SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC
CO 60/2021

In the matter between:

THE REPUBLIC **Republic**
(rep. by Nissa Thompson and Georges Thachett)

and

FAIZ ALI MUBARAK & ORS **1st Accused**
(rep. by Mohammed Saleh)

Neutral Citation: *The Republic v Faiz Mubarak & Ors* (CO 60/2021) [2022] SCSC (26 August 2022).
Before: Burhan J
Summary: Application for recusal.
Heard: 24 August 2022
Delivered: 26 August 2022

ORDER

Application for recusal denied.

ORDER

BURHAN J

[1] On 23rd August 2022, learned Counsel Mr Shakeel Mohamed on behalf of the 1st Accused-Applicant Mr Faiz Ali Mubarak (hereinafter 1st Accused) made an application in Criminal Case 60/2021, moving that the Presiding Trial Judge (Presiding Judge) recuse himself from the hearing of the said case. On declining to do so learned Counsel, filed a formal motion for recusal supported by an affidavit dated 23 August 2022.

[2] As per the rules and procedure for recusal laid out in the case of ***The Government of Seychelles & Anor v The Seychelles National Party & Ors and Viral Dhanjee SCA CP 3 & 4 of 2014,*** the motion was referred to this Court by the Chief Justice in terms of Rule 10 which reads as follows:

> *"On taking cognisance of the formal motion, the Chief Justice shall assign another judge who is not concerned with the case to hear and determine the recusal motion of the judge in question."*

[3] Learned Counsel for the Republic and learned Counsel for the 1st Accused were given an opportunity of being heard and both made oral submissions supported with the necessary authorities.

[4] I will first set out the main grounds relied on by the 1st Accused for recusal of the learned Presiding Judge as set out in the attached affidavit of the 1st accused. His motion for recusal is based on the following criteria:

a. That the learned Presiding Judge has already had to deal with the case at an earlier stage of the proceedings and has given various decisions concerning him at the pre-trial stage in regards to his applications for bail.

b. That some information of a very sensitive nature has been placed before the Presiding Judge during pre-trial proceedings namely:-

(i) an affidavit sworn by the 1st Accused on the 2nd of August 2021 (Annex A),

(ii) an affidavit sworn by Mrs Lydia Mubarak Ali on the 13th of August 2021 (Annex B).

(iii) the testimony of officer Davis Simeon on the 27th of August 2021 (Annex C) (page 15) where he explains inter alia that the 1st Accused *"agreed to*

show us several places where such offences are..." and to a question from the Court that he answered that that this was *"During the investigation"*.

(iv) Officer Davis Simeon in his evidence also stated on the same date before the Presiding Judge that the 1st accused had incriminated himself during discussions with the police.

c. That he had instructed his Counsel to speak of this issue to both learned Counsel Mr. Andre who appears for the other accused and as well as learned Counsel J. Revera for the prosecution.

d. That it should be noted that learned Counsel J. Revera has drawn the attention of the Court to the "danger" on the 27th of August 2021 (Annex C). Counsel for the prosecution is reported in the minutes of proceedings to have expressed his view that *"any information revealed could potentially prejudice this Court and during the case proper this is the only fear as to any information if it might prejudice the Court in any way.'*

e. That the learned Presiding Judge referred to a passage in the Ruling of 2021 which reads as follows;

"The modus operandi of the commission of this offence shows a high level of organization and operational capacity of the accused person. They were prepared to strategise their operation and rendez-vous with non-nationals in open sea and there and then transhipped the controlled drugs and effect payment. This shows a strong commercial element, at least on a prima facie basis."

[5] It is the contention of the 1st Accused that due to these factors the learned Presiding Judge should recuse himself due to the following reasons:

a. The Presiding Judge is biased in his appreciation of the facts.

b. The Presiding Judge should not have been informed about what he had allegedly stated during the investigation and / or about any issues pertaining to self-incrimination.

c. That the Presiding Judge made an assessment and finding about the *"high level of organisation", "operational capacity"* in the commission of the offence in relation to the 1st Accused at the pre-trial stage.

d. That the learned Presiding Judge made an observation about the *"strong commercial element"* at the pre-trial stage.

