

SUPREME COURT OF SEYCHELLES

Reportable

CM144/2023

Arising in CO52/2021

In the matter between:

PATRICK ERNESTA
(*Self-Representing*)

Applicant

and

THE REPUBLIC
(*rep. by Alvin Marie*)

Respondent

Neutral Citation: *The Republic v Patrick Ernesta* (CO52/2021) (25th April 2025)

Before: Burhan J

Summary: Application for Recusal

Delivered: 25th April 2025

ORDER

Application for recusal is declined and dismissed.

RULING

BURHAN J

- [1] The Applicant/Accused (hereinafter referred to as the “Applicant”) Patrick Ernesta stands charged with possession of a controlled drug with intent to traffic contrary to Section 9 (1) of the Misuse of Drugs Act 2016, read with Section 19 (1) (d) (ii) of the said Act and punishable under section 7 (1) as read with the Second Schedule of the Misuse of Drugs Act 2016. The particulars of offence are that, Patrick Ernesta, residing at La Rosiere, Mahe, on the 03 September 2020, at La Rosiere, Mahe, was found in unlawful possession of a

controlled drug namely, Cannabis Resin (Hashish) with a total net weight of 735.00 grams, giving rise to a rebuttable presumption of having possessed the said controlled drug with intent to traffic it.

- [2] On 15 June 2023, the Applicant requested the Registrar of the Supreme Court to initiate proceedings for the recusal of the Trial Judge, M Vidot J (Trial Judge) from hearing case CR52/2021. On 7 September 2023, the Trial Judge considered the recusal application in chambers, with Mrs. Gulmette Leste, learned Counsel for the Respondent present. On 13 October 2023, the Trial Judge ruled that the application had no merit and declined to grant it.
- [3] On 3 November 2023, the Applicant again filed a further application by way of a motion and affidavit for recusal. The Trial Judge by letter, dated 13 November 2023 referred the said application to the Chief Justice with a recommendation that the said application be placed before another Judge for determination.
- [4] The matter was accordingly referred to this Court by the Chief Justice on 13 November 2023 and on 14 December 2023, as the Applicant complained about the correctness of the proceedings, a report was called from the Registrar regarding the correctness of the proceedings.
- [5] Thereafter, this matter was handled by other Judges for a considerable period of time due to this Court not sitting due to medical reasons. The Applicant meanwhile was given an opportunity to listen to the proceedings. The report by the Registrar in respect of the proceedings was filed on the 24 July 2024 and on the 25 July 2024, the report was explained to the Applicant in open court. I observe that in the report it is mentioned that a pen drive containing the audio recordings was given to the Applicant. I also note that the Registrar's report states that the audio recordings of the 13 July 2022 in respect of the *locus in quo* could not be found on the system.
- [6] Thereafter, the Applicant was given further time to reply to the report of the Registrar which he eventually did by way of a motion dated 9 September 2024 and an affidavit dated

7 October 2024 on which date, both were filed in court. I observe that the grounds of recusal are set out in the affidavit dated 7 October 2024 from paragraphs 8 to 22.

[7] Prior to analysing the grounds set out by the Applicant pertaining to the recusal of the Judge, it would be appropriate to set out the law in relation to the factors that should be considered in deciding the issue of recusal. Applications for recusal are mainly based on the maxim that Judges are independent and charged with the duty of impartiality in administering justice. In the Seychelles this was discussed in the landmark cases of **Government of Seychelles & Anor v Seychelles National Party & Ors; Michel & Ors v Dhanjee (SCA 4 of 2014) [2014] SCCA 33.**

[8] The test to apply as set down by various authorities 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. Some of the factors to be considered by a Judge challenged with recusal in deciding his partiality or impartiality include whether the Judge:

