IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 52
CR 70/2021

REPUBLIC *(rep. by Evelyn Almeida)*	**Applicant**
and	
DAHLIN JOUBERT *(rep. by Joel Camille)*	**1st Respondent**
MARVIN CAMILLE *(rep. by Joel Camille)*	**2nd Respondent**
ALEX CECILE *(rep. by*	**3rd Respondent**

Neutral Citation	*Republic v Dahlin Joubert & Ors* CR 70/2021 [2021] SCSC 52 (20 July 2021
Before:	Vidot J
Summary	Remand application; defective affidavit, hearsay evidence contained in affidavit; substantial grounds
Heard:	06 July 2021
Delivered:	20 July 2021

RULING

VIDOT J

[1] The Accused have been charged with the offences of trafficking in a controlled drug contrary to section to section 7(1) as read with section 2 of the Misuse of Drugs Act 2016, ("MODA") and conspiracy to traffic in a controlled drug contrary to section 16(a) as read with section 7(1) of MODA and both offences are punishable under section 7(1) read with the Second Schedule of MODA.

[2] The Prosecution has now filed a Notice of Motion supported by an affidavit sworn Sub-. Inspector Johnny Malvina of the Anti-Narcotics Bureau (ANB) of the Seychelles Police Force asking Court to remand the Accused to custody. This Application is made in terms with section 179 of the Criminal Procedure Code read with Article 18(7) of the Constitution. The affidavit apart from rehearsing the facts leading to the arrest of the Accused spells out the grounds on which the application is being made.

[3] These grounds are as follows;

(i) The offences of Trafficking in a controlled drug and Conspiracy to traffic in a controlled drug are serious offences that carry an indicative minimum sentence of 20 years and a maximum sentence of life imprisonment and a fine of SR750,000.00 for Class A drug on conviction;

(ii) The 1st and 2nd Respondents were found with a large amount of cash and several phones and electronic devises and a digital scale among other items, aggravated by the fact that the 1st Respondent is an ANB Patrol Officer and one of his duties is to act upon information of any drug transaction taking place and the 2nd Respondent as a Watch Stander with the RCOC, which duties include surveillance of illegal activities at sea which he is required to report to his supervisor and the 3rd Respondent has a pending case with the ANB in CB578/19 ANB, having been caught with 1.6 grams of heroin and 24.77 grams of cannabis resin, shows a highly organised and commercial element with possibility of involvement of a larger group;

(iii) There are reasonable grounds to believe that considering the nature of jobs held and background of the Respondents with the seizure of several electronic devices and large sum of money that could have been obtained by illegal means, if released on bail, there is a high likelihood of interference with the other investigation in relation to those suspected of involvement which may lead to further arrest;

(iv) There are reasonable grounds to believe that the Respondents will fail to appear for trial and/or do other activity thus obstructing the course of justice, if released on bail considering the seriousness of the offence; severity of punishment for such offences and considering the conduct of the 3rd Respondent to flee twice and trying to dispose of the controlled drug and his attempt to bribe the ANB officers and the 1st and 2nd Respondents' flee from the scene by taking a U-turn in their vehicle on seeing the 3rd Respondent being arrested; and

(v) Drug offences are on the rise and the related consequences are a menace on the health and well-being of the small island state with serious impact on the younger generation and its potential negative impact on tourism and the image of Seychelles on the international platform

[4] Counsels for the Respondents were most forceful in their submissions objecting to the remand of their clients. Their main arguments were rooted on what they call failure of the Prosecution to present to Court substantial grounds for supporting the grounds for bail and they also took issue with the affidavit of Sub-Inspector Malvina as being not in compliance with the law and therefore invalid.

[5] An application for bail or remand strikes at the core of a most important Constitutional right; the right to liberty guaranteed under Article 18(1) of the Constitution. That is a right that cannot be arbitrarily nor removed on flimsy or capricious demand of the Police or other law enforcement bodies. A plethora of Rulings delivered by this Court, has echoed sentiments held in **Esparon v the Republic SCA 1 of 2014** that 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*** to remand the accused. Compelling reasons is often referred to as "substantial grounds".

