

## SUPREME COURT OF SEYCHELLES

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Reportable

[2023] SCSC 580

CO34/2023

In the matter between:

**THE REPUBLIC**

*(rep. by Mrs. Nissa Thompson )*

and

**Prosecution**

**VIRAF UDWADIA**

*(rep. by Mr. Basil Hoareau)*

**Accused**

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**Neutral Citation:** *Republic vs Viraf Udwadia* (CO 34/2023) [2023] SCSC 580 (21<sup>st</sup> July 2023)

**Before:** Esparon J

**Summary:** Application for bail

**Heard:** 30<sup>th</sup> June 2023

**Delivered:** 21<sup>st</sup> July 2023

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### ORDER

Application seeking an Order from the Court to release the Accused on bail pursuant to section 179 of the Criminal Procedure Code read with Article 18(7) of the Constitution- Application was dismissed.

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### RULING

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**ESPARON J**

**Introduction**

1. This is an Application under section 179 of the Criminal Procedure Code read with Article 18(7) of the Constitution seeking an Order from this Court for the accused to be enlarged on bail subject to stringent conditions.

### **The evidence**

2. The Accused testified on Oath in Court to the fact that he is the owner of a number of properties and he is the director and shareholder in a number of Companies which own a number of properties and that the only properties that are subject to the charge and in respect to the Application under the Proceeds of Crime (Civil Confiscation) Act are the properties situated on Eden Island and that the other properties are not subject to the same namely Palmont.
3. He further gave evidence that before his arrest, he was the only one looking after these properties, everything as from maintenance to reservations, to any break down or emergencies.
4. According to the accused, these properties are namely Palmont Commercial Center of which above the commercial activities businesses found at ground level of the building there are self-catering apartments. There is also the Palmont Apartments and the Palmont Studio apartments. The Palmont Commercial center has 8 one bedroom apartments and a 3 three-bedroom Apartment in the Attic. Then we have the Palmont Apartments, there are 3-bedroom apartment and also there is a large swimming pool and at the top floor there is a 1-bedroom apartment. There is also Palmont Studio apartment where you have 2 two bedroom Apartments. Furthermore, he has a three-bedroom apartment with a private pool and then there is a 3-bedroom apartment and there is a private pool on the ground and that is near where the Ah-Time family lives of which this property is called the Verlac property. There is also the Palmont Complex which has four 2 bedroom apartments and on the ground floor there is two bed room with a private pool.

5. The Accused further gave evidence that on the same property there is what you call Beau Vallon villa which has two 3 bedroom apartments which each having their own pool and that also on the same property there is Beryl's Studio which is a one-bedroom apartment and then where Palmont is there is Pierre's Studio.
6. The Accused testified to the fact that since his arrest these properties are in a deplorable state since all the bank accounts have been frozen and hence PUC automatically came and disconnected all the electricity leading to burst in the solar panels and that the water tanks are leaking. Furthermore, the place has no security and that their properties are now actually in the wild.
7. He further testified that his step father Pierre Ghislain, his mother having a cervical cancer and the son of Mr. Pierre Ghislain who is handicapped and has fallen in a depression cannot take care of the properties and hence there is no one to help at all since these properties are very complex since they are different properties and also since the staff have not been paid they have left employment
8. The accused gave evidence to the fact that if he continues to remain in detention, he will have to file for bankruptcy straight away since the whole properties are going from bad to worse.
9. The Accused gave evidence that he does not even have a passport and that his passport has expired for over 2 years and that since he was a flight attendant and travelled the world, for the last 2 years he has chosen not to travel and now he does not like travelling and that he will not leave Seychelles if he was released on bail. He also wants his properties to get back on its feet and the business to shine the way it was.
10. During cross-examination by counsel for the Republic, he maintained that there is no one to look after the property and that the extra-visit that he has from his girlfriend while in custody is to explain to her how to maintain the swimming pool and that it is impossible for his girlfriend to take care of the properties alone since there are quite a lot of properties

and furthermore she has not been in the business of which we are talking about 30 to 40 rooms.

