Panagary v Republic

(2010) SLR 59

France Bonte for appellant in CRSCA 09
Alexia Amesbury for appellants in CRSA 10
Alexandra Madeline for respondent

Judgment delivered on 7 May 2010

Before Domah, Hodoul, Fernando JJ

The above two appeals have been heard together and we shall deliver one judgment for both. A copy will be filed in both. The appellants were convicted by the Supreme Court for the offence of possession of explosives under the Explosives Act and sentenced to a term of imprisonment of three years on 22 January 2010. They have appealed against that decision. Meanwhile, they applied for bail before the Supreme Court pending the determination of their appeal. The Judge, in a reasoned judgment delivered on 15 February 2010 decided, following the principles laid clown in our case law, that the appellants had not shown any special reason for which bail should be granted to them pending the determination of their appeal.

Aggrieved by that decision, the appellants have appealed against that order. The grounds they have stated are that the Judge failed to consider the clear records and the personal circumstances of the appellants which constitute special reasons for granting bail pending appeal.

Appellant Gemmel's contention, in his affidavit, is in short as follows: that he is one of the two experts for outboard Suzuki engines; that the country needs him for his specialized services in that most of the boat charters involved with tourists in the country depend upon his expertise; that his services include the Seychelles Coast Guard; that his appeal has a strong likelihood of success in that the prosecution had not adduced evidence to prove that he was in joint or exclusive possession of the explosives in question; that he trains young persons in marine engineering, among whom includes the third appellant, then aged 17; that he was on bail and he observed all the conditions for bail; that his incarceration could give rise to a compensation claim against the State on the ground of miscarriage of justice.

In their appeal, the appellants have raised a number of issues of law and procedure against their conviction: namely, that the case of each appellant should have been considered separately; no proof of possession, exclusive, joint or otherwise had been made; no concerted action had been proved against any of them; and no evidence of knowledge had been adduced.

The respondent has objected to this appeal on the ground that they do not satisfy the principles laid down in the decisions of our courts. She referred in particular to the cases of *R v Joubert* (1976) SLR 17 and *Sinon v R* SCA 4 of 2006, LC 284.

In *R v Joubert*, Sauzier J was of the view that:

> The Court would grant bail where the chances of success of the Appeal are so great that the probability that the Appeal will be allowed is overwhelming.

In *Gaetan Rene v R* Civ A no 5 of 1998, the Court of Appeal provided the following guidelines for such applications:

> 1. Chances of success in the appeal should not be considered as a ground for granting bail. If, however, prima facie there exists some obvious error of law, the court should arrange an expedited hearing of the appeal in the Supreme Court, in the case of the Court of Appeal an appeal from the Supreme Court is usually heard within four months, which is a reasonable delay in the case of a convicted person.
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> 2. Bail will only be granted in exceptional and unusual circumstances that may arise in a particular case or where the appeal is likely to be unduly delayed.
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> 3. In dealing with the latter class of case, the court will have regard not only to the length of the time which must elapse before the appeal can be heard but also the length of sentence being appealed from, and further these two matters should be considered in relation to one another.

In *Sinon v R* SCA 4 of 2006, LC 284, Hodoul J took the view that for someone to be granted bail pending appeal, there must be special reasons which must be exceptional and unusual. We endorse that view. The ground is widely worded, and rightly so. It is our view that to close the category of cases within restrictive legal terms would be reductive on a question which has to do with the constitutional freedom of the individual.

An application for bail pending appeal is unlikely to succeed unless supported by strong grounds of appeal which are likely to result in the appellant being released from custody: *R v Walton* (1978) Cr App Rep 293.

On a jurisdictional issue raised on the propriety of this appeal on the decision of the Supreme Court declining bail, Mrs Amesbury referred to the decision of this Court in *Roy Beeharry v Republic* SCA 11 of 2009, LC 326,and Mr Bonte acquiesced. That decision enshrines the principle that, when it concerns the right to release from detention or custody, no citizen in this country should feel that the doors of the courts are at any given time ever closed, or will ever be closed for him or her. We are not unaware of jurisdictions today where any action for habeas corpus has been abrogated. We are not unaware of places where citizens may be picked up from their homes, from their workplace, from the streets or from their hiding places and detained without either their families, their parents or the community having a clue to the whys, the wherefores, the whens and the whats of such “enlevement" by State authority or agents of State authority, and the sheer helplessness of the near and dear in finding them out let alone what has come of them.

God forbid that, by our acts and omissions, such a culture surreptitiously finds its way into our democracy. Our courts are entrusted with that formidable primeval duty under the Constitution as the guardians of the fundamental freedoms and liberties of the citizen that the rights of the individual do not end up as dead letters but are translated as real rights in the everyday life of the people. It is for this reason that we decided in the case of *Roy Beeharry v Republic* that the right of access to the Court of Appeal for the release of any citizen falls within the inherent jurisdiction of the courts, especially the Supreme Court and, by extension, the Court of Appeal. We did point out that if the founding fathers of the Constitution of Seychelles found it fit to include the right to bail in the very Constitution, they must have had a reason for it.

True it is that when the Supreme Court has already determined a question of bail, especially where it has declined it, after a hearing of the parties and has based its conclusions with reasons given, an applicant who has been convicted to serve a sentence would have to come up with exceptional reasons to succeed before this Court. That makes sense and that is what the courts of all evolved democracies decide. But the doors of the courts should never be closed where the liberty of the subject is in issue.

In the present matter, we have taken into account the content of the affidavits and the submissions of all three counsel. Our difficulty is that we are unable to evaluate the merits of the application on the face of the lean documents put in and in the absence of the record of proceedings. We note that the parties are within the first months of a three year sentence following their conviction pronounced on 22 January 2010. In other words, a proper scrutiny of the averments in this appeal would require a proper examination of the complete proceedings of the case.

To obtain the transcript would require time. That would be as good as hearing the case on appeal.

Have the applicants shown that they have special reasons for release? They rely on their clear records and personal circumstances. But we note that the appeal is against conviction only and not against sentence where the clean record and personal circumstances would have been relevant.

We have also given consideration to the final prayer of the appellants. We conclude that it would be in the interests of justice and consonant with the principles of fairness and equity that this is a fitting case for the application of paragraph (f) of the guidelines laid in *Roy Beeharry v Republic*.

Accordingly, in consultation with the President of the Court of Appeal, we have offered to the appellants a fixture in the August 2010 session. With that end in view,

(a) the parties concerned shall make all necessary arrangements for a hearing of the appeal in the forthcoming August session; and

(b) the parties shall ensure timely compliance with all the relevant Rules of the Court of Appeal for the purposes of the prosecution of this appeal.

We direct the Registrar to ensure timely readiness of the transcript for the purposes of giving effect to the above.

We also stated to counsel that should the documents be ready, this Court would be pleased to give a date earlier than August 2010, subject to availability.

The application is otherwise set aside for the reasons stated above.

Record: Court of Appeal (Civil No 9 of 2010)