- 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.*

[9] When one considers the grounds for recusal relied on by the Applicant, one ground is that the audio proceedings of the *locus in quo* done on the 13 July 2022 is not available. However, the typed proceedings of the *locus in quo* have been made available to the Applicant and it is to be noted in the proceedings 16 January 2023 (A13b), the Applicant sought to amend the *locus in quo* proceedings. When one considers this proceeding together with the proceedings of 7 September 2023 (A14) seeking the recusal of the Judge, one will observe that the Applicant insists that the test (demonstration) done at the site was done by Officer Malvina and not by Officer Servina as stated in the proceedings and moves that the proceedings be amended accordingly. He also alleges that Officer Servina had “tampered with the house”. Sergeant Malvina by an affidavit filed by the Applicant as (A15) objects to any amendments being made as suggested by the Applicant and states that it was not him that did the demonstration of pushing the exhibit through the space between

the wooden planks. He also denies that Officer Servina pulled down any planks and that all he observed was that Officer Servina touched a plank and it moved.

[10] After listening to all parties, the Trial Judge on the 13 October 2023 made the following ruling in respect of the amendments of locus in quo proceedings stating “*I do not believe that it is highly important as to which officer did the demonstration. The Court can confirm that the demonstration was done and the Officer undertaking the demonstration had difficulty in getting the exhibit to go to the said open space.*”

[11] He therefore permitted the following amendment:

“The court is therefore unwilling to amend the record of proceeding of the locus in quo as requested by the Applicant. However, the Court will permit the insertion of the following:

‘Further to the demonstration by Police Officers to pass the alleged Controlled Drugs through a gap between a plank in the house, it was met with some difficulty because the size of the Exhibit appeared too big to pass through the gap’.

[12] Giving due consideration to the abovementioned facts, the Trial Judge being handicapped with the absence of the recording and having to make a ruling after one year of the *locus in quo* made the above finding. I am of the view that the said finding is indeed favourable to the Applicant and not the prosecution and not a cause or basis for the Applicant to seek recusal of the Trial Judge. Further it was the Applicant who sought that an amendment be made to the *locus in quo* proceedings and now cannot seek to complain that the Judge amended the proceedings. The amendment was done after giving a patient hearing to both parties. The fact that the recording and notes of the reporters was not maintained properly is a matter for the Officers of the Court Registry in charge of the recording to be blamed and not the Trial Judge. I see no merit in the Applicant’s application for recusal based on these grounds.

[13] The Applicant next raises a discrepancy concerning an exhibit: the white envelope used by the Judge during the *locus in quo* is claimed to differ from the black bin bag that he allegedly disposed of at his residence, an inconsistency he asserts has biased the Judge against him and impaired his ability to present his case fairly. The Applicant seems to be

unaware that it is standard procedure for the detecting Officer to put seized exhibits into exhibit envelopes. As the trial has not started the exhibits have not been formerly produced in court and are still with the Exhibit Officer. At the *locus in quo* it appears the sealed envelope was used in the demonstration which would contain inside the exhibit, a black bin liner bag with substance. I see no prejudice to the Applicant arising from this. Therefore, the Applicant's contention that this alteration changed the substance of the proceedings and rendered the transcript inaccurate, thereby demonstrating bias and a lack of impartiality on the part of the Judge bears no merit.

- [14] The Applicant next contends that the Trial Judge violated recusal rules by presiding over CR51/2022 on 14 November 2023, despite knowing that Judge Burhan was handling the recusal application, thereby breaching his right to a fair hearing of the recusal request and this signals a deliberate disregard for established recusal rules. I observe that the learned Judge after recording the six grounds of recusal made by the Applicant on the 7 September 2023 had given an order in respect of the amendment of the proceedings on the 13 October 2023 and also a ruling declining the application for him to recuse on the same date.
- [15] Thereafter, on the 13 of November 2023 by a letter addressed to the Chief Justice the learned Judge had referred the formal recusal application dated 03 November 2023 to the Chief Justice who thereafter appointed this Court to formerly consider the merits of the application. It is to bear in mind that the Judges themselves who set down the rules in respect of recusal stated that the rules are not carved in stone but are to be used with imagination and not dogmatically (**Government of Seychelles & Anor v Seychelles National Party & Ors; Michel & Ors v Dhanjee (Supra)**). I see no prejudice being caused to the Applicant by the procedure done by the Trial Judge in referring the recusal application to the Chief Justice in this manner which has been done in accordance with the recusal rules with a slight variation that causes no prejudice to the Applicant. Therefore, the contention that the Trial Judge deliberately disregarded established recusal rules also bears no merit.
- [16] The Applicant next complains that the Trial Judge took up the case on the 14 November 2023 when the recusal application was pending before this Court. The Trial Judge had the

