

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** F. MacGregor (PCA) , M. Twomey (JA) ,B. Renaud (JA)

## **Criminal Appeal SCA 09/2019**

**(Appeal from Supreme Court Decision CO02/2019)**

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Balamurali Pillay	1st Appellant
Karumbayiram Pillay	2nd Appellant

Versus

The Republic	Respondent
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Heard: 04 May 2019  
Counsel: Mr. Bernard Georges for Appellants  
Ms. Brigitte Confait for Respondent  
Delivered: 10 May 2019

### **JUDGMENT**

M. Twomey (J.A)

- [1].** The First and Second Appellants (siblings) are charged before the Supreme Court with the offences of aiding and abetting the commission of the offence of uttering false documents contrary to section 22 (c) of the Penal Code read with section 339 and trafficking in persons contrary to section 3(1) (a), (b) and (e) as read with section 22 (a) of the Penal Code Cap 158 punishable under section 5(2) of the Prohibition of Trafficking in Persons Act 2014 respectively.
- [2].** They had moved the trial court for their release on bail on the 28<sup>th</sup> January 2019 and again on 18<sup>th</sup> February 2019. Both applications were refused. They have appealed the second decision delivered on 25<sup>th</sup> February on the following grounds five grounds:

1. *The learned Judge failed to consider the reasons set out for the respective Appellants in respect of their bail application, namely the medical condition of the 4<sup>th</sup> Accused and the reason set out by the 3<sup>rd</sup> Accused that he was leaving to attend to his ailing mother as supported by the Affidavit of his sister.*
2. *The learned Judge's reason that the accused if enlarged on bail would tamper with the witness failed to note that the second Accused was enlarged on bail and the reasoning of tampering with the witness as refusal to bail cannot stand.*
3. *The learned Judge erred in his finding that the 3<sup>rd</sup> Accused did not have any legal and other restrictions from leaving the jurisdiction while accepting the views of the Prosecution that the 3<sup>rd</sup> Accused was leaving the country without permission.*
4. *The learned Judge failed to appreciate the difference between taking treatment while one is on bail and when one is in custody bearing in mind that the 4<sup>th</sup> Accused is an acute diabetic patient (one of whose toes was removed) while he is on remand and while his continued treatment during custody would only aggravate his diabetic condition.*
5. *The learned Judge failed to appreciate that the 4<sup>th</sup> Accused is also having heart ailments.*

**[3].** The above grounds of appeal can be conflated for the consideration of the following issues:

1. Whether the learned trial judge took into consideration the reason for the First Appellant to leave the country and the medical condition of the Second Appellant.
2. Whether the learned trial judge took into consideration the circumstances of the Appellants if released on bail as to tampering with witnesses.

**[4].** In the consideration of these issues, Mr. Georges, learned counsel for the Appellants, has submitted that the Court ought to remind itself that bail is a right and that remand is the exception. The two exceptions to the right to bail in this matter submitted by Ms. Confait, learned Counsel for the Respondent, are that the Appellants would not turn up for trial and that they might interfere with the witnesses.

- [5]. In fleshing out his submissions, Mr. Georges has stated that bail is provided for in Article 18 of the Constitution and substantively and procedurally in section 101 of the Criminal Procedure Code. In brief, Article 18 provides a right to liberty which is not absolute and subject to permitted derogations. The permissible derogations relevant to the present case concern the seriousness of the offences with which the Appellants have been charged, the substantial grounds for believing that they would fail to appear for the trial or would interfere with the witnesses or would otherwise obstruct the course of justice or commit an offence while on release (See Article 18 (7) (b) and (c) of the Constitution).
- [6]. Relying on *Beeharry v R* (2008-2009) SCAR 41, he submits that these derogations are narrowly and strictly construed by the court which tend toward upholding the right to liberty while ensuring that accused persons turn up at their trial and do not interfere with the administration of justice.
- [7]. Further, he added, the case of *Brioche v R* (SCA 20/2015) [2015] SCCA 46 (17 December 2015) reiterated the principle that pre-trial detention was an “exceptional measure of the very last resort” and that the idea behind bail was “not to cage the detainee against flight but to ensure that he appears at trial”. This result would be achieved by admitting accused persons to bail and imposing adequate conditions to ensure it.
- [8]. With regard to the substantive reasons for the learned trial judge’s decision to refuse bail he submits that the record is scant. He deduces that the learned trial judge refused bail because the First Appellant had tried to leave the country a week before the charges were laid, that the Appellants were part of well organised conspiracy which raised the possibility of their interference with witnesses, that the offences were serious and that the Second Appellant was not suffering from a life-threatening disease.
- [9]. In counter submissions, Ms. Confait for the Respondent has stated that the trial judge’s decision was well reasoned. First, the attempt by the First Appellant to leave the country was taken into account by the learned trial judge. He was not convinced that the First Appellant was leaving the country to attend to his sick mother as the documents he

