

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2020] SCSC .1./20
CR44/2017

In the matter between:

THE REPUBLIC
(rep. by Georges Thatchett)

versus

STEPHEN MONDON
(rep. by Alexia Amesbury)

1st Accused

Neutral Citation: R v Mondon (CR44/2017) [2020] SCSC .1./20... (9 January 2020).
Before: Carolus J
Summary: Bail – Article 18 Constitution – Section 179 Criminal Procedure Code
Heard: 6 January 2020
Delivered: 9 January 2020

RULING

CAROLUS J

[1] The accused persons are charged with various offences related to drug importation and trafficking. The original charge dated 7th September 2017 was preferred against 8 accused persons but charges were withdrawn against some of them and an amended charge dated 6th March 2018 filed maintaining charges against the 1st to 5th accused only. The 1st accused now stands charged under count I with the offence of, together with the second accused, aiding abetting, counselling or procuring the 3rd and 4th accused persons and other persons to import 33,855.3 grams of cannabis resin into Seychelles on board a yacht and two vessels belonging to the 1st accused. The 1st accused is also charged under Count II together with

the 3rd and 4th accused persons of importation of 33,855.3 grams of cannabis resin into Seychelles on board a yacht and two vessels belonging to the 1st accused.

[2] The 1st to 4th accused persons were remanded to police custody by an order of the Court of the 7th September 2017 pending hearing and determination of an application by the prosecution to remand them to custody under section 179 of the Criminal Procedure Code read with Article 18(7) of the Constitution. The 5th accused person was released on bail. The application for remand of the 1st to 4th accused persons was granted by an order dated 22nd September 2017, on the grounds of the seriousness of the offences with which they stand charged evidenced by the penalties for such offences, the amount of the drugs sought to be imported into the country, the sophistication and complexity of the modus operandi employed by the offenders, and the number of individuals involved in the commission of the offence and their common intention as well as the high level of synchronization of their efforts and skills to ensure that their objective was met. The Court was further of the view that there was substantial grounds to believe that the accused persons would likely obstruct the course of justice by absconding and failing to appear for trial if released on bail and that they would also likely interfere with potential civilian witnesses. On that basis the Court remanded the accused persons to custody and they have remained on remand since, various bail applications made on their behalf having been refused and their remand having been extended for varying periods not exceeding 14 days.

[3] The last period of 14 days for the remand of the 1st to 4th accused persons as ordered by the Court having come to an end, the matter was called before this Court. Prosecuting Counsel moved for extension of their remand for another 14 days. Mrs. Amesbury co-counsel for the 1st accused person opposed the application on the ground that the Court's previous order for remand of the 1st accused had lapsed upon the expiry of the previous 14 day remand period and that therefore Counsel could not make an application for an expired remand period to be extended. She submitted that Counsel should rather have moved for renewing the application for remand. Mrs. Amesbury further stated that the practice before the Courts is that once an accused person has been remanded, an application is made by prosecuting counsel for the extension of the remand period which the Court invariably grants unless the accused person shows that there is a change of circumstances which renders the original

order for remand no longer applicable. Relying on section 179 of the Criminal Procedure Code, she submitted that this approach is wrong and that each time the remand period expires the prosecuting counsel should show that reasons exist justifying the continued remand of the accused person failing which the accused should be released. She stated that in any event the fact that the 1st accused has been in custody for two years and four months constitutes a big change in circumstances which justifies him being released on bail.

- [4] In his ruling of the 22nd September 2017 granting the prosecution's application to remand the accused persons, the learned trial Judge did address to some extent the issue of extension of remand of an accused person although not specifically addressing the issue now being raised by Mrs. Amesbury. In respect of Mr. Gabriel's submission relying on the case of *Kenneth Esparon & Ors v The Republic (SCA CR Nos. 1/2/3/2014) [2014] SCCA (14 August 2014)* that the prosecution has to make a case every fourteen days for extending the remand and that there is no such law for remanding an accused in custody pending the full determination of the case, the learned trial judge without pronouncing himself on whether the prosecution has to make a case for extending the remand of an accused person every 14 days at the end of the remand period ordered by the Court, stated the following:

10. [...]

I also accept and it is confirmed in the case of Kenneth Esparon & ors Vs the Republic every 14 days the prosecution has to move the Court anew for further remand of an accused person and that an accused person cannot be remanded until the full determination of the case, it has to be renewed.

