CONSTITUTIONAL COURT OF SEYCHELLES

Reportable

[2019] SCCC 7

CP04/2019

In the matter between:

COLLIN FORTE — **1st Petitioner**

GINA FORTE — **2nd Petitioner**

(rep. by Alexia Amesbury)

and

ATTORNEY GENERAL — **Respondent**

(rep. by Ananth Subramaniam)

Neutral Citation: *Forte v Attorney General* (CP04/2019) [2019] SCCC

Before: Burhan, Dodin and Pillay J.

Summary: Concurrency of legal proceedings in the Constitutional Court and Court of Appeal – Constitutional Court is not an appellate Court in respect of decisions of the Supreme Court – Constitutional issues must be live – Appeal procedure and statutory and constitutional protections remain available to litigants on appeal.

Heard: 07 June 2019 and 10 June 2019

Delivered: 13 August 2019.

ORDER

Preliminary objection upheld. Application dismissed. No order in respect of costs.

RULING OF COURT

BURHAN J (DODIN J and PILLAY J concurring)

[1] The petitioners are moving the Constitutional Court to:

(a) interpret the Charter in a way that is not inconsistent with any international obligations relating to human rights and freedoms, particularly the United Nations Covenant on Civil and Political Rights and the International Convention against torture and other inhuman, degrading treatments and punishments which Seychelles accessed to;

(b) interpret the Charter in line with article 48 (a) to (d) of the Constitution;

(c) interpret the Charter in a way that does not confer any person or group the right to engage in any activity aimed at the suppression of a right or freedom contained in the Charter, including sentencing that violates their right under article 16 of the Constitution.

(d) declare that the rights of the petitioners under article 16; 18(14); 19(1), (3) and (11) and 27 have been contravened, and to provide appropriate remedies, including the provision of audio recording of the proceedings;

(e) make such declaration or order, issue a writ and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing the issues of the application;

(f) make a declaration that s 30(2) (a) and (b) of the Prison Act is null and void for being inconsistent with article 27 of the Constitution and contravention of the petitioners' right to get the statutory remission of one third of the sentence like all other prisoners is discriminatory and violates their fundamental rights to equal treatment before the law.

[2] The petitioners Mr. Colin Forte and Gina Forte are husband and wife and were convicted before the Supreme Court on charges of importing and conspiracy to import a quantity of 1336.5 grams of heroin (pure heroin content 642 grams) into the Seychelles. They were

sentenced on the Count of importation to a term of 30 years imprisonment each and on the Count of conspiracy to import the said controlled drug to a term of 27 years imprisonment each. It was further ordered that the sentences in both Counts run concurrently for each accused. The petitioners are claiming that their conviction and sentence has infringed their rights under articles 16; 18(14); 19(1), (3) and (11); and 27 of the Constitution. They have also challenged the constitutionality of section 30 (2) (a) and (b) of the Prison Act, 1991 which the Learned Trial Judge of the Supreme Court invoked to deny them remission.

[3] The respondents filed preliminary objections on the 1st of April 2019 to the said petition. The preliminary objections were set for hearing and on the said date both parties made submissions.

[4] The four preliminary objections to the petition raised by the respondent are that:

a. there is no cause of action;

b. the petitioners have not exhausted their statutory remedy and adequate means of redress under the Constitution as well as under the Criminal Procedure Code;

c. there was no actual or likely contravention of the petitioners' constitutional rights; and

d. the trial Court acted within the legal parameters in imposing the sentence against the petitioners.

[5] The petitioners claim based on the pleadings and preliminary submissions made by Learned Counsel Mrs. Amesbury is that their guaranteed right to a fair trial by an independent and impartial Court under article 19(1) of the Constitution, which in their view, includes the right to be sentenced fairly and proportionately and the right to a fair charge being laid against them, has been infringed by the Court. They further allege that their right to dignity guaranteed in article 16 of the Constitution which has in it the right not to be subjected to torture, cruel, inhumane or degrading treatment or punishment, has also been infringed.

[6] The petitioners have also relied on article 18, which guarantees everyone his right to liberty and security. In terms of article 18 (14), where a person is convicted of any offence, any period which the person has spent in custody in respect of the offence shall be taken into

account by the Court in imposing any sentence of imprisonment for the offence. They say that the 30 year sentence imposed without remission violates this provision, and is unjustified and grossly disproportionate. There must be a proportionate balance between the length of the punishment and the offence, and the Court has to consider not just the deterrent factor, but also the rehabilitative aspect and their personal circumstances.

[7] At the very outset, prior to dealing with the preliminary objections in regard to the alleged contraventions we note that Learned Counsel for the petitioners, admitted that the petitioners have filed an appeal against the judgment and sentence of the Learned Trial Judge. We were also made aware that the appellate process has not yet been concluded.