[6] It is the 1st Accused's contention that for these reasons the learned Presiding Judge should recuse himself as there is a likelihood of bias and / or appearance and perception of bias on the part of him.

[7] The background facts are that in the main case CR No 60 /2021, the 1st Accused with six others were charged on the 07th of June 2021, for the offences of Importation into Seychelles and Trafficking in a Class 1 controlled drug Heroin and Class B controlled drug Cannabis Resin. The quantity of Class A controlled drug was 8019.40 grams (pure 3839 grams) and quantity of Class B controlled drug was 8917.60 grams.

[8] Initially, after taking the plea of all seven accused on the 10th of September 2021, the case was fixed for trial from the 20th till the 23rd of December 2021. Prior to the trial date four of the accused were granted a conditional offer under Section 61 A of the Criminal Procedure Code and released and an amended charge sheet was filed against the 1st Accused and two other accused on the 26th of November 2021.

[9] Learned Counsel for the 1st Accused Mr Shakeel Mohamed by notice of motion dated 17th December 2021, moved for an adjournment of the trial dates fixed for the 20th of December till the 23rd of December 2022. It appears from the record that on the 20th of December 2021, the case was postponed due to predicaments faced by learned Counsel for the prosecution and learned Counsel for the 1st Accused. Thereafter on the 18th of February 2022, the charge was put to the remaining three accused and the case re-fixed for hearing from the 22nd of August till the 26th of August 2022.

[10] On the 22nd of August 2022, the first date of trial, due to the lawyer of the 1st accused learned Counsel Mr Shakeel Mohamed being unable to fly in, the trial was postponed to

the next day. An application for recusal of the learned Presiding Judge was made in open Court the next day which was the 23rd of August 2022 which was declined and thereafter followed up by the formal motion for recusal dated 23rd August 2022 which was referred to this court by the Chief Justice and is now before this Court for determination. During the intervening period from the date of the case being filed, several applications and orders in respect of bail were made as the accused were in remand custody. It is in regard to observations made in an order dated 21 June 2021 in respect of a bail application in regard to the 1st Accused that the recusal application has been filed.

[11] Learned Counsel for the Republic Principal State Counsel Mr George Thatchet opposed the application on the following grounds:

a. The application for recusal is frivolous and vexatious and the application should have been filed prior to the case being fixed for hearing or at the earliest opportunity available in accordance with the directions given by Msoffe JA in the *Dhanjee* case.

b. The main purpose of the application is to delay the commencement of the trial of the case, as several prosecution witnesses are foreign Indonesian nationals who were initially co - accused.

c. The law in Seychelles specifically provides for the court hearing the case to issue ancillary orders in relation to the accused.

d. In any event the relevant proceedings of the case in relation to the bail application will be remaining in the file as part of the proceedings in the case and therefore allegations of bias will continue whoever takes the trial.

e. That the bail hearing inquiry was done at the request of the 1st Accused who himself listed the relevant witnesses to be called for the hearing and therefore cannot complain now.

[12] Prior to analysing the above mentioned grounds set out by the 1st Accused in regard to recusal, it would be appropriate to set out the law in relation to the factors that should be

considered in respect of such an application. The test to apply as set down by various authorities, also referred to in the many authorities referred to by both learned Counsel, is whether a fair minded and informed observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

[13] The maxim that Judges are independent and charged with the duty of impartiality in administering justice is the foundation stone in the dispensation of justice. Challenges to this maxim by means of applications for recusal could be made if it is shown that the Judge hearing the case:

a) has personal interest or personal knowledge in respect of the case,
b) has a personal interest in the outcome of the case.
c) is related to a party or attorney in the case.
d) is a material witness in the case.
e) has previously acted as an attorney for either party.

