

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO54/20

[2016] SCSC 863

THE REPUBLIC

versus

SERGE ROLAND ESPARON

Accused

Heard: 24th October 2016
Counsel: Mr. Jarayaj Chinnasamy, Principal State Counsel for the Republic
Mr. Nichol Gabriel for the accused
Delivered: 27th day of October 2016

ORDER

Vidot J

- [1] The Accused stands charged with one count of being found in unlawful possession of a controlled drug with intent to traffic, contrary to Section 9(1) of the Misuse of Drugs Act 2016 (MODA), read with Section 19(1)(c) of the said Act and punishable under Section 7(1) read with the Second Schedule of the Act.
- [2] The Particulars of the Offence are that on 14th day of October 2016, the Accused was found at Marie-Jeanne Estate, Baie Ste. Anne Praslin, trafficking in a controlled drug by virtue of having been found in unlawful possession of diamorphine (heroin) having a

total weight of 15.5 grams (with a purity of 6.95 grams), which gives rise to a rebuttable presumption of having possessed the same with the intent to traffic.

[3] On the 24th day of October 2016, the Republic filed a Notice of Motion supported by affidavit sworn by Agent Aubrey Labiche of the National Drugs Enforcement Agency, (NDEA), asking for the remand of the Accused to custody. The grounds upon which the application is being sought are laid down in paragraph 11 of the Affidavit and which can be summarised as follows;

- i. Trafficking is a serious offence and that the offence as charged carries a minimum indicative sentence of 20 years and a maximum of life imprisonment due to the presence of the aggravating factor pursuant to section 48(e) of MODA. The Accused has a previous conviction for drug related offence;
- ii. The amount of the heroin seized which is above the prescribed statutory limit of 2 grams;
- iii. Drug offences are on the increase in Seychelles and that it affects public order and morality, particularly the youth;
- iv. That there are reasonable grounds to believe that if released on bail the Accused will continue with drug related activity. The Accused was released 2 month earlier for conviction of a drug offence;
- v. That there is likelihood that the Accused will obstruct the course of justice if released on bail; and
- vi. There are reasonable grounds to believe that the Accused will abscond if released on bail and thereby obstruct the course of justice.

[4] Learned Counsel for the Republic made lengthy submission urging the Court to consider all these grounds cumulatively rather than individually. He argued that under Article 18(7) of the Constitution, the court has ample power to remand a person if there are facts that will convince the Court.

- [5] Mr. Gabriel, Counsel for the Accused argued that in considering bail application the Court has to balance the right to liberty of the Accused person, the presumption of innocence and on the other side the seriousness of the offence. He submitted that the averments made by the Republic have not been supported by any evidence. He argued that the quantity of drug seized is small and that does not make the offence one that is so serious that would warrant the remand of the Accused to custody.
- [6] Bail is constitutional right provided for under Article 18(1) of the Constitution. Bail remains the rule always and remand, the exception. As held in **Esparon v Republic SCA 1, 2 and 3 of 2014**, such right can only be curtailed in exceptional cases where the Prosecution has satisfied Court that there are compelling reasons in law and on facts for remanding the Accused. Article 18 (7) provides circumstances in which the right may be curtailed. In the present case only 18 (7) (b) and (c) are relevant. Section 18(7)(b) addresses seriousness of the offence and Section 18(7)(c) deals with grounds *“for believing that the suspect will fail to appear for the trial or will interfere with the witnesses or will otherwise obstruct the course of justice or will commit an offence while on release”*. The list seems exhaustive but this Court holds the view that it should not refuse to take into account any other grounds and material factors that call for consideration in its assessment for remand, (see paragraph 11 below). Nonetheless, Article 18 (7) advocates for release, either conditionally or upon reasonable conditions. That reinforces the position that remand should be granted in exceptional cases only and adopted as a last resort. As was pronounced in **Esparon v Republic (supra)**, in dealing with bail application, the Court needs to ensure that *“the principle is not reversed in the sense that bail instead of jail becomes jail instead of bail”*.
- [7] In placing emphasis that bail should be the rule and remand, the exception, I find support in the International Covenant on Civil and Political Rights (ICCPR) which Seychelles ratified in 1992 which provides that *“it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear at trial”*.

- [8] I have stated before and I shall again repeat and insist that in making an application for remand, it does not suffice to make mere and blank averments without more. All averments have to be substantiated and supported by facts. The Prosecution needs to come up to proof on the averments. The onus of satisfying Court that the rule of bail should be compromised in favour of remand rests on the Prosecution. The standard of discharging his burden is a high one.
- [9] In assessing the merit of the Application, I remind myself that the Accused is presumed innocent until he is proven or has pleaded guilty as provided for under Article 19 (2) (a) of the Constitution.
- [10] The Republic, in its submission has implored Court to consider all the grounds being relied on cumulatively rather than individually. I agree with Counsel for the Republic on that but it is necessary that each ground is also evaluated individually to confirm that it has been established.
- [11] It is trite and it has been held in **Becharry v Republic (2008-2009) SCAR** that seriousness of the offence is not a standalone provision. It has to be considered with other grounds of the application. Under paragraph 11(iii) of the Affidavit the Prosecution has averred that drug offences are on the increase and that this has affected public order and morality of the younger generation. I note that this ground does not fall within one of the derogations provided for by Article 18(7) of the Constitution. Nonetheless, this court will be willing to consider this ground if there was real and imminent danger to public interest and order or in circumstances where the rights of another will be seriously affected should the Accused be released on bail. In fact it was held in **Beharry v Republic** that the right to liberty is subject to the rights of others and the public interest. Unfortunately, the prosecution has not provided this court with any evidence to that effect. It is true to state that the court should not remain oblivious to the fact that Seychelles has a drugs problem but blank averments by the prosecution is not and should not be sufficient; they have to be substantiated. In the least the NDEA have statistics of drugs related offences and none of that has been thrust foreword. The prosecution has not satisfied this court as to the merit of this ground, so it fails.

