

IN THE SUPREME COURT OF SEYCHELLES

CriminalSide: CO52/2016

[2016] SCSC 892

THE REPUBLIC

versus

**(1) RICHARD ALLEN JOSEPH
(2) ALEX EDDY SAVY
(3) ROLAND SERRET**

Accused

Heard: 07 November 2016
Counsel: Mr. H. Kumar, Assistant Principal State Counsel for the Republic
Mrs.A. Amesbury for the first accused
Mr. A. Juliette for the second accused
Mr. Daniel Cesar for the third accused
Delivered: 15 November 2016

ORDER

Vidot J

[1] The accused are charged with one count of Trafficking in a controlled drug as follows;

Statement of Offence

Trafficking in a controlled drug by means of being found in possession of the controlled drug with intent to traffic in a controlled contrary to section 9(1) of the Misuse of Drugs Act 2016 read with section 9 (1)(d)(i) of the Misuse of Drugs Act 2016 further read with section 23 of the Penal Code and punishable under section 7(1) of the Misuse of Drugs Act 2016 read with the Second Schedule referred thereto in the said Act.

Particulars of Offence

Richard Allen Joseph of La Misere, Mahe, Alex Eddy Savy of Port Glaud, Mahe and Roland Serret of Perseverance, Mahe, on the 05th October 2016 at Barbarons, Mahe with common intention were unlawfully found in possession of controlled drugs having net total weights of 2 kilograms and 957 grams of cannabis herbal material which gives rise to a rebuttable presumption of them to have had the said controlled drug in their possession with intent to traffic the said controlled drugs.

- [2] On 11th October 2016, the prosecution filed a Notice of Motion supported by an affidavit sworn by Agent Lester Solin of the National Drugs Enforcement Agency (NDEA), requesting for the further remand of the accused to custody. At the time that the Notice of Motion for remand was called, Counsels for the accused indicated to Court that they would not take objection at that stage but would reserve the right to argue for bail at a subsequent date.
- [3] On 07th November 2016, Counsels for the accused filed a Notice of Motion supported by affidavit sworn by the accused praying for the release of the accused on bail.
- [4] The grounds on which the prosecution seeks to remand of the accused can be summarised as follows;
- i. Seriousness of the offence the accused are charged with;
 - ii. The offence carries a penalty of 50 years suggesting that it is of a serious nature;
 - iii. The accused persons tried to escape the scene evading arrest by the NDEA agents;

- iv. Likelihood of accused absconding if released on bail; and
- v. Drug offences being on the rise thereby endangering peace, public order and morality in society especially the youth.

[5] Bail is a constitutional right provided for under Article 18(1) of the Constitution. Bail remains the rule and not the exception. As provided for in **Esparon v the 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 for derogations whereby this right to liberty can be curtailed. The list of derogations seems to be an exhaustive one, but this court does not believe this to be so. The court should be able to evaluate the particular circumstance of the case and exercise its discretion to decide that there are exceptional reasons for remanding the accused. I find support for that position in the case of **Beeharry v Republic [2009] 11** whereby it was held that the right to liberty is subject to the rights of others and to the public interest. Another consideration would be if the release of the accused to bail could place his safety and security at risk. Nonetheless, Article 18(7) advocates for release; either unconditionally or upon reasonable condition. That reinforces that remand should be adopted as a last resort. As was pronounced in **Esparon v The 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”.

[6] 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 be detained in custody, but release may be subject to guarantees to appear at trial.*”

[7] At the end of the day, the court should be concerned with ensuring that the accused do not abscond and present themselves before court each time that the case is called. At the end it has to satisfy itself that either it should remand the accused or release conditionally or unconditionally.

- [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] It is trite and it has been established in **Becharry v Republic (supra)** that seriousness of the offence is not a standalone provision. It has to be considered with other grounds of the application. The prosecution has averred seriousness of the offence coupled with other grounds as above referred. I shall deal now with the grounds that drugs offences is on the rise and that as a result public order and morality and that the youth are being affected. This averment is a blank statement and not supported by other evidence. However, this court is not insensitive to the fact that there exists a chronic drug problem in Seychelles, but in my view taken alone with other grounds listed in support for remand is not sufficient ground on which the application should be granted.
- [11] The strength of the prosecution's application hinges on the possibility of the accused absconding if released on bail. Before dealing with that ground I wish to turn to the affidavit filed by the accused. I disagree with averment in that affidavit that the only ground on which the prosecution has moved for remand is seriousness of the offence. I also note that it is incorrect for the accused to have made averments that the court diary is congested and therefore they cannot be afforded a "fair trial within a reasonable time" as guaranteed under Article 19(1) of the Constitution. An accused should not be encouraged by counsel to swear to an incorrect averment. That is irresponsible. This court can provide dates in January 2017 to hear this case. I do appreciate nonetheless that counsels could be occupied and that it shall be difficult to synchronize the court's diary together with that of 4 counsels. Nonetheless, the duty to ensure and promote an accused right