[6] The mantra that should resonate in a Judge's mind when hearing a remand application is that a suspect or an accused is innocent until proven or has pleaded guilty as enshrined in Article 19(2)(a) of the Constitution.

[7] Therefore, to refuse bail the court has to be satisfied that there are "substantial grounds" for believing that the circumstances specified would occur. In **R v (on the application of F) v Southampton Crown Court [2009] EWHC 2206 (Admin)**, the Judge had refused bail on the basis that he was *"not sure"* that the accused would *"turn up and stay out of trouble"* On appeal, Collins J held that the wrong test was applied: *"it is not a question of him not being sure that the defendant would turn up or stay out of trouble ..... he 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."* The importance of applying the correct test was emphasised in **R (on the application of S) v Newcastle Crown Court [2012] EWHC 1453 (Admin)**. It is not a question that has to be answered in accordance with strict rules of evidence, for example, in **Re Moles [1981] Crim L.R 170,** it was held that it was permissible for a police officer to narrate what he had been told by a potential witnesses about threats that he had received.

[8] It was established in **Beeharry v R** that seriousness of the offence cannot be a standalone provision. Seriousness of the offence can be advanced as one of the highly probable reason for an accused to abscond or even interfere with witnesses and/or subvert the course of justice in an application for remand of an accused. However, there will be need in the latter instance for the prosecution to substantiate such ground. It is not sufficient to just state that the police believe that the accused will interfere with witnesses or obstruct the course of justice. To rely on mere belief is as per **R v (on an application of F)** (supra) be applying the wrong test.

[9] The nature and seriousness of the offence (and the probable method of dealing with the defendant for it): the relevance of seriousness of the offence is that the offence is likely to attract a severe sentence, the temptation for the defendant to abscond is more likely to increase. In **Hurnam v Mauritius [2005] UKPC 49; [2006] 1 W.L.R 857,** the Privy Council said that seriousness of the offence cannot to be treated as conclusive reason for refusing bail. The right to personal liberty is and remains an important constitutional right and should never be unnecessarily curtailed.

[10] Matters of character, antecedents, association and community ties of an accused; the significance of an accused having previous convictions is that it is likely to aggravate a sentence. Section 6 of the Bail Act of England, lists, failing to surrender to custody in answer to bail as especially relevant. Other known associations may give court concern about the possibility of further offences being committed whilst an accused person is on bail. The court may examine the community ties of the accused in order to make an informed decision on how likely it is that the accused will abscond. Other consideration could include marital status, whether the accused has dependent children, a stable employment (and for how long). Though a person with no fixed abode is not automatically prohibited from being granted bail, but it may in practice cause significant difficulty.

[11] The court will release an accused person either conditionally or unconditionally to allay any particular concern that the prosecution may have. If released on bail conditionally and the accused breaches the condition or more particularly fail to surrender to custody of the court then the court will issue a warrant for his arrest and once brought to court he shall be dealt with accordingly.

[12] It is unfortunate that Seychelles does not have a Bail Act that would set out the various considerations when dealing with bail/remand applications. England which has a Bail Act makes it an offence for failure to appear before court after a person has been released on bail. Such a provision serves as deterrent to prevent an accused who has been granted bail from absconding.

[13] The International Covenant on Civil and Political Rights (ICCRP) which Seychelles ratified in 1992 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.*" therefore remand remains an exception.

[14] I have considered the other grounds advanced by the Applicant in support of its application for remand. First there is the issue that the amount of cash found in the possession of the 1st and 2nd Respondents which, the Deponent of the affidavit states is 'large.' Personally I do not consider that amount of cash to be "large" or of particular

significance. In averring that the sum of money *"would have been obtained by illegal means"* the Prosecution is asking Court to make an adverse findings against the Respondents without an evaluation of the facts of the case. That is dangerous.

