

IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VS.

1. PATRICK GEMMELL (A1)

2. JOSE BONNE (A2)

3. SAMUEL ARRISOL (A3)

4. ANDREW PANAGARY (A4)

5. RAYMOND RABERA (A5)

Criminal Side No. 11 of 2007

Mr. Chetty for the Republic

Mrs. Antao and Ms. Domingue for the 1st, 3rd and 5th Accused

Mr. Elizabeth for the 2nd Accused

Mr. Bonte for the 4th Accused

RULING

Gaswaga, J

The five accused persons stand charged in this court as follows:

Count 1

Statement of offence

Possession of explosives under suspicious circumstances contrary to and punishable under section 17 of the Explosives Act (Cap 77)

Particulars of offence

Patrick Gemmell, Jose Bonne, Samuel Arrisol, Andrew Panagary and Raymond Rabera on the 3rd day of March 2007 at La Retraite knowingly had in their possession or under their control explosives, namely Molotov cocktail, in such

circumstances as to give rise to a reasonable suspicion that they were not having them in possession or under their control for a lawful object.

In the alternative to Count 1

Count 2

Statement of offence

Possession of explosives contrary to and punishable under section 9(2) of the Explosives Act (Cap 77).

Particulars of offence

Patrick Gemmell, Jose Bonne, Samuel Arrisol, Andrew Panagary and Raymond Rabera on the 3rd day of March 2007 at La Retraite, were in possession of explosives without a valid permit.

On the 5/03/2007 when the accused, now applicants were presented before this Court the State Counsel, Mr. Chetty made an application for them to be remanded in custody pending their trial. Although the accused's respective counsel resisted it the Court went ahead to remand the applicants basing on the reasons outlined herein under. However, one of the accused persons, Samuel Arrisol (A3) was enlarged on bail with stringent conditions. The Court found that he is a minor and still a student yet the Police and Prisons authorities had admittedly stated to court that they had no facility to accommodate juvenile offenders apart from the same prison where adults are housed. Article 18 (12) of the constitution is instructive on the matter. It reads:

“18(12) An offender or a suspect who is a minor and who is kept in lawful custody or detention shall be kept separately from any adult offender or suspect.”

Mr. Chetty submitted that the seriousness of this offence would warrant the Court to keep the applicants on remand. His application was supported by the affidavit of one Ron Marie an inspector in the Seychelles Police Force. In a very forceful submission Mrs. Antao appearing for **A1**, **A3** and **A5** objected to the application by the Learned State counsel. Mr. Bonte for **A4** and Mr. Elizabeth for **A2** associated themselves with her submission. She contended that the offence of *'being in possession of Molotov cocktail'* with which the accused stand charged was unknown to our law. In particular Mr. Elizabeth complained that the charge does not disclose proper facts to enable the accused to ably answer to the charges. Further, that the seriousness of offence was not a ground on its own to be relied on by prosecution while seeking a remand of accused persons. With due respect the charges are properly drawn and the statement of law as well as the particulars of fact are well laid out so much so that an accused person cannot say they did not understand the offence they are being called upon to answer. A charge sheet is a summary that outlines the section of the law under which the accused is charged and briefly, usually in one sentence couched in general but clear terms, the facts or circumstances giving rise to that offence. The nitty-gritties are neither provided in the charge nor at this point of the proceedings as demanded by the defence counsel. In fact caution should be taken not to turn bail application proceedings into a full-blown trial.

Since bail applications are almost a daily occurrence in this court, I feel constrained, for the sake of future proceedings, to offer some general observations on the subject more so, on the 'reasonable conditions' the court should keep in mind when deciding to grant bail or to refuse to grant bail. First of all, although there is an attempt to define the term 'bail' in Article 18 (7) of the constitution I think it would be correct to say that generally our law does not define 'bail' and the court has decided to look else where for the definition.

Byrne's Law Dictionary at Page 89 defines bail (in Criminal Proceedings) as follows:

“An accused person is said at common law to be admitted to bail when he is released from the custody of officers of the law and is entrusted to the custody of persons known as his sureties, who are bound to produce him to answer, at a specified time and place, the charge against him and who in default of so doing are liable to forfeit such sum as specified when bail is granted.

***Halbury's Laws of England Third Edition 10 Page 377** generally agrees with the above definition, but adds that the sureties may, at any time, seize their principal and discharge themselves by handing him over to the custody of the law. The accused person will then be imprisoned, unless he or she obtains fresh bail.*

In common parlance the definitions show that there is some kind of undertaking made by the accused before a court of law that he will attend his trial as and when called upon to do so on being released. The accused is not completely set free but remains under court surveillance.