[8] It would be pertinent to refer to article 46(4) of the Constitution that reads as follows:

"Where the Constitutional Court on an application under clause (1) is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned in any other Court under any other law, the Court may hear the application or transfer the application to the appropriate Court for grant of redress in accordance with law."

[9] On a reading of the petition, we observe the petitioner's application is based on personal circumstances concerning the petitioners, i.e. that the Court did not consider the impact that their prolonged incarceration would have on their marriage, since they would both be in their early 70s by the time they finished serving their sentences. It is apparent the petitioners' case is based more on the harshness and excessiveness of the sentence which is an issue to be considered in appeal and not by a Constitutional Court.

[10] Having given due consideration to article 46 (4) of the Constitution, we are of the view that it would be inappropriate at this stage for this Court to interfere in the sentence already passed and under appeal, as on cursory perusal of the sentence imposed, we are satisfied it is within the parameters of the sentence prescribed by law as set out in the 2nd Schedule of the Misuse of Dugs Act 1991 as amended. Learned Counsel has not sought to challenge the law prescribing the sentence to be unconstitutional.

[11] In ***Brioche v Attorney-General (2013) SLR 425 para 21, Egonda-Ntende CJ held:***

"It is important to point out to the petitioners, if only to avoid multiplicity of proceedings, that the Constitutional Court, is not an appellate Court in respect of decisions of the Supreme Court that aggrieve them. The appellate Court is the Court of Appeal. A criminal trial of course involves the observance of the Seychellois Bill of Rights including the right to a fair trial/hearing and the right to equal protection of the law. Recourse to the Constitutional Court should not be used to deter the progress of a criminal trial with matters that arise time and again in the conduct of criminal proceedings under the guise of enforcement of constitutional rights."

[12] It was brought to the attention of this Court by Learned Counsel for the respondents Mr. Ananth Subramaniam that the parameters of the sentence imposed is well within the provided law. It is our considered view that the harshness and excessiveness of the sentence are not matters the Constitutional Court should take cognisance of but is a matter for appellate procedure as provided for by section 342(1) of the Criminal Procedure Code and article 19(11) of the Constitution. Had the existing law in respect of the imposed sentence been challenged, on the basis it was unconstitutional as it was against any international obligations relating to human rights and freedoms, particularly the United Nations Covenant on Civil and Political Rights and the International Convention against torture and other inhuman, degrading treatments and punishments which Seychelles has acceded to, the position would be different.

[13] With regards to the next contention of the petitioners that the Learned Trial Judge when imposing the sentence refusing remission, failed to substantiate and justify his decision, leaving them in a difficult position to appeal against the decision, on a cursory glance at the annexures to the petition filed by Learned Counsel for the petitioners, we observe this contention is incorrect. The Learned Trial Judge has very clearly stated while sentencing that as there are aggravated circumstances, particularly due to the commercial value of the controlled drug, the accused shall not be entitled to remission.

[14] Once again ample opportunity is provided for Learned Counsel for the petitioners to further canvass the findings of the Learned Judge on this issue in refusing remission, before the Seychelles Court of Appeal. The law set out in the Prison Act read together with the Misuse

of Drugs Act (MODA) 1991 and even 2016, provides for instances for the refusal of remission under certain circumstances. Therefore it cannot be said that the Learned Trial Judge's findings were arbitrary and unfounded and therefore unconstitutional.

[15] The other principal issue raised by Learned Counsel for the Petitioner is based on article 27(1) of the Constitution, guaranteeing the right to equal protection of the law. The petitioners claim that s 30(2) (a) and (b) of the Prison Act contravenes their equality rights and is inconsistent with the Constitution. This issue has already been canvassed before the Constitutional Court and its decision upheld by the Court of Appeal in the case of ***Bouchereau and Ors V Superintendent of Prisons & Ors [2015] SCCA 3(17th April 2015)*** where it was held as follows by Twomey JA.

"Ground 2 of the appeal relates to the interpretation of the Prisons (Amendment) Act and Article 45 of the Constitution which provides:

"This Chapter shall not be interpreted so as to confer on any person or group the right to engage in any activity aimed at the suppression of a right or freedom contained in the Charter."

It is the Appellants' contention that in interpreting the amending provisions of the Act their rights to equal protection of the law has been breached. Firstly, we would like to point out that the remission of sentences is not a right. Secondly, the Prisons (Amendment) Act is neither conferring nor suppressing a right. Remission is a privilege accorded to prisoners in certain circumstances (emphasis ours). We have tried to follow the Appellants' argument which seems to suggest that all prisoners should have the right to remission in order for them to be equal before the law.