[14] It is apparent at the very outset that from the facts stated in the affidavit of the 1st Accused, he is not relying on any of the aforementioned factors in his application for recusal.

[15] It is for this Court to consider and decide whether the grounds raised by learned Counsel for the 1st Accused in his application, create the possibility that a fair minded and informed observer having considered the facts in the said application would conclude that there was a real possibility that the Presiding Judge would be biased in the hearing of the said case.

[16] One of the main grounds relied on by the 1st Accused in his application for recusal is based on certain observations made by the learned Presiding Judge in his order dated 4th February 2022 in respect of a bail application. On perusal of the said order, it is clear that the learned Presiding Judge had incorporated certain observations made by him in an earlier ruling dated 21st June 2021 in respect of the *modus operandi*, *high level of organisation* and *operational activity* in regard to the facts of the case and thereafter stated *"This shows a strong commercial element, at least on a prima facie basis"*.

[17] It is the view of this Court that it would be impossible for any Judge in coming to a proper finding in a bail application or an application to remand, to completely ignore the facts in respect of the case presented by both the prosecution and defence by way of affidavits. In the case of ***Steven Hoareau v Republic SCA No 28/2010 Fernando JA at [4]*** held that "*for the purposes of considering a bail application in respect of a drug case, the Judge considering the application has necessarily to look into this matter and there is nothing wrong in relying on an affidavit for that purpose. This amounts only to an examination in brief of the nature of the evidence against the accused and not at the precise evidence available to draw a conclusion as to the guilt of the accused, as stated by the Appellant in his skeletal arguments."* In this instant case, it is clear that the learned Presiding Judge dealing with the bail application was merely examining the affidavit evidence before him to decide whether *"there is a prima facie case to detain all of the Respondents in custody pursuant to Section 179 of the Criminal Procedure Code read with Article 18 (7) (a) and (c)of the Constitution."* (at last paragraph of Page1of the Order dated 4th February 2022).

[18] It is clear to this Court that the learned Presiding Judge was in accordance with the decision of the Seychelles Court of Appeal in *Steve Hoareau* (supra) only examining in brief the nature of the evidence against the accused in respect of the bail application and not the precise evidence available to draw a conclusion as to the guilt of the accused. This applies also to the evidence, either oral or by way of affidavit, given by Mr. Davis Simeon at the pre-trial hearing held in respect of the bail application.

[19] It is also apparent as brought to the notice of Court by learned Counsel for the Republic Mr Thatchet that the said order including the words *modus operandi, high level of organisation, operational activity* and *strong commercial element* was made as far back as the 21st of June 2021. Mr Thatchet further submits that on the first occasion, the trial had to be postponed due to the predicament faced by the prosecution and learned Counsel for the 1st accused. He further states that this recusal application made by the 1st accused at the last minute before the Presiding Judge, is another attempt to delay the start of the trial which was due to start on the 22 of August 2022 but had to be adjourned till today due to the recusal application. He further submits that the defence is aware that most of

the witnesses are foreign Indonesian nationals and there are difficulties in keeping them in the Seychelles.

[20] This in my view is a matter to be brought to the notice of the learned Presiding Judge. However, I wish to observe the fact that as the words and observations were set out in an order given as far back as 21 June 2021, it is clear that the recusal application could have been made, before the case was cause listed for hearing in December 2021 and August 2022. The belated application for recusal is not in conformity with the guidelines set down by Justice Msoffe in paragraph [5] of the *Dhanjee* case (supra). It may not be fatal to the application but the belated recusal application looks more of an afterthought which has certainly created a delay in the hearing of the case.