provided under the Constitution does not rest on the court only. If counsels find that their diary is so congested that will not be able to afford an accused a hearing “within a reasonable time”, provided under Article 18(6), they share an overwhelming duty as well to inform that accused and warn him of the possibility of them being remanded for a long time in the event that bail is not granted. The right to be defended by a legal practitioner of the accused’s choice provided under Article 18(3) should be invoked within reasons.

- [12] At this stage I shall also address on a matter raised by Mr. Juliette, which has my unequivocal endorsement. Mr. Juliette submitted that in considering application for remand, court should not lose sight of the economic consequence endured by state in remanding an accused to custody. It is not only that the taxpayers have to maintain a fully able person who is remanded and would most likely have to accord legal aid, but there is likelihood that members of the family of the accused who are dependent on him will have to seek social welfare assistance, an added burden to taxpayers. This nonetheless should not be interpreted to mean that where a real and overwhelming necessity and reason exist in favour of remand, that remand should be compromised for such a consideration.
- [13] In his affidavit attached to the Notice of Motion by the prosecution, Agent Lester Solin made averments that the accused resisted arrest and tried to escape when being apprehended by NDEA agents. This is not denied in the affidavit filed by the accused. I note that the 1st and 2nd accused, Richard Allen Joseph and Alex Eddy Savy respectively were apprehended on the 05th October 2016, the day of the operation. Roland Serret absconded but on 10th October 2016, he decided to turn himself in to the NDEA. I take the action of the accused to be serious and also that the offence charged with are serious that could warrant their remand to custody. But in the spirit of Article 18(7) the court must decide if imposing severe bail conditions will compound the concern of the prosecution as to the possibility of the accused absconding. I believe that just like in the case of **Esparon v The Republic (supra)**, where the amount of drug seized was considerably more than in the present case, the imposition of such bail condition can guarantee the attendance of the accused each time that the case is called before court. Nonetheless, I differentiate the case of **Esparon v Republic (supra)** with the present one

because in the former it was the court that could not provide early dates for the hearing of the case.

[14] Therefore, I accede to the request for bail and reject the motion for remand and the accused shall be released on bail on these conditions;


- i. Each accused shall pay into court a cash bail of SR95,000/- with 2 sureties each to be approved by court who shall each sign a bond of SR80,000/-, in order to secure the attendance of the accused before court each time that they are requested to do so;
- ii. The accused shall not leave the Republic until the final determination of the case and to that end shall forthwith, and before their release on bail, surrender their passport and all travel documents to the Registrar of the Supreme Court and the Immigration Authorities shall be directed not to issue any travelling documents to the Accused;
- iii. The accused shall report to the NDEA headquarters every Monday, Wednesday and Friday and other days of the week to the police station nearest to their residence; ie, the 1st and 3rd Accused to the Mont Fleuri Police Station, the 2nd Accused, the Port Glaud Police Station;
- iv. The accused shall until this case is completed remain on Mahe and shall not travel to any other island of the Seychelles jurisdiction. For avoidance of doubt the accused shall not while on bail go out at sea.
- v. The accused shall not whilst on bail commit any other offence;
- vi. The accused shall before being released provide to the court and the NDEA their address of residence, so that the NDEA and the police may monitor the accused to ensure that the bail conditions are observed;
- vii. Within 3 days of being released on bail the accused shall furnish to the NDEA and police a telephone number whereon they may be contacted at all times.

viii. The accused shall not interfere with the investigation of this case and in particular not to threaten any police or NDEA officers;

ix. The accused shall not leave their homes between the hours of 6.30pm and 5 am. until the final determination of this case;

[15] If the accused breach any of the aforementioned bail conditions; they shall be arrested and produced forthwith before this court.

Signed, dated and delivered at Ile du Port on 15 November 2016


M Vidot
Judge of the Supreme Court