[15] The fact that several phones and electronic devices were seized does not make a strong case that warrant the deprivation of the Respondents of their right to liberty. In any case if these telephones and electronic devices are in the custody of the Police to be examined, there is still no need to deprive the Respondents of their Constitutional rights.

[16] The 3rd Respondent is alleged to have a drug related case pending with the Police. The case, it appears, is still under investigation. Since, this case is still under investigation, I shall not attach great weight to it. It cannot act as a ground to curtail the liberty of that Respondent.

[17] I take seriously the fact that the 1st and 2nd Respondents were employed with the ANB and the RCOC which are institutions inter alia mandated to fight against activities involved with controlled drugs. That can be considered as reasonable grounds for remanding the Respondents. The Applicant further states that since the 3rd Respondent attempted to bribe the ANB officers that could be translated into the possibility of the Respondents obstructing the course of justice. I am of the opinion that ANB officers on the whole should be above being bribed. The officers refused to be bribed and therefore that is not reasonable cause for remanding the Respondents, though as I said above I take the fact that 1st and 2nd Respondent were in the force a serious consideration.

[18] The Applicant further avers that there are strong grounds to believe that the Respondents belong to a larger group of organised crime. Yet they have failed to substantiate that. It is to be remembered that belief alone will not suffice.

[19] The Applicant also submits that the they have reasonable grounds to believe that the Respondents will fail to appear at trial because the 3rd Respondent attempted to flee and the 1st and 2nd Respondents fled from the scene of the incident when they saw the 3rd Respondent being apprehended. I find that this argument alone does not suffice for remanding of the Respondents. Since their apprehension there is no evidence of any

attempt to abscond and indeed from the affidavit it is clear that the Respondents have been somewhat co-operative. The attempt to flee could have been a natural and uncalculated reaction upon seeing the ANB officers on the scene. I believe that the likelihood of it happening again is minimal and bail conditions can be imposed to mitigate any possibility of such an eventuality happening.

[20] The Applicant also submits that such offences are on the rise and it is posing a menace on the health and well-being of the country with serious impact on the younger generation and potential negative impact on tourism and image of the country. This argument does not fall within the derogations established under Article 18(7) for restricting the right to liberty of a person.

[21] I think that at best strict bail conditions could be imposed on the Respondents.

[22] Counsels for the Respondents have attacked the affidavit of Sub-Inspector Malvina as being defective as to form. Therefore, if the affidavit is rejected the Notice of Motion would be defective in that it will not be supported by an affidavit.

[23] Mr. Basil Hoareau attacks the affidavit because it fails to identify which averments are of Sub-Inspector Malvina's personal knowledge and which were received through information. At paragraph 19 of Sub-inspector Malvina's affidavit he avers to what I will call 'a catch all' averment clause which states *"[T] statements in paragraph 1 to 16 of the affidavit are true to the best of my knowledge and information.'* It is Mr. Hoareau's contention that Sub-Inspector Malvina should have identified the averments which are of his personal knowledge and which were received through information.

[24] Counsel relied on **Union Estate Management (Proprietary) Limited v Hubert Mittermayer [1979] SLR 140** in which Sauzier J said an affidavit based on information and belief must disclose the source of the information and the grounds of belief and distinguish what part is based on knowledge and what part is based on information and belief.

[25] Counsel was concerned that the way the affidavit was presented it allowed for hearsay statements to be admitted. In **Loidi Soda v The Republic; Miscellaneous Criminal**

Application 150 of 2018, a case of Malawi it was said *"[T]o begin with, it is important to bear in mind that an argued bail application is not a trial. There is no requirement that there should be formal evidence given: Mansfield Justices, ex-parte Sharkey [1985] QB 613. The Court is allowed to rely on 2nd hand hearsay evidence relayed by the Police Officers or State Counsel, or by the applicant for that matter: see Re Moles [1981] Crim LR 170.* However, counsels for the respondents were advocating that the law of evidence needs to be observed.