right to take up the matter up on the 14 November 2023 as the proceedings of 16 January 2023, indicate the case had been fixed for hearing before the Trial Judge on the 14, 16 and 17 of November 2023. Further no formal stay order had been requested by the Applicant from this Court in respect of the proceedings before the Trial Judge. It appears from the proceedings of 14 November 2023 (A16) that the Applicant was not present in Court on that day and the Trial Judge adjourned the case to the next trial date 16 November 2023. This Court took up the recusal matter for the first time on the 16 November 2023. The proceedings of 16 November 2023 of this Court indicate that the Applicant was informed by this Court on the first day that the hearing would not take place until the recusal matter was concluded. Thereafter the matter was taken up before the Trial Judge too on the same day 16 November 2023 as borne out by the proceedings produced by the Applicant (A8) as the case had been fixed for trial on the same date. The Trial Judge also categorically informs the Applicant that “*until Judge Burhan delivers his decision ruling on the recusal matter the case will be suspended*” (Pg. 4 of the proceedings of 16 November 2023, 9.00 am). In my view, it was the duty of the Trial Judge to inform the Applicant and witnesses present of this fact. Therefore, there is absolutely no merit in the Applicant’s contention that the Trial Judge has breached his right to a fair hearing.

- [17] I observe that all other issues raised by the Applicant are matters to be decided by the Trial Judge during the trial of the case and not in recusal application. It is the contention of the Respondent that the application for recusal is legally unsound. The Respondent submits that if any procedural irregularities exist, they do not independently amount to bias. Instead, they should be addressed through an appeal process rather than by removing the Judge from the case. The Respondent further submits that the Applicant did not raise these concerns at the time of the *locus in quo* proceedings and that any issues should have been contested immediately rather than retrospectively. The Respondent highlights that the Applicant’s motion does not rely on any recognized legal basis for judicial bias as outlined in **Government of Seychelles & Another v Seychelles National Party & Others (SCA 4 of 2014)** and reaffirmed in **Seychelles Human Rights Commission & Others v Speaker of the National Assembly of Seychelles & Others [2023] SCSC 1**. The Respondent submits that the Applicant has failed to demonstrate any actual or perceived bias on the part of the Trial Judge.

- [18] I am inclined to agree with the Republic that none of these allegations or claims meet the legally established criteria for recusal and that any perceived violation of fair trial rights should be addressed by appeal rather than recusal. For all the aforementioned reasons, I am satisfied that there is no basis for alleging either actual or perceived bias by the Trial Judge.
- [19] It would be pertinent at this stage for the benefit of the Applicant, 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.”*

- [20] In the case of **Michel v Michel & Anor (MA 221/2018 (arising from MA 291/2017 and DC 151/2014)) [2019] SCSC 120 (20 February 2019)**, one of the grounds given by the Learned Judge in her refusal to recuse is reminding Learned Counsel for the applicant that she had taken the official oath prior to her appointment as judge to act without fear, favour, affection or ill will.
- [21] 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 the Judge, this sacred oath is of paramount importance in the discharging or performing one's official duties independently and impartially. To give any other interpretation in the absence of any evidence to the contrary, would undermine the sacred official oath taken under the Constitution.
- [22] 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 of

possible appearance of prejudgment or bias, (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."

[23] I am satisfied having considered all the aforementioned circumstances set out by the Applicant, that, firstly, the Applicant has not established actual bias. Secondly, I find that the facts seeking recusal of the Trial Judge do not satisfy the perceived bias test. This Court is of the view 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 Trial Judge being biased.

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

Signed, dated and delivered at Ile du Port on 25th April 2025.

 25-04-2025

M Burhan J