

## IN THE COURT OF APPEAL OF SEYCHELLES

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### Reportable

[2024] (13 February 2024)

SCA CR MA 09/2023

In the matter Between

**Albert Hoareau**

*(rep. by Mr. S. Rajasundaram)*

**Applicant**

And

**The Republic**

*(rep by Ms. Luthina Monthly)*

**Respondent**

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**Neutral Citation:** *Hoareau v R* (Criminal Appeal SCA CR MA 09/2023) [2024] (13 February 2024)

**Before:** Robinson JA

**Summary:** Whether or not the supporting affidavit complies with the law — Defect in the *jurat* — The Commissioner of Prisons has taken the oath of the applicant — The interlocutory matter does not have a supporting affidavit as required by Rule 25 (3) of The Seychelles Court of Appeal Rules 2005, as amended, and, hence, is incurably defective

**Heard:** 12 January and 13 February 2024

**Delivered:** 15 February 2024

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### ORDER

The application is struck out and stands dismissed

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### RULING ON APPLICATION

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**Robinson JA**

1. On 11 September 2023, in case reference number CR69/2019, Albert Hoareau, the convict (the applicant), was found guilty on count one of the offence of "[s]exual assault contrary to section 130 (1) read with section, 130 (2) (d) and section 130 (3) (b) of the Penal Code

*and punishable under section 130 (1) of the Penal Code". The particulars of the said offence read as follows — "A. H of Glacis, Mahe, on a date unknown to the Prosecution in March 2019, sexually assaulted his daughter. A. H. aged 5 years old at the time, by licking her lips, inserting his penis in her mouth and inserting his finger into her vagina".*

2. The applicant was acquitted on count two of the offence of "[w]ilfully or negligently exhibits to a child an indecent material contrary to section 152 (1) (f) as read with section 152 (2) (b) of the Penal Code and punishable under section 152 (1) of the Penal Code".
3. On 20 October 2023, the Supreme Court sentenced the applicant to five years imprisonment on count one. The Supreme Court also ordered that the time spent on remand be deducted from this period of five years imprisonment.
4. On 9 October 2023, the applicant swore to an affidavit in support of a notice of motion in case reference number CM09/2023, praying to the Supreme Court to grant him bail pending the delivery of the sentence. The Supreme Court's decision concerning the bail application was not placed before this Court.
5. The applicant filed a notice of appeal on 10 November 2023. The appeal (case reference number SCA CR20/2023) will be heard in the April 2024 session of the Court of Appeal. The applicant filed an application on 15 November 2023 before this Court by way of notice of motion for bail pending appeal. The grounds upon which the application is grounded are supported by the affidavit of the applicant. The main grounds are that there are special reasons for granting bail and he has a *"bright, fair chances of succeeding in [his] appeal against the conviction in that the chances of [his] appeal are so great."* [verbatim].
6. No affidavit in reply has been filed on behalf of the Respondent. Counsel for the Respondent has filed a document titled *"Objection to Bail Application"*, which presented arguments on the merits of the application and preliminary objections. In the light of the issue to be determined, stated at paragraph [7] hereof, there is no need to repeat the

averments contained in the applicant's supporting affidavit and the submissions made by both Counsel.

7. At the hearing of this application, this Court asked both Counsel to make submissions on whether or not the supporting affidavit complies with the law as the Commissioner of Prisons appears to have taken the oath of the applicant. The *jurat* has been worded as follows — "*[t]he Deponent who currently serves imprisonment term at the Montagne Posee prison, on oath signed this Affidavit in my presence this 15th day of November 2023 signed at the prison premises, Montagne Posee, Mahe [...] Commissioner of Prisons Montagne Posee Prison department Mahe, Seychelles*".
8. Counsel for the applicant contended without more that while the law specifies specific persons before whom affidavits may be sworn and affirmed, it does not prohibit affidavits from being sworn and affirmed before other persons, such as the Commissioner of Prisons. This Court disagrees with this argument put forth on behalf of the applicant.
9. This Court considers section 354 of the Criminal Procedure Code and section 171 of the Seychelles Code of Civil Procedure, which specify before whom an affidavit may be sworn and affirmed in Seychelles —

*"354 [a]ffidavits and affirmations to be issued before the Supreme Court may be sworn and affirmed before a judicial officer<sup>1</sup>."*

and

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<sup>1</sup> Under section 2 of the Criminal Procedure Code, a "*judicial officer*" means a Judge, a Senior Magistrate, a Magistrate, a Justice of the Peace or the Registrar". It is mentioned that the Courts Act, Cap. 52, was amended by the Statute Law Revision (Miscellaneous Amendments) (No.2) Act 2021 (Act 49 of 2021). Section 24 of the Courts Act was amended by repealing the definitions of "*Magistrate*", "*Senior Magistrate*" and substituting therefor the following definition — "*Magistrate*" includes the Chief Magistrate, a Senior Magistrate or Magistrate exercising the powers and jurisdictions of a Magistrate under this Act or any other law;". The Criminal Procedure Code was amended by the Statute Law Revision (Miscellaneous Amendments) (No.2) Act 2021 (Act 49 of 2021). In the definition of "*judicial officer*", the words "*, a Justice of the Peace,*" were deleted.

"171 [a]ffidavits may be sworn in Seychelles —

- (a) before a Judge, a Magistrate, a Justice of the Peace, a Notary or the Registrar; and
- (b) in any cause or matter, in addition to those mentioned in paragraph (a) before any person specially appointed for the purpose by the Court."

10. I find that no written law stipulates that the Commissioner of Prisons is legally entitled to take the oath or affirmation of a deponent.
11. For instance, in the case of *Onezime v AG & Government of Seychelles SCA CL 3 of 2021* (delivered on 29 April 2022), the Court of Appeal emphasised — "*that only affidavits sworn before persons under section 171 of the Seychelles Code of Civil Procedure will be accepted and relied upon for any legal purpose in Seychelles*". In **Onezime** [supra], the Court of Appeal went on to state with respect to section 171 of the Seychelles Code of Civil Procedure — "[a]ll these are persons whose existence and title to administer an oath, namely to take the oath or affirmation in an affidavit, can be easily verified by a court in Seychelles [...]. This shows the emphasis placed in our law to ensure that the affidavit has been properly sworn or affirmed before a person who is legally entitled to take the oath or affirmation of the deponent".
12. In *Savoy Development Limited v Salum SCA MA16/2021*, arising in SCA10/2021, Twomey JA stated at paragraphs [13] and [14] — "[13] *The Court of Appeal in Lablache de Charmoy*<sup>2</sup> (supra) held that the parties cannot waive irregular affidavits. Affidavits are sworn evidence and evidential rules for their admission cannot be waived by the Court either. " In **Savoy Development Limited** [supra], Counsel for the respondent relied on defect in the *jurat*. Twomey JA considered the defect in the affidavit to be fatal. She dismissed the application with costs.
13. Based on the reasons stated above, this Court concludes that this interlocutory matter does not have a supporting affidavit as required by Rule 25 (3) of The Seychelles Court of

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<sup>2</sup> (SCA 8 of 2019) [2019] SCCA 35 (16 September 2019)

Appeal Rules 2005, as amended, and, hence, is incurably defective. Based on the conclusion that has been reached, there is no need to consider any other matter.

14. The application is struck out and stands dismissed.

A handwritten signature in dark ink, appearing to read 'F. Robinson', with a stylized flourish at the end.

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F. Robinson JA

Signed, dated, and delivered at Ile du Port on 13 February 2024.