

**CURPEN S v THE TEMPORARY DISTRICT MAGISTRATE OF THE DISTRICT COURT  
OF RIVIERE DU REMPART & 2 ORS**

2022 SCJ 175

SCR 122742

**IN THE SUPREME COURT OF MAURITIUS**

In the matter of:-

**Sada Curpen**

**Applicant**

v

1. The Temporary District Magistrate of the District Court of Riviere du Rempart
2. The Independent Commission Against Corruption
3. The Director of Public Prosecutions

**Respondents**

**JUDGMENT**

1. The applicant moves for the review of the ruling delivered by respondent no. 1 on the 7<sup>th</sup> January 2022, setting aside his application for a variation of the Prohibition Order imposed on him. He was arrested by the police on the 17<sup>th</sup> December 2020 and provisionally charged before the District Court of Rivière du Rempart with money laundering, in breach of sections 3 (1) (b), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002, coupled with section 44 (1) (b) of the Interpretation and General Clauses Act.
2. On the 22<sup>nd</sup> October 2021, he moved before the District Court to be allowed to travel to Reunion Island for medical purposes. The police objected to the application on the ground that there was a risk of him absconding. The applicant explained among other things that he needed to travel in order to undergo surgery. He also produced medical certificates to that effect.
3. On the 7<sup>th</sup> January 2022, the first respondent set aside his application for variation of the Prohibition Order after concluding that the risk of absconding was plausible and since the applicant had failed to establish that the decision for him to travel was “*almost absolutely necessary*”.

4. The applicant now moves that the ruling be reviewed on the following grounds:
  - (a) respondent no. 1 failed to give due consideration to the two medical certificates which are sufficient evidence of the medical reason for his application to travel on a restricted passport to Reunion Island;
  - (b) although respondent no. 1 rightly considered that the presumption of innocence remains until the applicant is found guilty by a trial court, he failed to give ample consideration to such a fundamental Constitutional right;
  - (c) respondent no. 1 erred in concluding that the risk of absconding is plausible when the evidence on record, especially that he had previously travelled on several occasions to France on a restricted passport whilst provisionally charged with a dangerous drugs case and did not abscond, should have weighed heavily in the balance to show that such risk was a mere apprehension by the police;
  - (d) although the learned Magistrate properly spelt out the principle regarding the balancing exercise to be carried out for the variation of a Prohibition Order, he failed to correctly apply the principle in the application made by the applicant.
5. The applicant further avers that the medical certificate dated the 9<sup>th</sup> February 2022 clearly showed that since he was entitled to a "*carte vitale*" as a French Citizen, that "*carte*" would cover most of the costs for his surgery in Reunion Island.
6. Respondents nos. 2 and 3 resist the present application. Respondent no. 2 chose to file an affidavit in response to the applicant's claims whilst respondent no. 3 restricted its objections to submissions in law.
7. Respondent no. 2 avers in its affidavit that the application is procedurally flawed and misconceived and that the applicant had previously been allowed to travel when he was only holding a Mauritian passport on which it was permissible to impose restrictions. He was now the holder of a French passport and no restrictions could be imposed on a foreign passport. That was why his applications for similar variations had been turned down as the risk of absconding was high. Furthermore, the applicant had breached bail conditions on more than one occasion and it was feared that he would never return to Mauritius.

8. Respondent no. 2's stand is therefore that the applicant failed to show an almost absolute necessity for him to travel to Reunion Island for medical reasons as the treatment could be obtained in Mauritius and that he posed a serious risk of absconding inasmuch as:
- (i) he is the holder of a French passport on which it would be impossible to impose conditions;
  - (ii) he is charged with a serious offence carrying a significant custodial sentence upon conviction;
  - (iii) he has family ties mostly in France and his life partner who is currently in Mauritius can join him abroad at any time as she is not subject to travel restrictions;
  - (iv) his properties are currently under investigation and are the subject matter of an attachment order and may ultimately be the subject of confiscation; and
  - (v) no condition which could be imposed by the court would diminish the risk of the applicant absconding, the more so as he had previously breached bail conditions on more than one occasion.
9. Both learned counsel appearing for respondents nos. 2 and 3 respectively challenge the procedure adopted by the applicant bringing the learned Magistrate's ruling under review.
10. At the start of the hearing before us, learned counsel for respondent no. 3 further remarked that the medical certificate annexed to the present application was dated the 9<sup>th</sup> February 2022<sup>1</sup>, i.e., after the date on which the hearing before the learned Magistrate took place and that this amounted to new evidence being adduced during the review. Mr R Santokhee also observed that the learned Magistrate had made reference to 2 medical certificates in his ruling which were not annexed to the present application. Learned counsel for respondent no. 2 further drew our attention to the fact that the brief filed before us missed two pages from the original file<sup>2</sup>.
11. Following the above statements in court, Mr R Gulbul for the applicant readily conceded that the medical certificate of the 9<sup>th</sup> February 2022 should be disregarded. Although he could not explain the missing pages of the District Court record, he submitted that the missing documents and pages were not material to the present application.

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<sup>1</sup> P. 33 of the brief.

<sup>2</sup> See pp. 18, 19 & 20 of the brief.

