The Role of the Court of Appeal in guaranteeing that the Constitution is always followed and respected

By President of the Court of Appeal Justice Anthony Fernando

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The judicial power of Seychelles, according to the Constitution is vested in the Judiciary and in the hierarchy of courts, the Court of Appeal is the apex court and the final appellate court in Seychelles. It hears appeals from the Supreme Court and the Constitutional Court. Unless excluded by the Constitution itself, or a law enacted by the National Assembly, there is always a 'Right of Appeal' to the Court of Appeal from a decision of the Supreme Court. The Court of Appeal, although not a court with original jurisdiction, has all the powers and authority of the Supreme Court when exercising its appellate jurisdiction. The authority, jurisdiction and power of the Court of Appeal is set out in the Constitution, other national laws and the Court of Appeal Rules made by the President of the Court, in accordance with the power vested in him under the Constitution.

The Court of Appeal consists of the President of the Court and other Justices of Appeal and Judges of the Supreme Court are ex-officio members of the Court, who are sometimes co-opted to sit as Justices of Appeal.

The Constitution provides that the Judiciary shall be independent and is subject only to the Constitution and the other laws of Seychelles and that Justices of Appeal shall not be liable to any proceedings or suit for anything done or omitted to be done by them in the performance of their functions.

In order to secure the independence of the Justices and Judges, the Constitution has laid down its safeguards by specifying in the Constitution itself, the method of their appointment, the qualifications they need to have for appointment, the tenure of their office, their emoluments, which cannot be altered to their disadvantage, and the manner they could resign or the method by which they could be removed from office. Once appointed a Seychellois Justice or Judge shall vacate office on becoming 70 years and in the case of an expatriate, at the end of the term for which he was appointed. They can be removed during their tenure of office only

if found unable to perform their functions due to physical or mental infirmity or misbehavior.

What we Justices and Judges have to always bear in mind is that our powers spring from the will of the people and thus we have to live up to the aspirations of the people as set out in the Preamble to the Constitution. We are shareholders in building a just, fraternal and humane society. The foundation for Justice and Peace can be built only in recognizing the inherent dignity and the equal and inalienable rights of the people, including the right to life, liberty and the pursuit of happiness free from all types of discrimination. The Judiciary should always bear in mind the solemn declaration made in the Preamble to the Constitution by the people, to their unswaying commitment to uphold the Rule of Law based on the recognition of the fundamental human rights and freedoms enshrined in the Constitution and on respect for the equality and dignity of human beings. The Judiciary is entrusted with the delicate function of carrying out a balancing act, to ensure that the exercise of individual rights and freedoms shall always be with due regard to the rights and freedoms of others and the common interest.

In the adjudication of appeals that come up before the Court, the Constitution obliges us, to ensure that all parties to a litigation are given a 'Fair Hearing' within a 'Reasonable Time', while maintaining our independence and impartiality. The concept of 'Fair Hearing' entails many a concept. In the foremost are the litigants that come before the Court, to see a finality to their cases which have begun in the Supreme Court and sometimes in the Magistrates courts or an adjudicating authority, and praying for justice, from the Court of Appeal, their last bastion of hope. In my view however the concept of a 'Fair Hearing" encompasses also the common interest of all people and maintaining the respect of all people for the Judiciary.

In guaranteeing our constitutional obligation to ensure a 'Hearing within Reasonable time', I am proud to state that this Court has now cleared the backlog that existed and if we succeed in disposing of the **27** appeals listed for the August session of the Court, we are left with only **21** appeals, both criminal and civil, all of which have been filed in 2023, save 3 civil appeals filed during the latter part of

2022. This I believe is a record, from the rates and standards of disposal of cases by the highest court, in any other jurisdiction.

The words in the Constitution that the 'Judiciary shall be independent' is not an empty platitude. Our allegiance is always to preserve, protect and defend the Constitution and to do what is right in accordance with the Constitution and other laws of Seychelles without fear or favour, affection or ill will. We are not subject to any form of interference or influence from the other two branches of Government, namely the Executive or the Legislature. We shall also not allow ourselves to be influenced by public opinion and the media. We are only guided by law and our conscience. In delivering justice we have always strived to uphold the rule of law recognizing the inherent dignity and the equal and fundamental and inalienable human rights of the people free from all types of discrimination. The case of **Azemia V The Republic**, was one where a woman was brutally murdered, and one which gave rise to a lot of public revulsion against the alleged accused. In a small jurisdiction like the Seychelles persons are convicted at the altar of public opinion even before a case comes before the courts. In such cases the Court of Appeal is put under severe social pressure and put to its utmost test in maintaining its impartiality and its commitment to act in accordance with the Rule of Law, when there had been a conviction in the Supreme Court before a Judge and Jury. We in the Court of Appeal in determining the appeal of the convict has the onerous task of deciding whether the charge against the person, who is deemed innocent under the Constitution, has been proved beyond a reasonable doubt, in accordance to the law, and whether the conviction can be maintained. To a person who is not versed in the law it is difficult to conceive how a person, indicted by the Attorney General and convicted by the Supreme Court by a Judge sitting with a Jury, especially in a sensational case, is acquitted by the Court of Appeal, as was in this case. They do not understand why the Constitution has guaranteed a right of appeal to a convict, and that we Justices have always to abide by the Rule of Law. In the case of Azemia we did comment: "*We are as concerned as anyone else with the brutality of this crime, but are unable and unwilling to sacrifice the sacrosanct principles of this Court, when the prosecution has miserably failed in its duty to conduct a proper trial… We need to say that the present outcome of this case is not*

