FREMINOT v REPUBLIC

(2011) SLR 323

B Hoareau for appellants 1, 2, 3, and 4
B Georges for appellant 5
D Esparon for the respondent

Judgment delivered in 2011 by

TWOMEY J: This is an application for bail pursuant to section 342 (5) of the Criminal Procedure Code in a case involving five appellants convicted for aiding and abetting in the importation of a controlled drug contrary to the Misuse of Drugs Act and for aiding and abetting in the trafficking of a controlled drug contrary to the Misuse of Drugs Act 1990. Counsel for the appellants have made applications for bail pending the hearing of the appeals. Their applications are supported by affidavits. Counsel for the respondent has submitted a counter affidavit in which reasons why bail should be refused are set out. Arguments on behalf of the appellants and respondents have been heard.

Counsel for the appellants contend that the appellants have been incarcerated since 21 May 2008 and submit that their constitutional right under article 18(1) of the Constitution has been breached, specifically their right to liberty. With respect, this submission alone cannot find persuasion with this Court. The appellants are presently incarcerated as they have been convicted and sentenced to prison terms by the Supreme Court, such a restriction to their constitutional right is permitted by the Constitution in its article 18(2)(a). Counsel has however submitted several cases, some of which are very much to point.

Counsel for the respondents, the Attorney-General, argues that an application for bail in the Court of Appeal is not contained in either article 18 or article 19 of the Constitution and that the regime for such applications is solely based in legislation. In that respect he has also submitted several cases.

We respectfully disagree. It is clear that the Constitution by including the right to bail in its very letter (article 18(1)) enhances its rightful importance and this Court is mindful of safeguarding such constitutional rights. Further, the unfettered discretion of the Court to grant bail pending appeal is contained in section 342(5) of the Criminal Procedure Code. In this respect it is incumbent on the respondents to show why it should not be granted, even in cases pending appeal.

In general, bail acts as a reconciling mechanism to accommodate a person's constitutional right to liberty and society's interest in assuring his presence at trial and other related court proceedings. The fundamental principles for the granting of bail generally, has been laid down recently by Domah J, in the case of *Beeharry v R* (SCA11 of 2009).The case of *Panagary v The Republic* (SCA 9 of 2010) addresses the issue of bail pending appeals. We see no reason for departing from the established principles therein summarized and accept that in such cases bail is only

granted in exceptional circumstances. Further, although the rights enshrined in the Constitution came well after *Joubert v R*(1976) SLR 17, its principles still obtain:

> Where there is an appeal the principles which apply for granting bail are different from the principles which apply when an accused is first brought to trial...In such cases the appellant must show special reasons. A clear record and the shortness of sentence would together form a special reason. This however is not limitative...

Sauzier's J ruling is similar to the English Court of Appeal's finding in the case of *R v Watton* (1978) 68 Cr App R 293,namely, that in deciding whether to grant bail pending appeal:

> the true question is, are there exceptional circumstances, which would drive the Court to the conclusion that justice can only be done by the granting of bail?

In *Sinon v R* (SCA 4 of 2006), Hodoul J took a similar view and went on to express the view that the special reason would have to be exceptional and unusual.

Does the present case reveal special, exceptional and unusual reasons for granting bail? When addressing these considerations, this Court, not seized of the Supreme Court proceedings, finds itself limited to the judgment of the Supreme Court in the appealed case which has been duly signed and dated by Gaswaga J. It also has before it the averments contained in the affidavits and arguments of counsel. It cannot take cognisance of any other factors which may be contained in the proceedings of the case which are to all intents and purposes not extant.

Further, the Constitution whilst enshrining the right to a fair hearing in its article 19 provides in article 19(3) that:

> When a person is tried for any offence that person or other person authorized by that person in that behalf shall, if either of them so requires and subject to payment of such reasonable fees 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. (emphasis added)

In considering the phrase "as soon as is practicable" we have looked at correspondence with the Supreme Court Registry in relation to this matter. The notice of appeal in this case is dated 29 July 2009 and was filed first for the August session of 2009 and has missed five subsequent sittings of the Court of Appeal including this one. The records of the Court of Appeal show that numerous letters and oral representations have been made to the Supreme Court Registry to have the record of proceedings expedited and served on all parties concerned, but to no avail.

We strongly condemn this systematic ineptitude and failure of the court system to provide timely deliverables at the expense of the rights of appellants to obtain a fair trial within a reasonable time as guaranteed by the Constitution.

We are mindful that neither the appellants nor the respondents are to blame for this failure. In this respect, the Court has to balance the constitutional rights of the

appellants with the State's public interest considerations. Here the appellant's rights are very much in abeyance pending the production of records of proceedings which they require to conduct their appeals. The inexplicable and unacceptable delay in producing records of proceedings cannot operate to breach the appellant's constitutional rights. In several cases decided by the Strasbourg Court namely, *Zimmerman and Steiner v Switzerland* (1984)6 EHRR 17*, Bezicheri v Italy* (1990) 12 EHRR 210, and *Abdoella v Netherlands*(1992) 20 EHRR585 shortage of judicial manpower and judicial overload were not recognized as sufficient State excuse to breach a prisoner's rights under article 5 or article 6 of the European Convention on Human Rights (articles which are similar to articles 18 and 19 of the Seychelles Constitution). By logical extension, the behaviour of the Registry has led to a similar breach. The State has to organize the legal system so as to meet its obligations.

In *R v Landy* (1981) 72 Cr App R 237a determining factor in granting bail pending appeal was that the hearing of the appeal would be delayed for some months in order for the transcript to be prepared.

As pointed out we are limited by the slim proceedings before us and cannot weigh the chances of success or failure of this appeal in the absence of court records. We are comforted to learn that the transcript of proceedings is now ready and will be distributed. Nonetheless, we are of the view that we shall have no alternative but to release the appellants on bail on the following conditions if through any other systemic failure for which the court system is responsible, this case is not heard at the next session of the Court of Appeal:

- Surrender of all travel documents by the appellants
- The immigration authorities to be informed not to issue any travel documents to the appellants pending the disposal of this case
- The immigration authorities to be informed that the appellants should not be permitted to leave the country pending disposal of this case
- Each appellant to report to the Central Police Station once a week
- A surety of R 20,000 for each defendant.

These are grave offences and we issue the following warning and direction:

- In these exceptional circumstances if the appellants are released on bail at the next sitting and experience a further delay in the hearing of the appeal, that delay must not be relied on if their appeal fails as a reason for their not being sent back to prison to serve their sentence.
- We take note of this denouement which has taken place as a result of the failure of the Supreme Court Registry. We are by the present directing the Registrar as a matter of priority to complete the record of proceedings in these appeals urgently so that they may be heard in the forthcoming August session. We further direct the Registrar to organise the contemporaneous recording and transcription of proceedings in all matters before the Court of Appeal to avoid the catastrophe of mislaid or delayed records of proceedings and the holding up of the judicial process.
- A copy of this ruling is to be sent to all persons responsible for the administration of the Supreme Court Registry, namely the Chief Justice

and the Registrar and the President's Office. Further, all government departments charged with the oversight and financing of the Supreme Court Registry should be informed of this ruling.