produced to support his narrative do not show that this mother was ill at that point as she had been discharged from hospital after suffering from fever. Secondly, the First Appellant was arrested at the airport, three days after it had been publicised on the media that the a co-accused in his case, namely Jimmy Finesse, had been arrested three days prior, together with a person of Indian origin who was to be a witness in his trial. It is her submissions that it was these factors that caused the First Appellant to flee, which matters were known to the trial judge when he made his decision.

[10]. With regard to the Second Appellant's medical condition, she submits that the court took into consideration medical reports of examinations carried out on him. These show that he suffers from diabetes, a common ailment, but that his condition was stable, that he would require dressings and to continue on his medication. These were not conditions necessitating his release from detention. His ailment was being managed at the place of detention and did not necessitate his release for treatment. For these submissions she relied on the cases of *Ngui v Republic of Kenya* [1986] LRC (Const) 308 and *R v Francourt* (2006) SLR 21 which are authorities for the principle that where the detainee can be administered treatment in detention, the medical condition would not be sufficient consideration for release on bail.

[11]. As concerns the interference by the two Appellants with the administration on of justice, she submits that the witness of Indian origin is well known to the Appellants and of the same community as them. Moreover, there were indications that the case concerned interaction between a well organised group of persons. In the circumstances, the risk of interference with the witness were the Appellants to be released was too high, a consideration that partly grounded the learned trial judge's decision.

[12]. She submits in addition that the offence is one that is extremely serious as it carries a fine of up to SR 800,000 and imprisonment of up to twenty-five years and the person with whom the Second Appellant stands charged held an important position in the Ministry of Foreign Affairs.

[13]. It is our view that this case, although only an appeal from a refusal to grant bail by the trial judge has to be considered by this court as all other appeals. An appellate court's task

is to determine whether there was sufficient evidence to support the determination made by the trial court and whether the law was applied correctly.

- [14]. From this perspective we have given anxious scrutiny to the decision of the trial judge when refusing bail. Equally, we are very conscious of the adage *bail, not jail* as being the primary consideration for Article 18 (7) of our Constitution.
- [15]. We disagree that the considerations of the trial judge are demonstrably scant on the record. At this early stage of trial it is anticipated not all information is available to the prosecution who are bringing together the different elements necessary to constitute and complete the book of evidence. We are not of the opinion that based on the available information and the considered views of the trial judge that the Appellants have demonstrated to us why the trial judge was wrong in his denial of bail and his determination that the circumstances surrounding their detention were not within the derogations permitted under Article 18(7) of the Constitution. Indeed, first, as rightly pointed out by the trial judge, the offences with which they are charged are extremely serious. Secondly, the credibility of the First Appellant as why he was leaving Seychelles was shattered when the documents he produced did not support his assertions. He was not blind to the possibility that this was not a case of a son rushing to succour his mother on her death bed but rather, that this was a person conveniently availing of his mother's temporary demise by fever to rationalise his reason for trying to leave Seychelles.
- [16]. The Second Appellant's ailments are also not at all life threatening as he had wanted the court to believe and which were dismissed by the trial judge as ailments that could be treated while on remand.
- [17]. The risk of interference with the witnesses are also real threats to the administration of justice and have not been dispelled by the Appellants.
- [18]. Appeal bail is exceptional. When as is in this case there are specific indications of a genuine public interest, that is, the administration of justice together with the seriousness of the offence and the flight risk of the accused persons, the Court of Appeal will be reluctant to overturn the trial court's decision denying bail.

[19]. We wish to point out that *Brioche* (supra) was an exceptional case. When bail was granted to the detainees by this court, they had already been incarcerated for three years with no end in sight for their trial. In the present matter, the detainees were charged in February of this year and their trial is set for this October, a mere five months away. By no stretch of the imagination can their case be compared to *Brioche*.

[20]. We see no reason to interfere with the judge's decision to deny bail. The appeal is therefore dismissed.

M. Twomey (J.A)

**I concur:.** .....

F. MacGregor (PCA)

**I concur:.** .....

B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019