Bail applications are proceedings of a special category that require an urgent if not immediate decision because they deal with the liberty of a person. Article 18 (7) of the Constitution, 1993, the supreme law of the land, mandates a court to release a person produced before it either unconditionally or upon reasonable conditions. The first part of the provision is couched in mandatory terms but like every general rule there are exceptions to it, which in essence limit the enjoyment of this right. However, it is a cardinal principle of constitutional interpretation that when

interpreting an article or clause thereof, all articles bearing upon that subject matter under discussion have to be brought into purview and read or construed together as one whole so as to bring out the greatest effect of the document. I therefore find it apposite to read Article 18 (7) together with Article 47 that deals with the scope of exceptions. **Article 47 provides:**

“47. Where a right or freedom contained in the Charter is subject to any limitation, restriction or qualification, that limitation, restriction or qualification –

- a) *shall have no wider effect than is strictly necessary in the circumstances ; and*
- b) *shall not be applied for any purpose other than that for which it has been prescribed.”*

Generally, while considering bail, the Court would need to balance the constitutional rights of the applicant. The needs of society to be protected from lawlessness and the considerations which flow from people being remanded in prison custody which adversely affects their welfare, employment or business and that of their families and not least the effect on prison remand conditions if large numbers of unconvicted people are remanded in custody. In this respect various factors have to be born in mind such as the risk of absconding and interference with the course of justice. Where there is a substantial likelihood of the applicant failing to surrender or turn up for trial, bail may only be granted for less serious offences. The Court must weigh the gravity of the offence and all the other factors of the case against the likelihood of the applicant absconding. Where facts come to light and it appears that there is substantial likelihood of the applicant offending while on bail, it would be inadvisable to grant bail to such a

person.

Similarly where there is substantial likelihood of interference with witnesses, this is normally relevant when the alleged offence is comparatively serious and there is some other indication of violence or threatening behaviour by the accused, this would be a very strong ground for refusing bail. Bail could also be refused according to the status of the offence and the stage in the proceedings. The extent to which evidence pointing to proof of guilt or innocence of the applicant would seem to be one of degree in the circumstances of a particular case. There is no rule that such evidence cannot be placed before the Court. An investigating officer giving evidence of arrest often to connect the applicant sufficiently with the offence, as such as to claim that he or she may fail to surrender for trial.

While the seriousness of the offence and the possible penalty which could be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. **See. DPP vs. Woolmington AC. 462.** The concept of bail owes its existence on the presumption of innocence which we have incorporated in our constitution vide Article 19 (2) (a). The fundamental principles of justice declare that the accused is as innocent on the day before his trial as he is on the morning after his acquittal. The Court has to be satisfied that the applicant will appear for trial and would not abscond. The applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the said presumption of innocence. The Court must consider and give the applicant the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially.

Bail should not be refused mechanically simply because the state wants such orders. The refusal to grant bail should not be based on mere allegations. The grounds must be substantiated. Remanding a person in custody is a judicial act and as such the Court should summon its judicial mind to bear on the matter

before depriving the applicant of their liberty. What I have outlined above is by no means exhaustive. The Court should consider all other relevant circumstances.

All in all, both the Supreme Court and the subordinate courts have wide discretionary powers to set bail conditions which they deem reasonable, though I would caution this must be done judicially. Further, while walking this very delicate path of balancing the rights of the accused and those of the victims of the crime and the entire society, the court should never lose sight of the possibility of an innocent person who may, for a variety of reasons be caught up in the criminal justice system.

The charge sheet or indictment merely indicates that there is a probable cause, to believe that the accused has committed a crime, and that the state intends to bring him to trial for that offence. But the other side of the coin should not be ignored thus; that more often than not, by the time a person comes within police notice then there are high chances that his conduct or actions, to some extent, could have exceeded what is permissible. Or, it could have totally been outside the normal and allowed behavior therefore going against the law. (It is not somebody the police has just picked off the street without an iota of evidence and shoved to court for arraignment). Such person should therefore expect some inconvenience for example when invited by police for questioning or by court for trial. However I shall be quick to say that this inconvenience must be minimized as much as possible while pre-trial incarceration should be discouraged and only resorted to in cases that are of a serious nature (with serious effects for instance) or where the accused is considered to be a dangerous person.

In the present case, the evidence on the record shows that when the police intercepted and searched the car in which the applicants were traveling, Molotov cocktail (home made petrol bomb) was recovered there from. They had no valid permit to possess such explosives and these circumstances gave rise to a reasonable suspicion that the same was under their control not for a lawful object. It should be stressed once again that the accused are presumed innocent but in case it turns out that they are successfully prosecuted and convicted then they would face a maximum prison term of fourteen years. At this point in time the court is unable to tell what would have happened if they had not been intercepted. The motive is unknown. But what the court is able to say is that if detonated the Molotov cocktail can cause some considerable harm or damage not only to human beings but also to property that, among other things the judiciary is mandated to safe guard. Seychelles is known to be a peaceful country and any threat to or distortion of this peace, no doubt could have far reaching negative effects. As rightly put by Mr Chetty the presence of such objects in this country especially in the hands of unauthorized people poses a serious danger to its citizens.

The totality of these factors against the back ground of the world of today that is fraught with terrorist activities and the use of such weapons and ammunitions (as the one in this case) which have marred humankind reflect the seriousness of the charges in the case at hand. In the interest of justice peace and security these circumstances dictate that the accused persons be remanded in prison under Section 179 of the Criminal Procedure Code, Cap 54 for fourteen days.

The court so orders.

D. GASWAGA
JUDGE

Dated thisday of March, 2007