[26] Mr. Hoareau relied on **Re Cohen [1950] ALL E L.R36** wherein the Court said the following;

"There is no special rule which entitles a petitioning to depart, in seeking to establish his case, in any way from ordinary rules of evidence. One can see that there is a temptation, to save trouble or voluminous documentation, to use a form which the rules of evidence do not justify, but I think that it is desirable that state quite plainly that the rules of evidence must be properly observed. To depart from them may result in serious injustice being done to some individual who might suffer adjudication, or the making of a receiving, on materials which turn out afterwards to be quite incorrect, and which should never have been accepted in first instance. I venture to add this. It is suggested that insistence on oral evidence is, in fact, sometimes a troublesome matter which adds to the burden and costs in litigation, and that there should be much greater facilities for proving the facts in a case by affidavit evidence- the existing rules permit to a degree which is not, I think, always appreciated – but, for the use of affidavit evidence, instead of oral evidence, is destroyed at a blow. Affidavit evidence can only be entitled to the same weight as oral evidence if those who swear the affidavit realise that the obligation of the oath is as serious when making an affidavit as it is when making statement in the witness box."

[27] The Criminal Procedure Code does not provide rules as to form and content of affidavits. The only existing rules in Seychelles law with regards to affidavit can be found in the Seychelles Code of Civil Procedure ("SCCP"). Section 170 of the SCCP requires that an affidavit shall be confined to such facts as a witness is able of his or his own knowledge

to prove, except in interlocutory application for which statement as to his belief, with the grounds thereof are admitted.

[28] Therefore, in the absence of any such specific rules for affidavit in criminal proceedings, the general rule on affidavits must apply. The only rules are those for civil procedure. They should apply. A number of civil cases have addressed the issue of affidavits and in particular whether they comply in form and substance to section 170 of the SCCP.

[29] In **Erne v Brain & Ors (MA 290/2015 and 230/2016 arising in CS 126/2011 [2017 SCSC 10 (13 January 2017)** the Court made the following observation;

"The Court has on countless occasions laboured the points that affidavits are evidence and are therefore subject to the same rules of admissibility as other evidence. In the present affidavit it may well be that the Deponent may have been told by the Plaintiff what her wishes are but that is hearsay evidence and is inadmissible. The Deponent may however have personal knowledge of some facts that is not stated in his affidavit. That distinction is essential and will validate or invalidate an affidavit. In this case the latter applies"

[30] The question of form of affidavits was also considered in **Dubois & Ors v The President of the Republic & Ors. [2016] SCSC 23** in which the Constitutional Court took issue with the forms of affidavits and found that those statements in breach of section 170 of the SCCP and other written laws are improper and inadmissible. In that case, certain statements of the Petitioners were based on speculation, not fact; inadmissible hearsay; speculative about motivation and state of mind of the Respondents, which were not within the Petitioner's knowledge and are therefore, objectionable opinion evidence; argumentative; statements of opinion outside the factual knowledge and irrelevant opinion evidence that is vexatious and intended only to embarrass the Respondents. Based on the above and coupled with other deficiencies in the affidavit; the court ruled that it could not receive the affidavit.

[31] I have carefully considered the affidavit attached to the Notice of Moton in this case. I have to say that by implication of the catchall clause above mentioned averments, it is

clear that not all averments are within the personal knowledge of Sub-Inspector Malvina. There are in the affidavit matters that came to him through information.

[32] A brief perusal of case law on affidavits seems to support the principle that affidavits are sworn evidence and that evidential rules for their admission cannot be waived or ignored; see **Elmastry & Anor v Hua Sun (MA195/20101 (arising in CC13/2014)) [2019] SCSC 962 (8 November 2019)** and **Lablache de Charmoye v Lablache de Charmoy SCA 9/2019 [2019] SCCA 34 (17 September 2019)).** Therefore, the courts have been advocating that one cannot sacrifice proper form and procedure for the sake of expediency or simplicity where the issue at stake is a person's liberty.

