IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , M. Twomey (J.A) , J. Msoffe (J.A) **]**

Criminal Appeal SCA 44/2014

(Appeal from Supreme Court Decision 02/2013)

Danny Bresson
Robert Billy Jean
Franky Clement Thelermont
Naddy Peter Delorie — Appellants

Versus

The Republic — Respondent

Heard: 08 April 2015

Counsel: 1st Appellant represented by Mr. Clifford Andre
2nd Appellant represented by Mr. Melchior Vidot
3rd and 4th Appellant represented by Mrs. Alexia Amesbury

Mr. David Esparon with Mr. Hermanth Kumar for Respondent

Delivered: 17 April 2015

JUDGMENT

S. Domah (J.A)

[1] In an earlier appeal, in this very case, on a refusal by the trial court to admit the appellants and two others to bail, (vide **Esparon and Others v The Republic 2013 SCA no 1 of 2014)**, the Full Bench of this Court decided as follows as a matter of law.

1. Bail is an inherent function of the Judicial arm of the State and that function cannot be taken away by the legislature by any law as such.

2. This inherent function of the Judiciary is so sacrosanct that, in a democratic society, it cannot be taken away even by a constitutional amendment.

3. In the exercise of this function, the judiciary needs to ensure that the principle is not reversed in the sense that bail instead of jail becomes jail instead of bail.

4. Bail may only be denied, after the Court has properly ascertained that compelling reasons exist in law and on the facts which justify the denial such as those enumerated in the Constitution.

5. Every application for bail is independent of the criminal case for which the person is being tried.

6. If the case is still awaiting trial and a defendant is still incarcerated he may apply to the Court for his release. If he is not released after an adversarial first instance hearing at the Magistrate's Court, he may appeal to the Supreme Court. If he is not released after an adversarial first instance hearing by the Supreme Court, he may appeal to the Court of Appeal.

7. If, on the other hand, his case is already listed to be heard before a particular judicial officer a motion may be made before that judicial officer unless there is a good reason against it such as the existence of previous convictions which may become one of the issues.

8. Even if a right to bail is often canvassed under a right to be tried within a reasonable time, it goes well beyond it.

[2] In the application of the law to the facts of the case and the personal circumstances of each appellant, we granted bail to two of the seven original appellants: Kenneth Steve Esparon and George Michel for reasons which have been given in the judgment.

[3] Those whom we had declined bail were Roy Patrick Brioche, Danny Bresson, Robert Billy Jean, Franky Clement Thelermont and Naddy Peter Delorie.

[4] In the present appeal, four of the five namely, Danny Bresson, Robert Billy Jean, Franky Clement Thelermont and Naddy Peter Delorie have appealed against the decision dated 28 November 2014 of the learned judge who denied bail on a repeat application made before her.

[5] As regards these appellants, our appellate assessment was that, unlike the case of the two whom we had ordered a release, they fell in a different category altogether. The charges laid against them were serious: two charges under the Misuse of Drugs Act for drug trafficking of as much as 79 kilograms and 779.6 grams of cannabis herbal material and 3 kilograms and 954.6 grams of cannabis resin, respectively; a charge under the Firearms Act for unlawful possession of firearms and ammunitions - a rifle 47 Rifle S/N 1953 EW4928 and one AK magazine of 30 bullets of 7.22mm each; and, a charge of possession of sea turtle meat of a total weight of 154.02 kilograms.

[6] We had stated that, by any standard, these are grave charges likely to be visited by long sentences if they were to be found guilty. We had commented that the trial Court should exercise caution in their case since they are sea farers and flight from jurisdiction is not impossible for them. We had also stated that their release will only be possible on the most stringent conditions, if the trial which was set for September 2014 failed to take off, through no fault of their own. The trial was expected to have been completed in October 2014.

[7] The trial did take off in September 2014 but its time for completion is anybody's guess even if one year has passed by. Six witnesses have been heard. There are many more to go. A month has been allocated for the disposal of this case in May and June 2015. They have been on remand since 7 December 2012.

[8] In the history of this case, there have been a couple of applications for release on bail: namely, January 2013; October 2013; September 2014 and November 2014. The learned Judge in all those applications gave her reasons for refusing bail. In the last ruling she delivered, she rejected the two grounds under which the last application had been made. With respect to the first one raised: namely, material

change of circumstance, she stated that the fact that the trial has not been completed and been postponed to 2015 does not amount to a material change of circumstance.

