

SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 85
CR60 /2021

In the matter between

THE REPUBLIC
(rep. by Mr Esparon)

Applicant

and

Faiz Ali Mubarak
(rep by Mr Shakeel Mohamed)

1ST Respondent

Mickey Paul Barbier
(rep by Mr Andre)

2ND Respondent

Francois Richard De Letourdie
(rep by Mr Andre)

3RD Respondent

Neutral Citation: *R v Mubarak and Ors* (CR 60/2021) [2021] SCSC 85 (4 February 2022)
Before: Govinden CJ
Summary: Bail denied ; *prima facie* case for remand established ; offences serious ; substantial grounds to suspect that each may interfere with the evidence and abscond; no change of circumstances.
Heard: 21st of January 2022
Delivered: 4th February 2022

ORDER

The prosecution has proven that there is a *prima facie* case to detain all of the Respondents in custody in pursuant to Section 179 of the Criminal Procedure Code, read with Article 18(7) (b) and (c) of the Constitution; no change of circumstances that merits the enlargements have been proven.

GOVINDEN CJ

- [1] The prosecution has on the 7th of June 2021 moved this court on a motion for an order that all of the Respondents in this case be remanded in custody in accordance with Section 179 of the Criminal Procedure Code as read with Article 18(7) of the Constitution on the grounds set forth in an affidavit sworn by Detective Police Corporal Davis Simeon.
- [2] At that time the three accused were charged together with 4 other Indonesian Nationals as follows:

Count 1

Statement of Offence

Importation of a controlled drug contrary to Section 5 of the Misuse of Drugs Act 2016 and punishable under the said Section 5 as read with the Second Schedule of the Misuse of Drugs Act 2016.2

Particulars of Offence

Faiz Ali Mubarak (a Seychellois Citizen being the owner of the Vessel Baba Ali), Micky Paul Barbier (a Seychellois citizen), Francois Richard De L'etourdie (a Seychellois Citizen), Toripin (an Indonesian Citizen being the skipper on board the vessel Baba Ali), Oman Zul Fahmy (an Indonesian Citizen), Awal (an Indonesian Citizen) and Hamja Mohammad (an Indonesian Citizen) on the 22nd of May 2021 on the vessel Baba Ali, being a vessel registered in Seychelles (Seychelles Flag State) in the Seychelles territorial waters was found importing into Seychelles a controlled drug namely 8917.60 grams of Cannabis Resin.

Count 2

Statement of Offence

Importation of a controlled drug contrary to Section 5 of the Misuse of Drugs Act 2016 and punishable under the said Section 5 as read with the Second Schedule of the Misuse of Drugs Act 2016.

Particulars of Offence

Faiz Ali Mubarak (a Seychellois Citizen being the owner of the Vessel Baba Ali), Micky Paul Barbier (a Seychellois citizen), Francois Richard De L'etourdie (a Seychellois Citizen), Toripin (an Indonesian Citizen being the skipper on board the vessel Baba Ali), Oman Zul Fahmy (an Indonesian Citizen), Awal (an Indonesian Citizen) and Hamja Mohammad (an Indonesian Citizen) on the 22nd of May 2021 on the vessel Baba Ali, being a vessel registered in Seychelles (Seychelles Flag State) in the Seychelles territorial waters was found importing into Seychelles a substance with a total net weight of 8019.40 grams containing 3839.31 grams of a controlled drug namely Heroin (Diamorphine).

Count 3

Statement of Offence

Trafficking in a controlled drug contrary to Section 7(1) as read with Section 2 of the Misuse of Drugs Act 2016 and punishable under Section 7 (1) of the Misuse of Drugs Act 2016 as read with the Second Schedule of the said Misuse of Drugs Act 2016.

Particulars of Offence

Faiz Ali Mubarak (a Seychellois Citizen being the owner of the Vessel Baba Ali), Micky Paul Barbier (a Seychellois citizen), Francois Richard De L'etourdie (a Seychellois Citizen), Toripin (an Indonesian Citizen being the skipper on board the vessel Baba Ali), Oman Zul Fahmy (an Indonesian Citizen), Awal (an Indonesian Citizen) and Hamja Mohammad (an Indonesian Citizen) on the 22nd of May 2021 on the vessel Baba Ali, being a vessel registered in Seychelles (Seychelles Flag State) in the Seychelles territorial waters was found trafficking in a controlled drug by means of transporting, or offering to do any act preparatory to or for the purposes of selling, transporting, supplying, delivering or distributing a controlled drug namely 8917.60 grams of Cannabis Resin.

Count 4

Statement of Offence

Trafficking in a controlled drug contrary to Section 7(1) as read with Section 2 of the Misuse of Drugs Act 2016 and punishable under Section 7 (1) of the Misuse of Drugs Act 2016 as read with the Second Schedule of the said Misuse of Drugs Act 2016.