[21] The next issue raised in the recusal application is that the bail application/applications should have been handled by another Judge and not the Presiding Judge. This may be happening in other jurisdictions but in the Seychelles as brought to the notice of this Court by learned counsel for the Republic, the law as articulated under Section 179 of the Criminal Procedure Code, empowers the Court hearing the case to deal with any application in respect of remanding a person into custody or releasing him upon the accused entering into a recognisance with or without sureties. Therefore, the argument that the matters in respect of bail should have been heard by another Judge bears no merit as in the Seychelles, the law empowers the same Court hearing the case to hear ancillary applications including bail applications. Further the threshold to be established by the prosecution in an application seeking remand under section 179 is different and does not in any way affect or lessen the burden on the prosecution to prove the essential elements of the charge beyond reasonable doubt to establish a finding of guilt, thereby having no effect on his right to a fair trial.

[22] The legal system in Seychelles may differ in certain respects to other systems but at the same time, it upholds the rule of law and respects the rights of citizens especially the rights of accused persons which lie enshrined and engraved in the Constitution. In Seychelles, the Presiding Judge is the same Judge who decides on pre-trial matters such as bail. This has never posed challenges before. However in this instant case, it is the

submission of accused person that because the Presiding Judge has heard evidence in a hearing relating to bail, he will be perceived to be bias. This is the view of the accused person and not the view of a fair minded and informed person.

[23] Learned Counsel for the 1st Accused also brought to the attention of Court that the affidavits filed by the 1st Accused and his wife Lydia Mubarak in the application for bail hearing, would prejudice the mind of the Presiding Judge against them and therefore another Judge should hear the case. As correctly pointed out by the Chief Justice in his ruling dated 23 August 2022 and by learned Counsel for the Republic in his submission, the affidavits and the pre-trial proceedings in respect of bail (pre-trial done at the request of the 1st Accused) have all now become a part of the proceedings in this case and therefore the issue of perceived bias will persist and be applicable to any Judge who proceeds to hear this case. Therefore if the contention of learned Counsel for the 1st Accused is to be accepted, it would end in absurdity as any Judge hearing this case would be perceived to be bias, the moment the Judge peruses the proceedings in the record. It is also good to observe that the then learned Counsel for the prosecution Mr Revera was alert and aware of the danger of prejudicing the Court and accordingly moved cautiously duly considering this aspect as well.

[24] I will proceed to deal with the cases submitted by learned Counsel for the 1st Accused Mr. Shakeel Mohamed. The case of ***Smith v Attorney General of Trinidad and Tobago*, 2022 WL 02307043** involved a question of bias on the part of a Magistrate. The said Magistrate presided over a criminal matter involving a charge against the former Prime Minister, Mr Panday. The allegation of bias on part of the Magistrate arose because of mainly two things. First, it was in regard to the purchase of land and the financial pressures it put on the Magistrate and the assistance he received thereafter from a company connected to another case. Secondly, it was also based on the content of three meetings and discussions he had with the Chief Justice who attempted to influence the Magistrate in relation to the Panday trial. While this case relates to the perception of bias by a Presiding Officer, it is not comparable to this instant case because there have been neither meetings of this nature nor have there been similar circumstances as in *Smith*

case. Cases need not be identical to be found to be persuasive, but they should be similar in the facts in order to be comparable and persuasive.

[25] Another case referred to by learned Counsel is ***Porter v Magill*****, 2001 WL 1479752 (2001).** This case was heard in the House of Lords but has no connection to a Judicial Officer hearing a case. In the case of ***Marie Joseph Charles Robert Lesage v The Mauritius Commercial Bank Ltd*** **[2012] UKPC 41, Privy Council Appeal No 0027 of 2011** the perception of bias in this case arose from a letter one of the parties to the case, Mr Lesage, sent to the two Presiding Officers and the Chief Justice. The said letter contained privileged information of what had been discussed by Mr Lesage and his lawyer. It was the Court's opinion that sight of the letter and privileged information, created "an inevitable appearance of prejudice" because the Judges had been informed of material which was privileged and which was obviously adverse to his defence of the action. The Court agreed that there was a perception of bias even if that perception was partly created by the Appellant (Mr Lesage) himself when he sent the said letter with privileged information. However, in this instance, no such 'privileged disclosure' in secret has been made but rather only facts in an affidavit based on legal advice given by Counsel to the accused persons have been openly disclosed to all parties in Court.