In this regard we endorse the findings of the Constitutional Court that the right to equal protection translates into the State treating an individual in the same manner as others in similar conditions and circumstances. A distinction or classification is constitutional if it has a rational basis or a legitimate state objective. Discrimination or classification based on race, colour, gender or status is generally suspect and will be strictly scrutinised by the Court as will classification that interferes with rights protected under the Charter.

However, where the discrimination or classification has a rational basis or where the state has a rational interest in making the distinction then the qualification will pass the Court's scrutiny.

In applying this test to the instant case, it is rational that the State provides a deterrent for serious offences and the removal of remission in sentences can be legitimately construed as meeting that objective. The second ground of appeal is therefore also rejected."

[16] Therefore it is clear that the Seychelles Court of Appeal and Constitutional Court have already decided that remission is not a right but a privilege. Therefore denial of remission does not amount to a constitutional contravention or infringement. Therefore there is no necessity to once again, consider whether section 30 of the Prison Act is null and void for being inconsistent with article 27 of the Constitution and therefore contravenes of the petitioners' right to get equal treatment before the law as requested by Learned Counsel for the petitioner.

[17] The petitioners claim further that the transcription of the record of their Court proceedings cannot be relied upon because it is unclear/garbled in some parts and are not an accurate presentation of witness testimonies and other interventions, and some parts were left out. Learned Counsel for the petitioners submit these discrepancies in the record will adversely affect their right to have a fair determination on appeal and infringes their rights under article 19(2) and (11).

[18] On a reading of article 19(2) of the Constitution no doubt it mandates the provision of the record of criminal proceedings after judgment. This provision reads:

"when a person is tried for any offence that person or any other person authorised by that person in that behalf shall, if either of them so requires and subject to payment of such reasonable fee as may be specified by or under any law, be given as soon as is practicable after judgment a copy for the use of that person of any record of the proceedings made by or on behalf of the Court.

This has been done so there is no violation of the article. This article also sets out the remedy as article 19(11) entrenches the right to appeal against a conviction and sentence: *every person convicted of an offence shall be entitled to appeal in accordance with law against the conviction, sentence and any order made on the conviction.*

[19] This Court is of the view that the Seychelles Court of Appeal being a higher Court and having wider jurisdiction than even the Constitutional Court which is limited to constitutional violations, has wider jurisdiction in considering the appeal, to verify with the recordings and determine whether the alleged "unclear/garbled proceedings" have affected the final decision of the Trial Judge and give the necessary relief if necessary. Therefore Learned Counsel for the appellants' contention that these discrepancies in the record will adversely affect their right to have a fair determination on appeal and infringes their rights under article 19(2) and (11) is incorrect.

[20] For all the aforementioned reasons, we therefore proceed to uphold preliminary objection (c) that no actual or likely contravention of the petitioners' constitutional rights of the petitioner is visible and we would also uphold preliminary objection (d) i.e. that the trial Court acted within the legal parameters in imposing the sentence against the petitioners.

[21] It appears that learned Counsel for the respondents is essentially taking issue with what appears to be an attempt by the petitioners to bypass the appeal remedies available, by raising parallel alleged contravention claims in this forum. The question therefore is whether the Constitutional Court may hear the petitioners' claim, in circumstances where they have a right to appeal.

[22] The petitioners have a right of appeal against both their conviction and sentence. This is uncontentious. This right is guaranteed in s 19(11) of the Constitution which states that every person convicted of an offence shall be entitled to appeal in accordance with law against the conviction, sentence and any order made on the conviction. The parameters for appeals against conviction and sentences to the Court of Appeal from the Supreme Court are set out in s 342(1) of the Criminal Procedure Code.

[23] In the same vein, however, article 46(1) of the Constitution provides that a person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission may, subject to this article, apply to the Constitutional Court for redress.

[24] However, article 46(4) further states that where the Constitutional Court on an application under clause (1) is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned in any other Court under any other law, the Court may hear the application or transfer the application to the appropriate Court for grant of redress in accordance with law.

[25] Considering the facts peculiar to this case and our findings in paragraph 20 herein, there is no doubt in our mind that the petitioners can move for relief by way of appeal and for reasons given herein, this Court is of the view that the reliefs which centres round the trial Court's judgment and the sentence are more appellate in nature than constitutional ***R v Khan*** **2001 SCC 86**, and we are of the view that for two forums to hear the same issues is a waste of time and resources. Further as the petitioners' have also decided to appeal against the said judgment and sentence one must await the finality of the judgment and sentence decided on by the Court of Appeal.

[26] Finally, as the petitioners on their own volition have already invoked the jurisdiction of the Seychelles Court of Appeal, the necessity to refer this matter to the Seychelles Court of Appeal does not arise. We therefore proceed to dismiss the petition. No order is made in respect of costs.

Signed, dated and delivered at Ile du Port on 13 August 2019.

Burhan J Dodin J Pillay J