

**IN THE SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2021] SCSC  
CR 101/2021

In the matter between:

**SM**  
(Represented by Mr Daniel Cesar)

**Applicant**  
(Accused)

and

**THE REPUBLIC**  
(Represented by Ms. Esha Benoiton)

**Respondent**

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**Neutral Citation:** *R v SM* (CR 101/2021) [2021] SCSC 839 (2 December 2021)  
**Before:** Adeline B, J  
**Summary:** Application for unconditional or conditional bail  
**Heard:** 11 November 2021  
**Delivered:** 2 December 2021

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**RULING**

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**ADELINE B, J**

[1] On a charge of Sexual Assault Contrary to Section 130(1) read with Section 130(2) (d) of the Penal Code, punishable under Section 130(1) as read with Section 130(4) (a) and (b) of the Penal Code as amended by Act 5 of 2012, [SM] of [Redacted] Mahe, Seychelles stands accused before this court of one count of Sexual assault.

[2] The particulars of the offence as featured in the charge sheet dated 22<sup>nd</sup> October 2021, reads as follows;

“SM on the 19<sup>th</sup> October 2021, at Montagne Posee, sexually assaulted one AM aged 14 years old by penetrating the body orifice, namely, the vagina of the said AM with his penis for a sexual purpose.”

[3] On the 4<sup>th</sup> November 2021, the said SM pleaded not guilty to the charge, and trial was fixed to commence on the 7<sup>th</sup> December 2021, to continue on the 21<sup>st</sup> of March 2022 up to the 25<sup>th</sup> March 2022.

[4] The Applicant/Accused (also the accused) who was remanded in police custody on the 22<sup>nd</sup> October 2021, remained in police custody following an unopposed application made by the prosecution. Through defence Counsel, the Applicant/Accused now applies to this court by way of Notice of Motion supported by an affidavit duly sworn by him for his release on bail unconditionally or in the alternative, for his release on strict bail conditions.

[5] At paragraph 6 of his sworn affidavit, the Applicant/Accused makes the following averment;

“That I am desirous to have bail and not to be remanded in Police custody for the following reasons;

(a) That although the offence alleged is serious in nature, I am innocent of all charges until proven guilty as enshrined and guaranteed by the constitution of Seychelles

(b) That I deny all the charges and there are no evidence but fabricated lies against me.

(c) That I have my business with expatriate workers with some their Gainful Occupational Permit coming to an end for both, my Farm and Garage business.”

[6] In reply to the Applicant’s/Accused’s application, the Respondent/Prosecution avers, that given that the accused has already been remanded in Police custody by an Order of this court, unless there is a “change of circumstances” that may affect the original decision to remand the Applicant/Accused, the court should not entertain the application for bail, citing *Samson v Republic* CR 82/2020 [2021] SCSC 90 (15 March 2021), and *R v Emmanuel* 2004 SCR 11, *R v Alphonse* CR 47/2006.

[7] The Respondent/Prosecution also avers, that the order for remand should be maintained because in its application for remand dated 22<sup>nd</sup> October 2021, it relied on the grounds specified under Article 18(7) of the constitution, particularly, “the grounds of the

seriousness of the offence coupled with obstructing the course of justice by way of interfering with the Key Witness in the case”.

- [8] Through its averment at paragraph 8 of the affidavit, the Respondent/Prosecution reminds the court, that the victim/complainant of the alleged offence is a minor who is only 14 years old, and who is “classified as a vulnerable witness who is prone to being intimidated by seeing the Applicant”.
- [9] The court is also reminded, that “the said offense is on the rise in this country and endangers the peace and tranquillity of the society” as put it by the Respondent/Prosecution.
- [10] Before giving due consideration to the merits of the Applicant’s/Accused’s application for bail, I am reminded, that the Respondent’s/Prosecution’s application for remand of the Applicant/Accused in Police custody dated 22<sup>nd</sup> October 2021, was decided on uncontroverted affidavit evidence because the Respondent opted not to object to the application, thus filed no affidavit in reply.
- [11] The Respondent/Prosecution had relied on the principle spelt out in R V Emmanuel [2004] SCR11. The principle basically says, that “the court should not hear arguments as to fact or law which have previously been heard unless there has been a change in circumstances that may affect the original decision as to bail”. In the instant case, the court has not heard any argument as to the fact or law in reply to the application by the Respondent/Prosecution dated 22<sup>nd</sup> October 2021 for the Applicant/Accused to be detained in Police custody because the Applicant/Accused simply opted not to object to the application. Therefore the facts and circumstances of this case fall outside the ambit of that principle.
- [12] I am somewhat baffled, that the Applicant/Accused has not put up a strong case for his release on bail unconditionally or with conditions. By large, in his supporting affidavit, he fails to disclose material facts that would justify the granting of bail. He nonetheless acknowledges, that the offence of which he has been charged is serious, but fails to plead why the seriousness of the offence should not be a bar to him being granted bail. He

avers, that he has “no reason to interfere with witnesses, and will not interfere with the course of justice” without giving any convincing commitment as to how he will go about to avoid or prevent interfering with witnesses, particularly, the star prosecution witness who is a minor and the alleged victim of the offence.