11. He further gave evidence during cross-examination that if placed under house arrest he will be able to run his businesses by using his phone to give instructions to his staffs and even if given certain phone privileges whilst in custody, he will still not be able to do it since he gets one phone call per day or even none at times.

12. During cross-examination, when counsel for the Republic asked the following question to the accused namely 'what about boat trips as a means to travel', the accused was very hesitant to answer the question and from his answers the Court could see that he was being very evasive to the question but he finally stated that 'how will he go on boat trips if he has all these properties'. He also stated in his evidence thereafter that he does not have access to boats.

### **Submissions of Counsels**

13. Counsel for the accused submitted to the Court that there has been a change in circumstances and that the change in circumstances here being the properties which are now under the control of the companies which the accused is both the shareholder and director of which he is the principal director in the sense that he was the one running the businesses and that these properties are now in a dilapidated state of which we are talking about several properties and that the prosecution has not challenged the fact that there are issues with these properties, hence the evidence of the accused on this issue is uncontroverted that these properties are in a deplorable state.

14. Counsel for the accused also submitted to the court that it is not practical for the accused to run his business while in custody since the prison authorities will not allow him to be in possession of a phone.

15. Counsel invited the Court to revisit the issue of bail since remand should not be taken as a temporary means of punishment. Counsel also wanted the Court to address its mind whether this Court really believes that there are substantial grounds to believe that the accused will abscond if he is released on bail. Since the accused has stated that he does not intend to abscond and he will comply with any bail conditions.
16. Counsel for the accused relied on a case of the African Court of human rights namely the case of In the matter of LEGAL and Human Rights Centre and Tanzanian Human Rights Defenders coalition V/S United Republic of Tanzania, Application No 039/ 2020 and submitted that our constitution provides that you are innocent until proven guilty and that the Constitution provides that an accused should not be denied bail unless exceptional circumstances exist of which article 18(7) walks hand in hand with Article 19(2) of our Constitution.
17. He further submitted that what the Court should look at is that the accused person has his domicile in Seychelles, his occupation is that he was running a business and that his family ties are in Seychelles, that his businesses are in Seychelles and that these are the factors which the Court should focus on not in terms of the severity but mainly his nexus and connection with the Country where he is being prosecuted and that the accused connection is very strong. Counsel for the Accused further submitted that when the accused is on bail, he is in a better position to exercise his rights in terms of adequate time and facilities to prepare his defense.
18. On the other hand, Counsel for the prosecution has strenuously objected to the Application for bail and has submitted to the Court that there has not been any change in circumstances since the last order has been made by this Court and that there is still a risk that the accused may abscond and that there has been a possibility that he can use a vessel as well.
19. Counsel submitted to the Court that the only main ground that they are relying on is that because the properties are not in good state and that there is no one to run the properties

and that this is not a good reason enough to have the accused release on bail of which this does not amount to a change of circumstances.

### **Analysis and determination**

20. First and foremost, this Court reminds itself of the provisions of Article 19(2) of the Constitution which provides that ‘every person charged with an offence is innocent until the person is proved or pleaded guilty’ and hence in this jurisdiction a person is innocent until proven guilty.
21. Article 18(7) of the Constitution provides that ‘a person who is produced before a Court shall be released either unconditionally or upon reasonable conditions for appearance at a later date for trial or for proceeding preliminary to a trial except where the Court having regard to the following circumstances;
  - a) Where the Court is a magistrates Court, the offence is one of treason or murder;
  - b) The seriousness of the offence;
  - c) There are substantial grounds for believing that the suspect will fail to appear for trial or will interfere with witnesses or will obstruct the course of justice or will commit an offence whilst on release;
  - d) There is a necessity to keep the suspect in custody for the suspect’s protection or where the suspect is a minor, for the minor’s own welfare;
  - e) The suspect is serving a custodial sentence;
  - f) The suspect has been arrested pursuant to previous breach of conditions of release for the same’.
22. It is trite law from the above Article of the Constitution that an accused person has a right to bail subject to the permissible derogations as provided for in Article 18(7) (a) to (f) of the Constitution. It is also the rationale of the law of bail that bail is the rule and remand is the exception.
23. In the case of *Laura Valabji V/S the Republic* SCA CR 08/ 2022, of which the Court of Appeal relied on the case of *Beehary V/S Republic* SCA 11 of 2009 which endorsed the case of *Hurnam V/S State* (2005) UKPC (2006) 1 WLR, which held the following;

‘that seriousness of the offence and the severity of the sentence which an Applicant would be likely to incur are not of themselves grounds for refusing bail, but are factors relevant to the Judgment in all circumstances, if it is necessary to deprive the Applicant of his Liberty’.

