Lesperance v The Republic
and
Azemia & Or v The Republic
(2004) SLR 134

Pesi PARDIWALLA for Mr. Rolly Lesperance
Alexia ANTAO for Mr. Robert Azemia & Mr. Beddy Payet
Ronny GOVINDEN for the Republic

Order delivered on 12 July 2004 by:

PERERA J: There are two applications for bail pending Appeal. One filed by Rolly Lesperance in the Supreme Court under the provisions of Section 342(4) of the Criminal Procedure Code, and the other filed by Robert Azemia and Beddy Payet in the Court of Appeal. Rule 20 of the Seychelles Court of Appeal Rules 1978, provides that –

> Whenever application may be made to the Court or to the Supreme Court, it should normally be made in the first instance to the Supreme Court.

Hence although both applications are entertainable by this Court, yet, different considerations would apply. In respect of the former application, Section 342 (4) provides that:

> the Judge may in is discretion, in any case in which an appeal to the Court of Appeal is filed ..... grant bail pending the hearing of such Appeal.

In a ruling in the case of *Salim Mohammed Akbar v. R* (Criminal Side 5 of 1998), which involved a bail application pending Appeal filed in the Court of Appeal, the use of the words "the Judge" and not "a Judge" in the context of that Section was held to necessarily mean, the Judge who convicted and sentenced the accused. Such Judge being seized of the merits of the case and other circumstances is empowered to use his discretion in granting bail pending Appeal.

In the latter application filed in the Court of Appeal, I am being called upon to consider the application as an ex-officio single Judge of the Court of Appeal. In view of the distinct nature of the applications, I shall consider them separately.

Rolly Lesperance v. R (S.C.A. no 2 of 2004) the Applicant has relied on two grounds:

(1) That there exists cogent grounds of Appeal and the circumstances are such that prima facie, the chances of success of the Appeal are very high.

(2) There are special and usual (sic) reasons for the granting of bail.

Obviously, the second ground was based on "unusual" reasons, and not "usual" reasons as erroneously stated therein.

As regards the first ground, I stated the following in the *Akbar* case (supra):

> 1. Chances of success in 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 hearing of 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 time which must elapse before the Appeal can be heard, but also to the length of sentence being appealed from, and further, these two matters should be considered in relation to one another.

An application under Section 342(4) of the Criminal Procedure Code is of wider application. In the case of *Joubert v. R* (1976) SLR 17, it was held 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 *Akbar* I observed that this was an overstatement of the English rule in dealing with applications of this nature. The Applicant, in the present matter, has quite correctly, modified the rule contained in *Joubert* (supra) and formulated ground 1 on the basis that on a prima facie basis, the chances of success of the appeal are very high.

I have perused the grounds of appeal against both the conviction and sentence. Without dwelling on the merits of such grounds, I fail to be convinced that there are any grounds which, on a prima facie basis provide even the remotest chance of success in appeal.

As regards ground 2, based on the averment that there exists special any unusual reasons for granting bail, Mr Pardiwalla Learned Counsel for the Applicant invited the Court to consider the present situation created by the non-functioning of the Court of Appeal due to the appointments of the President of the Court and that of one Justice of Appeal being challenged by the Bar Association of Seychelles, and a practising lawyer. This indeed is an unprecedented situation not only for Seychelles but perhaps in the whole world. The functioning of the highest appellate court has been paralysed for about six months. However it will become functionable shortly. In this respect, Mr. Pardiwalla relied on the statement made by me in *Akbar* that:

> bail could however be granted for reasons unconnected with the merits of the case, such as the possible delay in the hearing of the Appeal. The prisoner who has a right of appeal under Article 19(11) of the Constitution, has also the right to a hearing of that Appeal within a reasonable time. The delay is considered in relation to the sentence of imprisonment imposed on him.

Mr. Govinden, Learned Principal State Counsel however submitted that the delay caused by the non-functioning of the Court of Appeal alone was not a special reason unless there was prima facie, a fundamental error of law in the sentencing. He submitted that there was no such error and that hence the Court should not consider that delay.

Article 19(11) of the Constitution provides that-

> Every person convicted of an offence shall be enti o appeal in accordance with the law against the conviction, senten ıd any order made on the conviction.

The right of a fair hearing contained in Article 19(1) extends to ppellate hearing as well. Hence when I stated in *Akbar* that bail could be granted asons unconnected with the merits of the case, I had not anticipated a situation as revailing. However where there is a delay for which the appellant is not responsib ıd which cannot be remedied by the trial Court, from where bail is sought, it is witl e right contained in Article 19(1) to consider the granting of bail. This is more so, bail is refused, an appeal to the full Court of Appeal will also be subject to a del aving the applicant without a remedy. However, the reasonable delay envisaged i cle 19(1) is relative to the facts and circumstances of each case.

In *Akbar* I stated that the delay is considered in relation to the ence. In that case the sentence was 8 years imprisonment, and hence I ruled t normal delay of 3 months was reasonable. In *Joubert* (supra) a delay of two mo in a 12 month term of imprisonment was considered reasonable. In the present the applicant was convicted on 18 May 2004. He has not even served two mont t of the possible 18 months he should serve with the 1/3 remission. Hence in ca where there are no prima facie errors of law in sentencing, it is too premature to der granting bail for reasons unconnected with the merits at least until half the perio d been spent. That would be a reasonable delay in the circumstances of the pres ase. Hence bail is presently refused.

Robert Azemia and Beddy Pavet v R (S.C.A. no 1 of 2004)

This joint application for bail which has been filed in the Court of Appeal comes up for consideration before me in my capacity as ex officio single Judge of the Court of Appeal. The grounds urged are the same as those in the application of Roily Lesperance. Mrs. Antao, Learned Counsel for the Applicants conceded that in view of the dicta in *Akbar*, chances of success in appeal may not be considered by an ex officio single Judge. She however urged the Court to consider ground 2 based on the delay in disposing the Appeal by the Court of Appeal, due to the unprecedented situation where there is no functional Court. She also referred the Court to Article 19(1) and 19(11) of the Constitution. However for the same reasons stated in respect of the application of Roily Lesperance, the present application is refused, as there are no prima facie errors in sentencing, a consideration of granting bail for reasons unconnected with the merits would be premature unless at least half the period of the sentence had been spent. That delay is reasonable in the circumstances of the case.

Orders made accordingly;

Record: Criminal Side No 11 of 2003