delivered with a gaiete de Coeur (cheerfulness) at our level. As impartial and independent Judges, we owe it to ourselves that we own and operate a justice system in our democratic society discharging our duties and responsibilities properly and professionally. If that is not so, the risk is, we would have a flawed system of justice that will not uphold the principles of due process and the rule of law in our courts". A convict who has appealed to the Court of Appeal can therefore rest satisfied that he would be afforded a 'Fair Hearing' and we are not there to rubber stamp a conviction by the trial court. There have been some drug cases where persons in the public eye, who are known Escobars have been acquitted by the Court of Appeal as we found that the cases against them have not been proved according to the standard accepted by law, sometimes due to failure to prove exclusive possession or the chain of evidence. None of these decisions give us great joy and we are conscious of the public criticism we have to sometimes face. But we owe a greater duty to uphold the principles of due process and the rule of law.

In the case of **Ragain V The Republic**, a convict who had appealed only against his sentence after having been convicted on his own plea of guilt to the offence of manslaughter was acquitted by a unanimous decision of this Court. The Court of Appeal entertained doubts about his conviction itself and called upon Counsel for the Republic and the Appellant to argue on conviction, despite the fact he had not appealed against the conviction. Ragain had been charged with murder and in the course of the trial he had been advised by his Counsel to plead guilty to manslaughter, without seeking the views of the Jury to whom the case had been entrusted. In addition to this grave procedural irregularity there was not an iota of evidence to prove that the convict had deliberately or negligently run over the deceased while driving the bus along a very narrow stretch of the road. For us in the Court of Appeal this was clearly an accident. The appeal judgment was unique as it was the first of its kind, for there was no provision under the Court of Appeal Rules which made reference to interfere with a guilty plea where it had resulted in a miscarriage of justice. But we were guided mainly by the Constitution which convinced us that the convict had been denied a 'Fair Hearing'. I also wish to mention that in an appeal that was listed for hearing in the August 2023 session at Case Management level, I advised an Appellant **Neil Azemia**, who wanted to

withdraw his appeal against his conviction for manslaughter, not to do so, as I was convinced that his conviction was unstable. Like in the case of Ragain in this case too, the Appellant had been convicted of manslaughter in reversing a vehicle into a store in one of the islands where there was no public around. There was no evidence how the deceased came by her death, and nothing to exclude the possibility that she accidently fell when the vehicle was being reversed. However, the Appellant decided to withdraw his appeal, despite my advice, probably because he knew the deceased well and felt guilty that he was in some way responsible for her death. Sometimes justice acts in a mysterious way. Even in the April 2023 session of the Court of Appeal we did, in the case of **Vincent Samson V the Republic** acquit the appellant of one of the charges levelled against him and quashed his sentence imposed in respect of that charge, because he had been charged and convicted of a non-existent offence, despite the fact that the Appellant had not raised it in his grounds of appeal, nor challenged his conviction on that basis. The three examples I referred to, are just a few out of many others. But I must also state that where this Court finds that a sentence meted out to a convict who has appealed against the sentence, had been too lenient we have not hesitated to enhance it, especially in sexual abuse of young children. Unfortunately, our law does not provide a right of appeal to the Attorney General or the aggrieved party in criminal cases to appeal against an acquittal or a lower sentence passed by the Supreme Court.

In 2011, this Court in the case of **Lucas V The Republic,** did away with an archaic rule of practice that had existed for many years in our courts, namely that it was obligatory for Trial Judges to give a corroboration warning in cases involving sexual offences against women. This Court held, that to say that every complainant in a sexual offence case is less worthy of belief than another witness is an affront to their dignity and violates the right guaranteed under article 27(1) of the Constitution, namely: “Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as is necessary in a democratic society”. This Court commented, by referring to authorities, that “the corroboration warning is viewed by many as misogynistic in conception. It was expounded in a remote age

when a woman was considered but little more than chattel, and presumed, unless she was corroborated, to have been willing to engage in sexual intercourse almost upon suggestion. It perpetuated an archaic and unjustified stereotype of women and is highly insulting because it is based on the folkloric assumption that women are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it." This Court therefore held that it is no longer obligatory for trial judges to give corroboration warnings in cases in involving sexual offences, but left to the decision of the Trial Judge to look for corroboration and determine the strength and terms of the warning where there was an evidential basis for suggesting that the evidence of any witness might be unreliable. In the case of **Adrienne V The Republic** we did away with the need for the corroboration warning in relation to the evidence of an accomplice on the same basis of Lucas V The Republic and left the decision to the Trial Judge on the guidelines as laid down in Lucas.