- [5] The right to bail is a constitutional right guaranteed under Article 18(7) of the Constitution. This right is however subject to exceptions also enumerated under the same provision which allow an accused person charged with an offence to be detained. Our Courts have stated time and again that the release on bail of an accused after he is charged is the rule and that his remand in custody should be an exception. Section 179 of the Criminal Procedure Code gives a discretion to the Court to either release an accused person charged with an offence on bail with or without conditions or to "commit him to prison" but this is subject to the conditions enumerated in article 18(7) being met. The burden lies on the

prosecution to show that the circumstances in article 18(7) exist. In terms of the proviso to section 179 of the Criminal Procedure Code if the accused is “committed to prison” any adjournment of the matter has to be for a period of not more than 15 clear days, the day following that on which the adjournment is made being counted as the first day. In practical terms, this means that the accused has to be brought back to court every 14 days, so that the period of remand is extended for a further 14 days, until the day fixed for trial. I do not subscribe to Mrs. Amesbury’s view that prosecuting counsel cannot make an application for a remand period to be extended after the expiry of the previous remand period of 14 days. However it goes without saying that if the justification for remanding the accused person has ceased to exist due to a change of circumstances, then the accused must be released.

[6] It is Mrs. Amesbury’s submission that the prosecution cannot every 14 days come and ask the Court for an extension of the remand period without justifying such extension.

[7] On this issue I refer to the ruling dated 17th October 2017 by the trial judge in this same case pursuant to a bail application made by the accused persons, as follows;

8. ... *I find that bail remains a right to a detained person and this right is exercised every 14 days and is subject to the prosecution being able to prove that remand is still necessary. This I have held previously in this case and is confirmed by the Court of Appeal case of **Kenneth Esparon v The Republic**. Underlining is mine*

[8] The trial judge however goes on to state the following:

9. *However, though one has a right to apply for bail every 14 days and the Prosecution has a duty to show to the Court that one has to be remanded further based on prima facie ground, there has to be a substantial change in circumstances that would lead this Court to reconsider the remand of the accused person.*

[9] In that ruling the Court refused the application for bail on the basis that there were no change of circumstances, the reasons given by the accused persons in support of releasing them on bail being the same given and dealt with in his earlier ruling of 22nd September 2017, remanding them to custody.

[10] The issue now before this Court was also canvassed to some extent in the case of Republic v Hoareau (CR SCA No.28/2010) [2011] SCCA 23 (01 September 2011). The appellant who was charged with trafficking in 76 grams of cannabis appealed against an order for his remand on the ground, *inter alia*, that “The Learned Judge erred in law in holding that *“The accused is remanded till the conclusion of the case, however the said order will be reviewed every 14 days to monitor any change in circumstances.”* The appellant submitted that the order of the Learned Judge remanding the appellant until the final determination of the case contravened section 179 of the Criminal Procedure Code which provides that “no such adjournment shall be for more than 15 clear days”; that the said order has the effect of fettering the discretion of the next presiding judge before whom the bail application is brought; that the practice of judges stating that the order will only be reviewed if there is a “change in circumstances” is a bad practice which has no constitutional or legal basis; and that section 179 of the Criminal Procedure Code is inconsistent with Article 18(7) of the Constitution and therefore void.

[11] The Court found that there was no conflict between the two provisions. Having examined Article 18(7) and 18(5) of the Constitution, it drew a distinction between pre-trial detention under Article 18(5) and (7) of the Constitution and detention after a person has been charged by a Court under sections 179 and 195 of the Criminal Procedure Code, in relation to the “Right to be released” under the Constitutional provisions and in light of an accused person’s right to be tried within a reasonable time. After examining section 179 of the Criminal Procedure Code the Court stated the following:

19. *It is to be emphasized that the right to be released at the pre-trial stage under article 18 (7) of the Constitution and once a person has been charged under section 179 of the Criminal Procedure Code are qualified rights to be determined judiciously by the courts on whom the drafters of the Constitution have vested the judicial power of Seychelles. The only difference being that once a charge has been laid it becomes the duty of the court to ensure that the accused is afforded a fair hearing within a reasonable time.*

20. *It will be misconceived to argue that once a person has been charged before a court, he can be committed to custody only for a period of 15 days before or during the hearing and he should as of right be released thereafter.* Underlining is mine.