[33] I have in the past, both formally and informally, I invited State Counsels to reconsider affidavits filed in support of Notices of Motion for remand application and have given them copies of **Union Estate Management (Proprietary) Limited v Herbert Mittermayer** (supra) for consideration. However, some State Counsels pronouncement that the rules set down in that case apply only in respect of affidavit in civil cases. I do not agree with the position. I am of the opinion that Sauzier J in holding that there is a requirement that deponents of affidavits disclose their information and the grounds of belief and distinguish what part is based on knowledge and what part is based on information and belief to be applicable to affidavits both criminal and civil cases. There was no attempt to restrict that requirement to civil cases. Most of the cases I have quoted above and below as far as form of affidavits is concerned, are civil cases. As I have already mentioned in the absence for specific rules for affidavit in criminal proceedings, the general rules on affidavit apply.

[34] It would therefore be safe to state that the affidavit in this matter does not meet the ordinary rules of affidavits. The issue that the Court has to decide is whether it is a fatal defect that would render the affidavit inadmissible. In some circumstances the court has been willing to adopt a less stricter interpretation of the affidavit requirements, especially in Constitutional Court matter and urgent applications; see **Paul Chow v The Commisioner of elections CC3/2007, United Opposition v Attorney General (unreported) CC 8/1995** and **Chetty v Chetty CS417/2006** (unreported) where the

courts dealt with defective affidavits with a degree of latitude and refused to dismiss the affidavits outright.

[35] In **Krishnamart & Company v Opportunity International [2007] SLR,** wherein an affidavit not bearing the stamp of notary was dismissed but the court suggested that a defective affidavit may be remedied at the court's discretion by *"rectifying it by way of amendment or filing a new affidavit"*.

[36] It was held **Re Moles** (supra) that, it has always been accepted that in an application for remand an affidavit may contain hearsay evidence. However, that does not necessarily mean that the affidavit may deviate from the rules established in **Union Estate Management (Proprietary) Limited v Herbert Mittermayer** (supra). The affidavit of Sub-Inspector Malvina did comply with the form as laid down in that case. It is nonetheless important that an accused is made aware which of the averments in the affidavit are purely hearsay. Therefore, I find the affidavit defective. That means that the Notice of Motion is not supported by a competent affidavit. That means that there is no affidavit at all. Can that defective affidavit be remedied by the Court or is that lack of form of the affidavit fatal?

[37] In **Chetty v Chetty** (supra) the Supreme Court stated;

"..... merely not being supported by an affidavit is not enough reason to warrant a dismissal of a motion especially where the grounds to be argued require no evidence and are, for instance purely matters of law. A motion drawn in the prescribed form and in general terms sufficiently setting out the grounds on which it is made would suffice where no evidence is required. (see Odongokara v Kamanda (1968) EA 210)"

[38] It appears that the court is granted a discretion, having regard to the nature, purpose and content of the affidavit to admit or disallow an affidavit. In recent cases, the Courts appear to prefer the stricter approach to affidavits such as in **Lablache** and **Elmastry** where it concluded that defective affidavits were bad in law and would not be admitted by Court. The **Krishnamart** case suggests that not all defects are fatal to the affidavit and

consequently to the cause. The Court may admit defective affidavits or allowed the defects to be remedied, for example by filing a fresh affidavit.

[39] This Application concerns fundamental human rights. The affidavit in this case serves as the main source of evidence against the Respondents. I do not believe that at these stage the affidavit can be cured. Sub-Inspector Malvina needed to specify which averments were within his knowledge and which were from information. I have reservation if in all instances the police have to reveal their source of information, despite what was held in **Mittermayer**. I will venture to state that if the information emanates from the Police themselves that source should be identified. However, if the source is from private citizens and that at the stage of a remand application requires a certain anonymity as a form of protection, the name of that source should not be revealed but averments in the affidavit should make that clear.

[40] Therefore, since I have ruled that the affidavit is defective and that it cannot be cured at the stage of proceeding, I find that the Notice of Motion is not supported by affidavit. The Application fails and the Respondents are dismissed from these proceedings.

Signed, dated and delivered at Ile du Port on 19 July 2021

M Vidot J