In **Poonoo VS The Attorney General** the Court of Appeal held that to the extent that the trial court in this particular case felt that it was bound by the minimum mandatory sentence imposed by the legislature and further felt that all discretion had been removed from it to sentence the appellant according to his just deserts, there occurred a breach of the right of the appellant to a fair trial and the principle of proportionality. We were of the view that where the penalty imposed by the legislature wholly or grossly is disproportionate with regard to the mischief to be avoided, it is unconstitutional as it violates the Right to Dignity and if not, if the mandatory provision removed all discretion from the court in exercising its judicial powers in sentencing an offender in the particular circumstances of the case it would be unconstitutional and be a breach of the article in the Constitution guaranteeing the independence of the Judiciary.

A democratic Constitution cannot be interpreted in a narrow and pedantic sense. I must state that this Court has not hesitated to give the Constitution a purposeful and meaningful interpretation and do a balancing act, to ensure that the exercise of individual rights and freedoms shall always be with due regard to the rights and freedoms of others and the common interest. In the recent case of **Charles and Parekh v Republic**, the first case of a contract killing in the country, which was

decided in April 2023 this Court had to interpret what meaning should be given to **article 19(2)(h) of the Constitution** which states that "Every person charged with an offence shall not have any adverse inference drawn from the exercise of the right to silence either during the course of the investigation or at trial." This Court was unanimously of the view that an accused who has voluntarily made a statement to the police at the investigation stage and had not objected to the statement being produced as an exhibit at the trial, cannot rely on his constitutional right and remain silent at the trial, especially in a case where there has been damning evidence against him, which he only could have explained.

The prohibition against the drawing of an adverse inference under article 19(2)(h), serves the purpose of preserving an accused person's right to silence and right not to incriminate himself. In a case where there is strong circumstantial evidence led by the prosecution which the accused alone can explain, and if he elects to remain silent in the face of that evidence, the court is entitled to give due weight to such evidence which has neither been rebutted nor explained by the accused person and this would not fall within the intended purpose of the prohibition under article 19(2)(h). Here the accused is not required to confess guilt but to rebut a presumption of guilt that human reason and common sense demands. It is an opportunity to exculpate himself and not to inculpate himself and hence is not a violation of the right to be treated as innocent. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice. To say that an inference has been drawn from the accused's failure to testify is only to say that the Crown's evidence stands unchallenged. This does not violate the accused's right to silence or presumption of innocence. Under the right circumstances, silence can be probative and form the basis for natural, reasonable and fair inferences. There are certain situations where the web of inculpation fashioned by the Crown requires the accused to account for unexplained circumstances or face the probative consequences of silence. An accused's right not to have an adverse inference drawn from his exercise of the right to silence, needs to be balanced as against what human reason and common sense demands.

In the case of **PDM V Electoral Commission**; this Court reversing the decision of the Constitutional Court held that 'votes cast'; referred to in paragraph 2 of Schedule 4 of the Constitution; meant only the 'valid votes' cast at that election and not, the total number of ballot papers cast which included the votes that had been rejected.

We were of the view that to assume that a spoilt vote that was rejected had any status in determining the will of the people to develop a democratic system or to be counted in the determination of the number of proportionately elected members of the National Assembly, had no constitutional or legal basis.

I have always said and believed that the Role of the Court of Appeal in guaranteeing that the Constitution is always followed and respected is not only the duty of the Court of Appeal. It is also the duty of every citizen of Seychelles to uphold and defend the Constitution and the law as postulated by article 40 of the Constitution, and in doing so ensure that the Court of Appeal keeps up to its obligations and lives up to the expectations of the people in maintaining its independence and impartiality. There is sometimes on the part of some to attack Judges if the decision does not go the way they want. There is nothing wrong in critically evaluating a judgment. Motives to the Judges need not be attributed. As observed by Lord Atkin, Justice is not a cloistered virtue and she must be allowed to suffer the criticism and respectful, though outspoken, comments of ordinary men. But improper or intemperate criticism of Judges stemming from dissatisfaction with their decisions constitutes a serious inroad into the independence of the Judiciary.

In the words of Lord Devlin "The prestige of the Judiciary and their reputation for stark impartiality is not at the disposal of any Government or persons, it is an asset that belongs to the whole nation." As for us Judges, it calls for our personal morality and ethical probity. It is the sacred godhead within us all, that is the fount of wisdom that makes possible the creation of a sphere within which the humane and the sense of Justice in us can thrive and prosper.

Let me conclude with my vision for the Court of Appeal and the Judiciary with the memorable words of Nobel Prize winner **Rabindranath Tagore, in 'Gitanjali'**, which was said of course in a different context; and therefore I shall quote them with a slight alteration, as it has significance to our work in the Court of Appeal:

"Where the mind is without fear and prejudices and the head is held high;

where knowledge is free;

Where our work in the Judiciary has not been broken up into fragments by narrow domestic walls;

Where words come out from the depth of truth;

where tireless striving stretches its arms toward perfection;

Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit;

Where the mind is led forward by thee into ever widening thought and action;

In to that heaven of Justice, my father, let us awake!”

Thank You.

Justice Anthony Fernando