

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) ,S. Domah (J.A) ,M. Twomey (J.A) **]**

Criminal Appeal SCA 20/2015

(Appeal from Supreme Court Decision CR 02/2012)

Roy Brioché

Appellant

Versus

The Republic

Respondent

Heard: 10 December 2015

Counsel: Mr. Joel Camille for Appellant

Mr. Hermanth Kumar, led by Mr. David Esparon for Respondent

Delivered: 17 December 2015

JUDGMENT

S. Domah (J.A)

[1] Pre-trial detention, including detention through trial, is an exceptional measure of the very last resort in a democratic society founded on the rule of law as the Republic of Seychelles is. The legal system in law as well as in practice should shift to this paradigm. And where it does not, the judicial system should ensure that it does so. Even then, the duration of this exceptional measure should be as limited in time as possible. It is the joint responsibility of the law enforcement authorities, the Office of the Attorney-General, the Bar and the Courts to jealously guard this citadel of freedom of the individual from which flows the exercise of all other freedoms of our democratic society: see **Roy Beeharry v Republic SCA 11 of 2009**.

[2] Roy Brioché, the appellant in this case, charged for drug trafficking offences has already spent three years in detention. His trial is pending completion only in 2016. He has made application upon application for release and commuted from trial court to appellate court

three times. Albeit all the guarantees pledged in the republican Constitution, his right to be released enshrined in Article 18(7) of the Constitution and his right to a hearing within a reasonable time enshrined in Article 19(1) of the Constitution have remained dead letters only.

- [3] For what reason? His last application before Court was rejected by the trial judge. She accepted the submission made by the prosecution that appellant is a flight risk. Flight risk is a label. The content should justify the labelling. In support, learned counsel for the prosecution adduced evidence that in 2003, applicant had fled the jurisdiction after he was served with a summons to appear before Court to answer a charge of robbery with violence. The prosecution produced the copy of a Court Summons on which was written a note that appellant had refused to sign at the back of the summons. He then had fled jurisdiction and returned only after the charge had been withdrawn against him.
- [4] Appellant rebutted these allegations when he was called upon to depose. He denied that he had been served with any summons at all. His story is that he had left legally with a passport in 2004 to be with a woman who had gone to work in Madagascar but that he had returned in 2008. He came back on his own accord and is now in the home country where he has settled even if he has maintained some manner of a tie with the woman in Madagascar. Regarding the alleged refusal to sign on the Court Summons, his explanation is that he is not aware of any such incident. All that he knows is that he had been called at the Police Station once regarding a matter. Following his explanation, he had been allowed to go.
- [5] The Constitution requires that there should be substantial grounds for such beliefs of denial: see article 18(7). Looked at more critically, the prosecution should have come up with more meat to show that appellant is a flight risk. It does not make sense to us that an accused in this jurisdiction could have been charged for robbery with violence and he was not arrested and detained and/or on bail. Nor does it make sense that his passport was not retained and/or that there was no prohibition to departure issued. Nor does it make sense to us he returned only after the matter was withdrawn against him. Short of evidence to

show the contrary, the inference is that the matter was withdrawn because there was no prima facie evidence. The prosecution produced the copy of a Court Summons to show that the appellant had refused to sign on it. The author of the note was not called to support that fact, all the more so after the explanations given by the appellant regarding his departure and return.

[6] Irrespective of the above, the crucial fact remains that the appellant is today back home and in court jurisdiction. There was no international warrant issued against him for a deportation order which brought him back home. If he was a flight risk, he would not have returned. The risk of flight should not be a matter of mere suspicion but reasonable apprehension, the facts of which should be critically scrutinized.

[7] The trial in which he is implicated is yet to be completed. To keep him in detention any further would encroach on his constitutional rights. As was stated in the Australian case of **Antonius Mokbel v Director of Public Prosecutions 11 September 2011 [2002] VSC 393:**

“the question of unacceptable risk is to be judged according to proper criteria, one of which is the length of delay before trial; that is although the risk might be objectively the same at different times, the question of unacceptability must be relative to all the circumstances, including the issue of delay.”

[8] That Australian decision is not foreign to our own jurisprudence in the matter. In the case of **Freminot v Republic (2011) SLR 323**, this is what Twomey JA., now Chief Justice, stated in this Court:

“the inexplicable and unacceptable delay cannot operate to breach the appellants’ constitutional rights.”

[9] The judgment referred to the Strasbourg jurisprudence of **Zimmerman and Steiner v Switzerland (1984) 6 EHRR 17** and **Bezicheri v Italy (1990) 12 EHRR 210** and **Abdoella v Netherlands (1992) 20 EHRR 585** to hold that shortage of manpower and judicial overload are not recognized as sufficient State excuse to breach prisoner’s rights

under Article 5 or Article 6 of the European Convention on Human Rights which are identical to Articles 18 and 19 of the Constitution of the Republic of Seychelles.

[10] We have ourselves referred to the cases of **Gonta v Romania Court [Application No. 38494/04; Novruz Ismayilov v Azerbaijan [Application No. 16794/05]; Danny Bresson & Ors v Republic SCA 44 of 2014**. At this stage, we should address the issue in his case of how we should eliminate all risks of his absconding: **Hurnam v The State [2004 PRV 53]**. The idea behind bail is not to cage the detainee against flight but to ensure that he appears at trial: see **Juan Ponce Enrile v Sandyganbayan And Anor** G.R. 213847, a decision of the Republic of Philippines of 18 August 2015, He has agreed to the conditions to be imposed on him. This is what we shall do.

[11] We allow the appeal and we release the appellant on bail with the following conditions designed to eliminate the risks of his absconding:

- (a) that appellant shall provide two sureties of SRs 100, 000 each and shall enter into a recognizance in the sum of SRs 100,000;
- (b) that appellant shall reside at a fixed and permanent place of residence indicated by him;
- (c) that appellant shall not engage in any marine activity while on bail;
- (d) that appellant shall report to the nearest Police Station twice daily at 8.00 hours and 20.00 hours;
- (e) that appellant shall inform the Police of his daily movements each time he reports at the Police Station;
- (f) that appellant shall submit himself to a permanent monitoring of his movements and location which shall be carried out in the following manner –
 - i. he shall be permanently equipped with a mobile phone at his own cost, the number of which he shall communicate in advance to one or more NDEA officer/s nominated for that purpose;
 - ii. he shall ensure that the mobile phone is in good working condition and open for communication at all times;
 - iii. he shall ensure that the mobile phone is available solely and

exclusively for the present monitoring purposes to enable any NDEA Officer at any time to ascertain his movements and location and, if necessary, to direct him to be in attendance at any indicated spot; and

- iv. he shall use, if at all, the social media only for the purposes of communicating with his family members, on domestic matters and not use coded messages;
- v. he shall surrender his passport, unless he has already done so.
- vi. in the eventuality that his passport has expired, a prohibition should be issued against his application for renewal until the disposal of the main case.

[12] Each and every of the above conditions is regarded by the Court as serious, the breach of which will be tantamount to a breach of bail conditions and amenable to the issue also of an international warrant if need be.

[13] As soon as each of the appellant has met the conditions laid down above, he shall be released on bail pending completion of the trial.

S. Domah (J.A)

I concur:.

F. MacGregor (PCA)

I concur:.

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2015