24. Justice Robinson also stated in the case of Laura Valabhji (Supra) that;

‘The European Court of Human rights has realistically recognized that severity of the sentenced faced is a relevant element in the assessment of the risk of absconding or re-offending (Vide Ilijkov V Bulgaria (Application no 33977/96, 26<sup>th</sup> July 2001, Unreported.

Her Ladyship further Stated that ‘in the case of Beehary, which endorsed the case of Hurnam, Lord Bigham, Lord Scott, Lord Carswell, Lord Brown and Lord Mances agreed and stated as follows;

It is obvious that a person charged with a serious offence, facing a severe penalty if convicted, may well have a powerful incentive to abscond or interfere with witnesses likely to give evidence against him and thus this risk will often be great in drug cases’.

25. In Laura Valabhji (Supra), Justice Robinson stated the following;

‘We are in agreement that in all countries where human rights are respected, the function of the law of bail is likely to be the same, being to reconcile, as stated in Labonne (at page 22) on the other hand, the need to safeguard the necessary respect for liberty of the citizen viewed in the context of the presumption of innocence and on the other hand, the need to ensure that society and the administration of Justice are reasonably protected against serious risk which might materialize in the event that the detainee is really the criminal which he is suspected to be’.

Based on the above principles, it follows that a person should be released on bail if the imposition of conditions reduces the likelihood that a person will fail to appear for his trial or will interfere with witnesses or will otherwise obstruct the Court of justice or will

commit an offence while on release under Article 18(7) (c) to such an extent that they become negligible, having regard to the weight that the presumption of innocence carries in the balance. When the imposition of conditions is considered to be improbable to make any of the risk negligible stated in Article 18(7) (c) negligible, then the person should not be admitted to bail'.

26. This Court has already held in a ruling dated the 30<sup>th</sup> May 2023 the following;

- i) This Court finds that Ex-facie the Affidavit the prosecution has established a prima-facie case in the present matter in respect of the remand application.
- ii) This Court is of the view that the seriousness of the offence and the severity of the sentence is a relevant consideration for the Court to consider whether there are substantial grounds to believe that the accused may not turn up for his trial or may abscond. However, taken together with the statement made by the 1<sup>st</sup> Respondent in the presence of sergeant Neddy Fred as averred by the deponent at paragraph 65 of his Affidavit in support of the remand Application shows that the 1<sup>st</sup> Respondent is a flight risk.
- iii) The said statement of the 1<sup>st</sup> Respondent also shows that the 1<sup>st</sup> Respondent is a man of considerable wealth of which he may even have the ability manage his businesses whilst in Dubai. Counsel for the Respondent during cross-examination of the deponent who swore the Affidavit in support of the remand application cross-examined the said witness on the issue that he did not make any averment in his Affidavit about an Application made to seize the assets of the 1<sup>st</sup> Respondent. However, the averments in the Affidavit speaks volume which show the modus operandi of the way the 1<sup>st</sup> Respondent conducted his business namely in 15 businesses, that the 1<sup>st</sup> Respondent has only 7 businesses registered with the Seychelles Revenue commission. Furthermore, the Respondent having certain business and cars registered on other persons shows that the Respondent may still have considerable amount of wealth despite his assets being seized which shows that the 1<sup>st</sup> Respondent is a fight Risk.

- iv) Furthermore, the statement made by the 1<sup>st</sup> Respondent to sergeant Neddy Fred as stated at paragraph 51 of this judgement and the modus operandi of the manner in which the 1<sup>st</sup> Respondent operates his businesses also shows that substantial grounds do exist for believing that the first Respondent may commit an offence in the event he is released on bail, namely the offence of money laundering
- v) As a result of the above, this Court is of the view that the imposition of conditions on the Respondents is considered by this Court to be improbable to make any of the risk negligible stated in Article 18(7) (c) negligible namely that there is a risk that the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent may not turn up for trial and abscond or may commit offences whilst on bail having regard to the weight that the presumption of innocence carry in the balance.

