);

(5) Counts from the existing charge sheet (Annex A) for official corruption, Counts 2 and 5; and conspiracy to launder money contrary to section 3(1)(a) and 3(2)(a), Count 4, are struck out for being defective;

(6) The existing charges shall remain on the Court's record until the determination of CP9 of 2022; and the filing of the charges for which leave has been granted.

Signed, dated and delivered at Ile du Port on the 19th of July 2024

Govinden CJ