[26] The case of ***Stubbs & Ors v The Queen*** **(Bahamas) [2018] UKPC 30, Privy Council Appeals No 0015 and 0016 of 2017** pertains to whether or not a Judge who presided over an aborted trial by jury should have recused himself from sitting as a Presiding Officer on an appeal against conviction by the same defendants who were convicted on the same charges at a different trial by jury under a different Presiding Officer. The Court acknowledged that "the limited size of the Court of Appeal" such as in Bahamas, can make it "*difficult to avoid accidental listings before judges who have had some prior involvement with parties or with earlier stages in the proceedings*." The facts of this case are not applicable to the instant case before me as the submissions are not based on the Presiding Judge having previously heard and determined a criminal matter pertaining to the 1st Accused.

[27] The ***Hauschildt v Denmark*** **(Application No 10486/83)** differs from the case before this Court, as the burden on the prosecution in Seychelles is to establish a prima facie case for the remand or detention of an accused person. Whereas in *Hauschildt* the law in question required the Judge to consider "particularly confirmed suspicion", meaning the Judge has to be convinced that there is "a very high degree of clarity as to the question of guilt". It is obvious that the considerations differ to Seychelles. It is interesting to note that in this case the ECHR (European Court of Human Rights) opined that the fact that the same Judge who presides over bail matters is the same judge who presides over the main trial does not in itself justify the question of impartiality of the Presiding Officer.

[28] ***Tannoo v Her Honour, Mrs Magistrate R. Teelock & Anor*** **2005 SCJ 287, 2005 MR 215** is not comparable to the case before the Supreme Court because the accused persons have not changed their pleas before the same Judge. The case of ***Francois P. J. D. v The State 1993 SCJ*** too cannot be comparable to warrant its persuasiveness in this Court because in the case before this Court the learned Presiding Judge has not been acquainted with the accused's recent convictions and this has not formed the basis of this recusal application.

[29] It would be pertinent at this stage for the benefit of the 1st Accused, to set down the Constitutional Oath as set out in the 1st Schedule of the Official Oaths Act.

> *"I ..... do swear that I will well and truly serve the Republic of Seychelles in the office of ..... and that I will do right in accordance with the Constitution of Seychelles as by law established, and in accordance with the laws of the Republic* ***without fear or favour, affection or ill will*** *(Emphasis mine).*
> *SO HELP ME GOD."*

[30] The main purpose of a Judge taking this oath peculiar to his office at the time of appointment, is to ensure that the said Judge acts in an independent and impartial manner in the conduct of his official duties as Judge, whoever the appointing authority may be. It is the considered view of this Court that one should not treat this oath of office lightly. In the absence of factors for the recusal of a Judge, this sacred oath is of paramount importance in the discharging or performing one's official duties independently and

impartially as a Judge. To give any other interpretation in the absence of any evidence to the contrary, would undermine the sacred official oath taken under the Constitution.

[31] It would be pertinent at this stage to refer to the case ***Livesey v New South Wales Bar Association (1985) L.R.C (Const) – 1107*** it was held:

> *"-----, it would be an abdication of judicial function and an encouragement of procedural abuse for a Judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds <u>of possible appearance of prejudgment or bias</u>, (emphasis mine) regardless of whether the other party desired that the matter be dealt with by him as the Judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular Court."*

[32] I am satisfied having considered all the aforementioned circumstances set out by the 1st Accused, 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 (see generally) ***Re Medicaments No 20 [2001] 1 LWR 700 and The Government of Seychelles & Anor v The Seychelles National Party & Ors and Viral Dhanjee*** *(supra).*

[33] I therefore proceed to decline and dismiss the application for recusal.

Signed, dated and delivered at Ile du Port on 26th August 2022.

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Burhan J