27. *In the case of The Republic V/S Terrence Alphonse CO47/2006*, the Court relied on the case of *Republic V/S Cliff Emmanuel & Richard Freminot CR85/2003* which cited the case of *R V/S Slough Justices, Ex-parte Duncan, 1982 Criminal Appeal R384* where it was said that the Court should not hear arguments as to fact or law which it has previously heard unless there has been a change of circumstances that might have affected the earlier decision.

28. Similarly, in the case of *Nottingham Justices ex-parte Davies 1980, Criminal Appeal Report 178*, whereby the Nottingham City Justices refused to hear full arguments in support of an application for bail, unless they are informed that there are new circumstances and they further considered that the nature of the new circumstances is such as to justify them in hearing full arguments. A similar approach was also taken in the case of Reading Crown Court ex-parte *Malik, 1981, Criminal Appeal Report 146*.

29. Counsel for the accused has submitted to the Court that there has been a change in circumstances and that the change in circumstances here being the properties which are now under the control of the companies which the accused is both the shareholder and director of which he is the principal director in the sense that he was the one running the

businesses and that these properties are now in a dilapidated state of which we are talking about several properties.

30. This Court has considered the submission of counsel for the Accused and counsel for the Republic as well as the authorities cited above and finds that such a reason as stated at paragraph 29 of this judgment does not amount to a change in circumstances warranting the accused person to be released on bail. With all due respect to Counsel for the Accused, this Court is not in a position to advise the Accused person of how to manage his property whilst he is incarcerated. However, there are other ways that he can preserve his property should he choose to do so such as giving another person a general power of Attorney to manage his property, enter into a management contract with another person, appointing a manager or even leasing the said properties.
31. Counsel for the Accused has also submitted to the Court that the Court should revisit the issue as to whether the Court has reasonable grounds to believe that the Accused may abscond. I have meticulously considered the submissions of Counsel for the Accused and Counsel for the Republic as well as the authorities cited above and this Court finds that in the event the Court revisits its order without finding that there is a change of circumstances warranting the accused to be released on bail, this Court would be acting on Appeal upon its previous Order made.
32. However this being said, although the accused has given evidence to the fact that he has no passport and that the said passport has expired since 2 years and that he doesn't like travelling in view that beforehand he had travelled the world when he was a cabin crew, since the Accused was being very evasive as to his answers given to the question while being cross-examined by Counsel for the prosecution on the issue of 'what about boat trips as a means of travel' of which this Court has observed the demeanour of the accused whilst giving his evidence on the issue of absconding and I find his demeanour to be wanting and hence this court finds that the accused was not a credible witness when he gave his testimony on this issue. As a result of this, I do not believe the Accused was being truthful when he stated that he does not intend to abscond. Hence this Court is of the view that there

are reasonable grounds to believe that the accused may abscond for the reasons given in my previous ruling and for the reasons given in this ruling.

33. Counsel for the Accused has further submitted that since the 2<sup>nd</sup> accused has now been released on bail, that the 1<sup>st</sup> Accused should be treated alike and that the Court should consider this when making its ruling. However, this Court is of the view that like cases should be treated alike bearing in mind of the number of counts of which has been charged against the 2<sup>nd</sup> Accused namely 4 counts and the number of counts against the first accused which was very much on the high side. Hence it cannot be said that making an order remanding the 1<sup>st</sup> accused, the Court has given a different treatment to the 1<sup>st</sup> accused from the 2<sup>nd</sup> accused. Furthermore, in my previous ruling, it is clear that in remanding the 1<sup>st</sup> Accused person, I had considered factors which are different from the ones I had considered in deciding to remand the 2<sup>nd</sup> Accused person in custody in relation to the ground of absconding.

34. As result of the above, I accordingly dismiss this Application and remand the accused in custody.

Dated, signed and delivered at Ile du Port on the 21<sup>st</sup> July 2023.

.....*J. Esparon*.....

Esparon J

