

IN THE COURT OF APPEAL OF SEYCHELLES

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**Reportable**

[2021] SCCA 8  
SCA CL 01/2020  
(Appeal from CP 18/2019)

**Durai Karunakaran**  
(*rep. by Mr. Philippe Boulle*)

**Appellant**

and

**Attorney General**  
(*rep. by Mr. Stefan Knights*)

**Respondent**

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**Neutral Citation:** *Karunakaran v Attorney General* (SCA CL 01/2020) SCCA 8

**Before:** Fernando President, Robinson JA, Dingake JA

**Summary:** The Appellant's argument was that a Puisne Judge cannot sit as a Justice of Appeal of the Court of Appeal to hear and determine cases

**Heard:** 20 April 2021

**Delivered:** 30 April 2021

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**ORDER**

Appeal dismissed. Puisne Judge, is an ex-officio member of the Court of Appeal.

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**JUDGMENT**

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**Fernando, President, (Robinson JA, Concurring)**

1. This is an appeal against the judgment of the Constitutional Court in CP 18 of 2019 dismissing the Appellant's petition.

2. The Appellant's complaint before the Constitutional Court was to the effect that the Court of Appeal bench that sat to hear his appeal against the judgment of the Constitutional Court in *D. Karunakaran V Attorney General SCA CL 05/2018*, contrary to the Seychelles Court of Appeal Rules 2005, did not consist of three Justices of Appeal, since one of them was a Judge of the Supreme Court. Thus, the complaint was in relation to the violation of the Seychelles Court of Appeal Rules, made under article 136(1) of the Constitution. It was the Appellant's complaint before us at the hearing that as a result of the said violation, his constitutional right was breached as no valid Court of Appeal as set out in article 120(2) heard his appeal and thus the judgment of the Court of Appeal, was unconstitutional, null and void.
  
3. At the very outset I wish to point out that Appellant, had not objected to the composition of the Court at the commencement of or during the Court of Appeal hearing, but had decided to do so only when his appeal was dismissed. Appellant's argument; that he made an objection in an earlier case and the fact that it was not considered, deterred him from making a similar objection, in my view is a weak argument. An objection to the composition of the court in my view, should have been taken at the very commencement of the appeal hearing, especially in the circumstances of this case. Once the Appellant submitted to the jurisdiction, he cannot now challenge it.
  
4. It is also noted that the petition filed before the Constitutional Court was not in compliance with rule 5 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules which specifies that a petition "*...shall refer to the provision of the Constitution that has been allegedly contravened or likely to be contravened...*" (emphasis added). I am of the view that there must be sufficient identification in a petition of the specific

constitutional provision violated and not left to be inferred. There must be reference to a specific article of the Constitution. There is no reference in the petition to any provision of the Constitution that has been allegedly contravened or likely to be contravened, nor has the particular rule of the Seychelles Court of Appeal Rules been identified and specified.

5. The above two matters in my view would have sufficed to dismiss the petition by the Constitutional Court.
6. The crux of this appeal as correctly stated by Counsel for the Respondent, the Attorney General, is whether a Puisne Judge can sit as a Justice of Appeal of the Court of Appeal to hear and determine cases.
7. **Article 121 of the Constitution** sets out the composition of the Court of Appeal as follows:

*“The Court of Appeal shall consist of -*

*(a) a President of the Court of Appeal and two or more other Justices of Appeal; and*

*(b) the Judges who shall be ex-officio members of the Court”*

8. According to the Principles of Interpretation at **clause 1(1) of Schedule 2 of the Constitution** ‘Justice of Appeal’ “*means a Justice of the Court of Appeal established by article 120*” and ‘Judge’ “*means the Chief Justice or a Puisne Judge*”.
9. The Appellant in his arguments before the Constitutional Court and before this Court had tried to peg his argument by citing article 120(2) of the Constitution to

state that there was no valid Court of Appeal. As stated earlier he had not referred to this article or any other article of the Constitution in his petition. Article 120(2) speaks in what instances one has a right of appeal, namely against a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court. It does not speak of the composition of the Court of Appeal. It is only article 121 that speaks of the composition of the Court of Appeal.

10. Article 121 deals with the composition of the Court of Appeal. If as the Appellant argues the Court of Appeal cannot consist of Judges of the Supreme Court, I do not understand why there is a reference to them in article 121(b). Article 121 of the Constitution, cannot be circumvented by any other rule of interpretation, even if there was any.

11. The words ‘ex-officio members of the Court’ means by virtue of office or as a result of one’s status or position. It is my view that by virtue of the characteristics inherent in the holding of a particular office, namely that of Judge of the Supreme Court, there is no need for a specific authorization or appointment as Justice of Appeal, when they sit as Justices of Appeal. I state this, as it was the argument of the Appellant that a Justice of the Court of Appeal is appointed by virtue of the provisions of article 123 of the Constitution and a Judge by virtue of the provisions of article 127 of the Constitution and thus a Judge of the Supreme Court cannot be a Justice of Appeal. One finds that the procedure for the appointment of both Justices of Appeal and Judges are identical, namely the appointment is by the President by an instrument under the Public Seal from candidates proposed by the Constitutional Appointments Authority. In view of **section 12 of the Official Oaths Act (Cap 153)** once a Judge of the Supreme Court has taken the Oath of Allegiance and the Judicial Oath, as required by the said Act, it is not required of him to take the said oaths again, even if appointed as a Justice of Appeal.