[13] As an alternative, the Applicant/Accused seeks to be released on conditional bail should the court refuse unconditional bail. He does not, however, plead or urge the court to consider any possible bail conditions such as for examples, a cash bail, a bail bond, or bail with or without sureties. The court cannot formulate a case for bail for the Applicant.

[14] An application for bail or remand, gives rise to the very fundamental question as to when the right to liberty guaranteed by Article 18(1) of the constitution can be restricted. It is a well settled proposition, that the right to liberty of the person cannot be arbitrarily curtailed. There is a plethora of courts’ judgements and rulings in which this legal position has been pronounced.

[15] In *Esparon and others v The Republic* SCA 1 of 2014, the court reiterated, that the right to liberty can only be restricted in “exceptional circumstances”, and therefore, in application by the prosecution to remand a suspect or accused, the prosecution has to satisfy the court that there are compelling reasons in law and on the facts of the case, to remand the accused in police custody. The term often used in statutes, such as for example under Section 101(5) (c) of the Criminal Procedure Code, and in case law is “substantial grounds”. In *R (on the application of F) v Southampton Crown Court* [2009] EWHC 2206 (Admin) Collins J held, that the Judge “was only entitled to refuse bail if there were substantial grounds for believing that he would breach, he would fail to turn up, or commit other offences”

[16] When hearing an application for bail or remand, the court has always to be mindful, that an accused person, by virtue of Article 19(2) (a) of the constitution, is innocent until proven guilty. That has to be the premise when adjudicating or ruling on applications of this nature. Given that a person suspected of having committed an offence, or a person charged with an offence has a right to bail as it was held in the *Esparon and others* case,

“bail may only be denied after the court has properly ascertained that compelling reasons exist in law, and on the facts which justify denial”.

[17] Strangely, in its affidavit in support of this application, the Applicant/Accused cites the case of Hurman V State [2004] PRV 53, thus assisting the court in determining this application. This is a case where the judicial committee held, that “where there are reasonable grounds to infer that the grant of bail may lead to such a result (ie absconding) which cannot be effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail”.

[18] In Bechary V The Republic SCA of 11/2009 326, the court spelt out Guidelines for consideration when determining an application for bail. In recognition that bail is a constitutional right, interalia, the court held that;

- (i) “the prime concern in a bail application is that once a court is properly seized of a case, the presence of the accused needs to be secured in a manner which respects the fundamental principle of innocent until a finding of guilt by an independent and impartial adjudication.
- (ii) The seriousness of the offence and the severity of the penalty likely to be imposed on conviction are factors relevant to the decision whether in all circumstances it is necessary to deprive the applicant of liberty. They do not of themselves provide grounds for refusing bail.
- (iii) A person must be released, unless the state can show that there are relevant and sufficient reasons for continued detention.
- (iv) The seriousness of the offence and the severity of the sentence are not irrelevant to the assessment of the risk of a defendant absconding or re-offending.
- (v) Continued detention can be justified in a given case if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the respect to individual liberty

- (vi) To support detention the prosecution must demonstrate a prima facie case against the accused. Then the court should determine whether the defendant may be released with or without conditions for the purposes of ensuring that the defendant appears on the day of trial, and
- (vii) The seriousness of the charge requires consideration of the facts of the particular offending charge. That is independent of considerations such as whether the defendant may interfere with witnesses, needs protection, has breached bail before, and may offend”.

[19] In sum, the Applicant/Accused is being remanded in police custody on an order of this court because he opted not to object to the motion that he be remanded and the motion had merits based on the law. The application under consideration is one for its release on bail. It was, therefore, incumbent of the Applicant to come up with a strong case addressing the matters as per the guidelines in the Beehary case. In this regard, the supporting affidavit to its motion is far from being adequate.

[20] Furthermore, there is no evidence of any “change of circumstances” that would warrant a reversal of the status quo and grant the Applicant bail with or without conditions. The Star prosecution witness whose testimony will be heard on the 7<sup>th</sup> December 2021, is a minor and a vulnerable witness who is prone to be interfered with. Should the Applicant be minded to file similar bail application in the course of the ongoing proceedings, this court would be most willing to give it its utmost consideration in the light of the evolving factual development, should there be any.

[21] Therefore, the instant application for bail fails, and is accordingly dismissed.

Signed, dated and delivered at Ile du Port on 2 December 2021.

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**Adeline, B**

**Judge**