[9] The appellants argue that the introduction of two additional defendants, the addition of six extra charges to the existing eight, the dropping of charges against one of the original defendants followed by the dropping of charges against another, the listing and re-listing of the case, the tenuous character of the evidence before the court, the release on bail of two of the co-defendants are material change in the circumstances.

[10] We agree with the decision of the learned Judge that they do not so amount. While events which took place may be the normal incidence in criminal procedure of a serious case of drug trafficking combined with other aggravating features, the issue of evidence is still impossible to evaluate at this stage when there are only 6 witnesses who have deposed out of 39. The two co-defendants were given bail because their participation was not averred to be as grave as that of the five appellants.

[11] With respect to the other ground ventilated by the appellants: namely, that the appellants are prepared to come to court on the imposition of stringent conditions, the learned judge applied the decision of **Hurnam v State [2004 PRV 53]** where the Judicial Committee held that: where there are reasonable grounds to infer that the grant of bail may lead to such a result (i.e. absconding) which cannot be effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail. (Bracket added).

[12] The question which arises in this case is whether the five appellants can flee jurisdiction by day or night. They are sea farers so to speak and the learned Judge stated that Seychelles is a small island state. On the other hand, the appellants have stated that they are prepared to abide by the most stringent conditions.

[13] One factor which we should not overlook is that this is a 2012 case which is yet to be completed in 2015. The fact remains that where a trial cannot be completed within a reasonable time, the defendants should be granted bail. The conditions imposed should be such as to eliminate the risks of flight from jurisdiction account taken of the nature and the gravity of the offence with which the applicants stand charged and their personal circumstances.

[14] Learned counsel for the appellants referred to two decisions of the European Court of Justice on how long may be too long for pre-trial detention. The first case is that of **Gonta v Romania the Court** [Application No. 38494/04] decided on 1 October 2013, a detention from the date of his arrest up to his sentence which spanned over a total of two years, four months and four days was regarded as a breach of his right to a fair trial within a reasonable time under Article 5 paragraph 3 of the Convention which are identical with the provisions of our Constitution on the matter. The second case is that of **Novruz Ismayilov v Azerbaijan** [Application No. 16794/05] decided on 20 February 2014, where the seriousness of the offence and the risk of absconding were the two grounds for which the applicant was detained for a period of one year, four months and three days on charges of breach of revenue laws. This was regarded, in the circumstances, as unwarranted on the ground of lack of sufficient reasons for his continued detention.

[15] We take into account all the facts and circumstances underlined above, the existing national and international jurisprudence against pre-trial detention of suspects. Above all, we take into account the following pronouncement of the Judicial Committee in the case of **Hurnam v State [supra]** where the Learned Law Lords observed:

> *"It is obvious that a person charged with a serious offence facing a severe penalty if convicted may well have a powerful incentive to discard or interfere with witnesses likely to give evidence against him, and this risk will often be particularly great in drugs cases. Where there are reasonable grounds to infer that the grant of bail may lead to such a result, which cannot be effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail."* [emphasis ours]

[16] Considering the time it is taking to dispose of this case, our concern should and does lie in eliminating the risks involved in the appellants' absconding and interfering with the course of justice.

[17] We, accordingly, impose the following conditions to eliminate the risks:

(a) that each of the appellants shall provide two sureties of SRs 50, 000 each and shall enter into a recognizance in the sum of SRs 100,000;
(b) that each shall reside at a fixed and permanent place of residence indicated by him;
(c) that none of them shall engage in any marine activity while on bail;
(d) that each shall report to the nearest Police Station twice daily at 8.00 hours and 20.00 hours;
(e) that each shall inform the Police of his daily movements each time he reports at the Police Station;
(f) that each 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.

[18] He shall understand that 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.

[19] As soon as each of the five appellants have met the conditions laid down above, he shall be released on bail pending completion of the trial.

[20] The accused Roy Patrick Brioche is remanded in custody for a further 7 days to be produced before Robinson J at the end of the remand period.

S. Domah (J.A)

I concur:. **…….** M. Twomey (J.A)

I concur:. **…….** J. Msoffe (J.A)

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