- [12] Paragraph 11(iv) of the Affidavit deals with the possibility of the Accused continuing with similar activity as the offence levelled against him. Again there is no evidence in support of that. Even if that concern is a real fear for the prosecution, would the imposition of strict bail conditions not be sufficient to address that concern? Article 18(7) as stated above places emphasis on bail either with conditions or unconditionally. So in presenting its arguments in favour of remand, the prosecution cannot omit to address the court as to why the imposition of bail conditions would not meet the course of justice and will not be sufficient. Therefore, the Republic has failed to satisfy court on the merit of this ground.
- [13] I shall deal with averments made under paragraph 11 (v) and (vi) of the affidavit attached to the Notice of Motion together. They respectively deal with likely obstruction of justice and possibility of the Accused absconding. Counsel for the prosecution in making submissions on those grounds relied on matters that happened pre-arrest. However, this court believes that as much as Accused's behaviour pre-arrest are pertinent and necessary for consideration that this equally applies to the Accused's post arrest behaviour. The fears enumerated under these grounds should also be substantiated. The prosecution needs to satisfy court that imposing stringent bail considerations would not alleviate these fears. The Affidavit makes no suggestion that when the NDEA agents approached the Accused at his home and told him they were going to search his home and his body that he made attempts to escape. Post arrest, there is no evidence that the accused displayed behaviour that would suggest that there existed a reasonable probability that the Accused will try to abscond if released on bail. The onus remains always on the prosecution to satisfy court that imposition of bail conditions will not suppress that probability. The Prosecution failed to do that.
- [14] As regards paragraph 11(v) of the Affidavit, the Prosecution has argued that since the Accused had placed a plastic containing heroin in his mouth when the NDEA agents were searching his room as indicative that he will obstruct the course of justice. This again was pre-arrest, but has the Accused done anything post-arrest that would have reinforced that fear? Sometimes an Accused will act irrationally at the time of arrest but post arrest his behaviour may changed. It is averred in paragraph 8 of the Affidavit that after arrest, the

Accused was taken to the Praslin NDEA station and there he gave a confession. Does that suggest a person who wanted to obstruct the course of justice? This Court believes not. Furthermore, the most potential witnesses are police officers. The likelihood of the Accused interfering with Police officers is rather remote and furthermore, I believe that strict bail conditions can manage that fear.

[15] Paragraph 11(i) and (ii) of the Affidavit, the Prosecution relies on the seriousness of the offence and the amount of drugs seized. These shall be treated together. Above I have already mentioned that seriousness of the offence is not a standalone provision. Therefore, if the Prosecution has not satisfied court on the other grounds these two subparagraphs cannot be treated on their own. All the grounds have to be treated as a whole. However, I shall give considerations as to the averments of aggravated factor as regards the offence as per Section 48(e) of MODA. The issue of aggravated factor will be pertinent as far as sentence is concerned. I also note that the offence is a serious in nature, but at the same time the amount of drugs seized, which is rather minimal, has to be taken into consideration in making a determination.

[16] Therefore, based on the above, I find that the Prosecution has not satisfied Court in law and on facts that there are compelling reasons to remand the Accused to custody but nonetheless the Court believes that his release should be subject to the most stringent conditions. In particular the Court takes into account the nature of the offence and the fact that drug seized is a class A drug. The Accused is therefore released on the following conditions;

- i. The Accused shall pay into Court a cash bail of SR70,000/- with 2 sureties to be approved by Court who shall each sign a bond of SR50,000/-, in order to secure his attendance of the Accused before Court each time that he is requested to do so;
- ii. The Accused shall not leave the Republic until the final determination of this case and to that end shall forthwith, and before his release on bail, surrender his passport and all travel documents to the Registrar of the

Supreme Court of Seychelles and the Immigration Authorities are directed not issue any travelling documents to the Accused;

- iii. The Accused shall report to the Baie Ste. Anne, Praslin Police Station 3 times per week, particularly on Monday, Wednesday and Friday;
- iv. The Accused shall not travel to any other islands in Seychelles, save Mahe and Praslin;
- v. The Accused shall without fail present himself before Court each time that this case is called;
- vi. The Accused shall not whilst on bail commit any other offence;
- vii. The Accused shall not threaten any Police office nor interfere with the investigation of this case and shall not commit any act that shall interfere with the course of justice in this case;
- viii. The Accused shall not while on bail commit any other offence;
- ix. The Accused shall not leave his home between the hours of 7 p.m and 5 a.m until the completion of this case.

Signed, dated and delivered at Ile du Port on 27th day of October 2016

M Vidot
Judge of the Supreme Court