[12] In dismissing that ground of appeal the Court concluded as follows:

21. The Learned Judge did not err when he said that "The accused is remanded till the conclusion of the case, however the said order will be reviewed every 14 days to monitor any changes"; especially when taken in conjunction with his earlier statement, namely: "Further nothing prevents court as the case proceeds from releasing the suspect on bail, if court feels that the evidence is weak though the charge may be of a serious nature." By making this statement he has clearly left open the issue of the release of the accused on bail and certainly not fettered the discretion of the next presiding judge before whom the bail application is brought. The 'change in circumstances' the Learned Judge had meant is in respect of the prosecution case, which certainly is for the advantage of the accused and not putting upon the accused any burden of adducing new material to substantiate his claim for release on bail, although this too would be a matter that will necessarily have the consideration of the court. We therefore dismiss this ground of appeal. Underlining is mine

[13] In light of the above, it is clear that the prosecution have to show that circumstances exist justifying further remand of an accused person. In my view, when prosecuting counsel requests for the extension of remand for the accused persons, although it is not required that he or she goes to the extent of making a fresh application for remand, they have to satisfy the Court that the continued remand of the accused is still necessary. They may do this for example, by stating to the Court that they are relying on the same reasons set forth at the original remand application which in the absence of any change in circumstances, justify the continued remand of the accused persons. To my mind it is not sufficient for them to simply move for extension of remand of the accused persons and leave it at that. Having said that, I also take into account that the terminology used, that is "extension of remand" implies that the reasons originally justifying the remand of the accused persons are being relied on. I am also mindful that this is a practice which has obtained for a long time in our jurisdiction and to which little objection has been made and that an overnight change may cause disruption to the judicial process. This is therefore something that the prosecution and the Courts should bear in mind in future applications, more so in light of the fact that it concerns a constitutional right.

[14] This brings us therefore to the contention of the 1st accused that the fact that he has been on remand since 7th September 2017 to date, that is a period of 2 years and now 4 months,

constitutes a change in circumstances which warrants him being released on bail especially in view of the fact that there is no date fixed for continuation of hearing of the case.

[15] I note that despite hearing dates originally being fixed on a number of days in April and May 2018 and thereafter on other dates, the case has only been partly heard. It also appears from the Court proceedings of the 20th December 2019, that the Court is ready to fix dates for continuation of hearing of this matter but that this was not possible because one of the defence counsels was absent.

[16] I further take note of the very recent ruling delivered on 23rd December 2019 by the learned trial judge, pursuant to a bail application made on behalf of the 1st and 2nd accused on grounds including that the accused persons had been on remand for almost two years. In refusing the application, the learned Judge stated the following at paragraphs 4 and 5 of his ruling:

4. *I have diligently considered the arguments presented by all parties in this case in favour and against the bail Application. Having done so I consider that these new bail Applications preferred by the Learned Counsel for the 1st and 2nd accused are not different from the ones that have been made in the previous Applications of this kind. They are founded on the passage of time and its effect that it has on the accused remand period.*

5. *In the last Ruling of this Court on the subject, I gave the reason why I believe that the case has been dragging before this Court and how I considered its effect on the right to liberty of the accused persons. Here I refer to the 14th and 15th Paragraphs of the Ruling delivered on the 11th October 2019. In a gist the Court held that the delay arising in this case was not inordinate but was perfectly ordinate, it arose as a result of the accused exercising the Constitutional rights to cross-examination of Prosecution witnesses. If it was to be inordinate this Court would have released the accused person on bail." Underlining is mine*

[17] It appears from this ruling that the reasons set forth for releasing the accused on bail, namely the period for which he has been on remand, has been considered by the learned judge in two previous very recent applications. He found no merit in the applications on that ground. I am inclined to agree with him.

[18] Having said that I am also mindful of the cases of *Kenneth Esparon & Ors v The Republic (SCA CR Nos. 1/2/3/2014) [2014] SCCA (14 August 2014)* and *Bresson v The Republic (SCA CR No.44/2014) [2015] SCCA (17 April 2015)*. In the second case (which is the most similar to the present one in terms of the time on which the accused persons had been on remand) the accused persons had been on remand for a period of 2 years 4 months and were released on bail on very stringent conditions despite being charged with serious offences and the risk of flight from the jurisdiction. However that case differs from the present one in that at the time the application was made, only 6 out of 39 witnesses had deponed and it was obvious given the circumstances of that case that it would be a protracted one. Here there are not so many witnesses remaining and the Court is ready to fix dates for continuation of hearing.

[19] In the circumstances I cannot find that the time that the accused persons have been on remand constitute a change of circumstances which warrant enlarging them on bail. Nevertheless should the dates for continuation be protracted to the extent that the hearing cannot be completed within a reasonable time, serious consideration should and must be given to the accused persons' release on stringent bail conditions which would eliminate any risks of absconding or interfering with the witnesses.

[20] In the circumstances the motion for bail is denied and the remand of the 1st to 4th accused persons to custody is extended until 15th January 2020 at 10.30am.

Signed, dated and delivered at Ile du Port on 9 January 2020



Carolus J