12. As far as the initial objections raised regarding procedure are concerned, namely the required process before the Judge in Chambers, learned counsel for the applicant did not dispute that the procedure whereby the application first had to be considered by the Judge in Chambers had not been complied with. He argued that this could not be fatal to the application under the authority of **Bhodaye D. v The Hon District Magistrate of the District Court of Riviere du Rempart & Another** [\[2022 SCJ 128\]](#), and **Margaret Toumany and John Mullegadoo v Mardaynaiken Veerasamy** [\[2012 UKPC 13\]](#), where the Board issued a reminder that our courts should be less technical and more flexible in relation to jurisdictional issues and objections<sup>3</sup>. Learned counsel for the applicant also referred to the judgment in **Dookhy v Passport and Immigration Officer** [\[1987 MR 75\]](#), where it was reaffirmed that the police had the power to withhold the applicant's passport, so that there would have been no impediment for the authorities to retain the applicant's French passport. In addition, the respondents had not denied that the applicant had been allowed to travel to France in the past. As for the applicant's wish to proceed to Reunion Island for medical treatment, it was argued that this was a matter of choice which was guaranteed under our Constitution.
13. Mr F Arzamkhan for respondent no. 2 maintained his preliminary objection and on the merits of the application, relying on the decision in **Peerthum S v The District Magistrate of Rivière du Rempart** [\[2009 SCJ 283\]](#), he argued that the learned Magistrate had conducted a proper balancing exercise and correctly applied his mind to the issues raised before him to conclude that there was no absolute necessity for the applicant to travel to Reunion Island.
14. Mr R Santokhee for respondent no. 3 joined in Mr Arzamkhan's submissions and further submitted that the applicant's averments regarding his medical treatment in Reunion Island could not be addressed for the simple reason that the medical certificates which were considered by the learned Magistrate were never put before us.
15. The procedural issues regarding such applications were settled in **Rangasamy M. N. v The Director of Public Prosecutions & Another** [\[2005 MR 140\]](#), where it was held that an accused party applying for his release on bail should first apply to the court before which he was remanded.

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<sup>3</sup> Para. 23 of the judgment in **Toumany**.

16. He could make a fresh application for release before that same court if new evidence became available. *If the accused was dissatisfied* with the decision of that first court and wanted a review of that decision, *he should then apply to the Judge in Chambers* for a rule to show cause directed against the Magistrate, whilst making a full disclosure of all the facts to the Judge in Chambers and by annexing a copy of the court record. It was only if the Judge in Chambers considered that the application was urgent and disclosed sufficient material for intervention and review that he would refer it to the Supreme Court for a review of the decision of the subordinate court. If the application was devoid of merit, the Judge in Chambers could reject it at that stage without proceeding further. It would however still be open to the applicant to then proceed by way of motion to the Supreme Court for review.
17. Although we can appreciate that in some instances such applications may require the kind of celerity for which the two-stage process affirmed in **Rangasamy** may not prove ideal, the role of the Judge in Chambers remains essential to weed out hopeless review applications which would otherwise inundate this court. This being said, and since we are here dealing with Constitutional fundamental rights, we shall exceptionally proceed to consider the application so as not to further protract matters.
18. The application is based on the complaint that the learned Magistrate failed to (1) properly consider the medical certificates produced (2) correctly consider the applicant's fundamental Constitutional right (3) rightly conclude that the risk of absconding was not justified, and (4) conduct a proper balancing exercise in the circumstances of the case.
19. The preliminary objections raised by learned counsel for respondent nos. 2 and 3 at the outset of the hearing before us are well-taken, namely that the record annexed to the present application being incomplete, therefore in total non-compliance with the directives outlined in **Rangasamy**, this application for review cannot succeed.
20. The reason why such a requirement is mandatory is that the applicant is seeking a review of a court decision which is entirely based on the evidence adduced and considered before that very court.

21. It would be impossible for the Supreme Court to attempt to review a Magistrate's decision unless a complete copy of the court record, including all documents or medical certificates produced, was placed before the reviewing court. It is only once an accurate record from the lower court is produced before it that the reviewing court can fairly and objectively assess whether a Magistrate properly conducted the kind of balancing exercise formulated in **Peerthum**.
22. In any event, we have seen nothing in the learned Magistrate's reasoning in his ruling which could suggest that he erred in reaching the decision that he did. He went through all the evidence before he considered that the applicant was charged with a serious offence and the holder of a French passport on which Mauritian authorities could not impose restrictions. Clearly, his conclusion that the applicant had failed to establish compelling reasons to travel abroad for medical treatment also available in Mauritius is unimpeachable on the face of the incomplete court record put before us.
23. For all these reasons, we find that this review cannot succeed and we set it aside, with costs.

**N. F. Oh San-Bellepeau**

**Judge**

**R. D. Dabee**

**Judge**

**This 17<sup>th</sup> May 2022**

**Judgment delivered by Hon. N. F. Oh San-Bellepeau**

<b>For Applicant</b>	<b>:</b>	<b>Mr P Rangasamy, Attorney-at-Law Mr R Gulbul, of Counsel</b>
<b>For Respondent No. 2</b>	<b>:</b>	<b>Ms B M Chatoo, Attorney-at-Law Mr M Roopchand &amp; Mr F Arzamkhan, of Counsel</b>
<b>For Respondent No.3</b>	<b>:</b>	<b>Ms S Jeetoo, State Attorney Mr R V Santokhee, Principal State Counsel</b>