12. It was also the Appellant's argument that the qualifications required for appointment as Justices of Appeal and Judges as set out in the Constitution, differ. Qualifications for Justices of Appeal, set out in article 122 are certainly not more stringent than those set out in article 126(1) for Judges. For that matter strangely the required qualifications for Justices of Appeal are less demanding, than for Judges. To be a Judge of the Supreme Court, the Constitution specifies, that the person should have been entitled to practice before a court of unlimited original jurisdiction for not less than seven years; and in the opinion of the Constitutional Appointments Authority the person has shown outstanding distinction in the practice of law and can effectively, competently and impartially discharge the functions of the office of a Judge under this Constitution. On the contrary all that is needed to be a Justice of Appeal is that the person is suitably qualified in law and can effectively, competently and impartially discharge the functions of the office of Justice of Appeal under the Constitution. A person is entitled to practice before a court of unlimited original jurisdiction, only if 'suitably qualified in law'. The requirement of seven years of practice before a court of unlimited original jurisdiction and the requirement that the person has shown outstanding distinction in the practice of law, have not been specified as required qualifications for appointment of Justices of Appeal.

13. The President of the Court of Appeal has been empowered under **article 136(1) of the Constitution** to make rules of the Court of Appeal. At **rule 4 of The Seychelles Court of Appeal Rules 2005** it is stated "*In respect of any appeal, the Court shall consist of those Judges, not being less than three, whom the President shall select to sit for the purposes of hearing that appeal*". (emphasis added)

14. 'Judge' according to the Interpretation provision at rule 2 in the said Seychelles Court of Appeal Rules "means a Justice of Appeal acting as such". The thrust of the Appellant's argument is based on this, namely a Judge should be a Justice of Appeal. In making this submission he overlooks the words 'acting as such'.
15. The Seychelles Court of Appeal Rules having being made under a delegated power, namely article 136(1) of the Constitution would have to be interpreted in accordance with article 121 of the Constitution referred to at paragraph 7 above. The word 'Judge' in rule 4 of the Rules, thus includes both Justices of Appeal and Judges of the Supreme Court. That the word 'Judge' includes Judges of the Supreme Court, is made clear by the use of the words "acting as such" in the Interpretation provision in rule 2 of the Rules. It would be illogical to refer to a Justice of Appeal "acting as such", for he is a Justice of Appeal for all purposes. It would also be superfluous to state that a Justice of Appeal is acting as a Justice of Appeal, for he is not a Judge of the Supreme Court or a Magistrate.
16. The words "In respect of any appeal" and "select to sit for the purposes of hearing that appeal" in rule 4 of The Seychelles Court of Appeal Rules 2005, referred to at paragraph 13 above makes this further clear. It is not for all purposes that a Judge of the Supreme Court is treated as a Justice of Appeal, but only when selected by the President, in respect of any appeal, to sit for the purposes of hearing that appeal.
17. That the word 'Judge' includes Judges of the Supreme Court is made further clear by **section 2(2) of The Judiciary Act of Seychelles (Cap104)** which states:  
*"(2) The President of the Court of Appeal may appoint any Puisne Judge to sit as a Justice of Appeal of the Court of Appeal:*

*Provided that the Puisne Judge appointed shall not have heard the case at the first instance before the Supreme Court or on appeal from the Magistrates' Court."*

18. In other jurisdictions too, provisions have made for ex-officio members of the superior courts.

19. **Article 85 of the Constitution of the Solomon Islands** which speaks of the establishment of the Court of Appeal there, is almost identical to article 121 of the Constitution of Seychelles. It states: "*The judges of the Court of Appeal shall be— a. a President and such number of other Justices of Appeal, if any, as may be prescribed by Parliament; and b. the Chief Justice, Deputy Chief Justice and the puisne judges of the High Court, who shall be judges of the Court ex officio*".

20. **Article 99(2) of the Constitution of Botswana**, which speaks of the composition of the Court of Appeal of Botswana, the apex court therein, states: "*The judges of the Court of Appeal shall be- (a) the President of the Court of Appeal; (b) such number, if any, of Justices of Appeal as may be prescribed by Parliament; and (c) the Chief Justice and the other judges of the High Court: Provided that Parliament may make provision for the office of President of the Court of Appeal to be held by the Chief Justice ex-officio.*"

21. The **Supreme Court of Ireland** is composed of the Chief Justice of Ireland, who is President of the Court, and nine ordinary Judges. In addition, the President of the Court of Appeal is *ex officio* a member of the Supreme Court. The President of the High Court is also an *ex officio* member of the Supreme Court. Where an insufficient number of Judges of the Supreme Court are available the Chief Justice may request any ordinary Judge of the High Court to sit as a member of the Supreme Court for the hearing of a particular appeal.

22. In Fiji, Judges of the Court of Appeal sit as ex-officio members of the Supreme Court and Judges of the High Court as ex-officio members of the Court of Appeal.

23. For the reasons set out above, I have no hesitation in dismissing the appeal.

Signed, dated and delivered at Ile du Port on 30 April 2021.

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Fernando, President

I concur

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Robinson JA