Particulars of Offence

Faiz Ali Mubarak (a Seychellois Citizen being the owner of the Vessel Baba Ali), Micky Paul Barbier (a Seychellois citizen), Francois Richard De L’etourdie (a Seychellois Citizen), Toripin (an Indonesian Citizen being the skipper on board the vessel Baba Ali), Oman Zul Fahmy (an Indonesian Citizen), Awal (an Indonesian Citizen) and Hamja Mohammad (an Indonesian Citizen) on the 22nd of May 2021 on the vessel Baba Ali, being a vessel registered in Seychelles (Seychelles Flag State) in the Seychelles territorial waters was found trafficking in a controlled drug by means of transporting, or offering to do any act preparatory to or for the purposes of selling, transporting, supplying, delivering or distributing a substance with a total net weight of 8019.40 grams containing 3839.31 grams of a controlled drug namely Heroin (Diamorphine).”

- [3] All of the accused persons have, since being charged, been remanded by the order of this court and in its Ruling dated the 21st of June 2021. In that decision the court motivated its pre-trial detention order as follows;

As to all the Respondents, I find that the offence of Importation in a controlled drug is serious in nature and carries a maximum sentence of life imprisonment and a fine of SCR 1 million if convicted. On the other hand, the offence of Trafficking in a controlled drug is serious in nature and carries a maximum sentence of life imprisonment and a fine of SCR750,000/- if convicted.

That the charged offences are on the rise in the country endangering the peace, public order and tranquility of society in nature and the need to protect the interest of the society within the legal, social economic and political environment of society. This is tarnishing the image of this country and it is having a serious impact on our socio cultural wellbeing. I give special consideration to the amount of controlled drugs involved, which are very high and consequently further impacts the seriousness of the offences.

The modus operandi of the commission of this offence shows a high level of organization and operational capacity of the accused person. They were prepared to strategise their operation and rendez-vous with non-national in open sea and there and then transhipped the controlled drugs and effect payment. This shows a strong commercial element, at least on a prima facie basis.

For these reasons, I am of the view that if they are released there are substantial grounds to believe that all of the Respondents would abscond from the due course of justice in an attempt not to face the consequences of their acts or that they would attempt to temper with the evidence of the prosecution and defeat the due course of justice

[4] However, following an agreement reached with the Attorney General under Section 61 (A) of the Criminal Procedure Code on the 9th of November 2021, the charges against the Indonesian nationals were dropped, with the aim of using their evidence in the forthcoming trial. This occurred on the 29th of November 2021. Though 2 new counts were added to the existing Information, the charges against the remaining three accused remains substantially the same as before, both in terms of their nature and severity.

[5] After this the 1st accused sought to replace his counsel, and his new counsel, a Mauritian national took his oath of office as Attorney at Law of the Republic of Seychelles on the 16th of December 2021. Counsel for the 1st accused then filed a motion for bail on the 17th December 2021. Everything proceeded thereafter as if the trial, fixed on the 20th December 2021, was to proceed.

- [6] However, on the first trial day, the prosecution informed the court that the accused has to plead de novo to the charges and further that his main witness was down with the COVID 19 and some others had been sent on an urgent case to La Digue and accordingly, it cannot proceed with the trial. On the other hand, the 1st accused informed the court that he is also applying for an adjournment as his new counsel had a personal predicament and had to go back to Mauritius. Hence, it was on the joint motion of the defence and the prosecution that the trial dates last December was aborted. No new trial dates have been fixed since then.
- [7] It is against this backdrop that the 1st accused counsel moved the court to release his client on bail. The principal thrust of his argument being that there has been a change of circumstances since the court made its previous remand order. He argued that this was principally caused by the acts and or omissions of the prosecution, with the end result that his client's right to fair hearing was being affected. This is strenuously resisted in a submission filed by the prosecution.
- [8] Learned counsel for the 1st accused made references to a number of local and international authorities which has finely established the following legal propositions. Firstly, that bail and liberty is the rule, whilst remand on detention pending trial is the exception. He went on to ground this submission on the fact that in this country a person is innocent until proven guilty whilst in many other jurisdictions it is through a presumption of law that this takes place. Secondly, that seriousness of the offence itself cannot be a ground in itself to order a pre-trial detention of an offender and that this has to effected only if the other preconditions such as risks of absconding and tempering with witnesses and evidence are present.
- [9] On the issue of whether or not there has been change of circumstances in this case, the Learned counsel made the following submissions; first, the fact that the 1st accused changed his counsel cannot be a change of circumstances. Especially as he was exercising his constitutional right to choose a counsel of his own choice in doing so and that in any event that his previous counsel could not stay on as he would be a witness in the trial. Further, he submitted that the record shows that the delay in the

case was not of his client's doing, as it was the prosecution which amended the charges and which asked for an adjournment of the trial and failed to disclose the bundle of disclosure material on time to the defence. He emphasised that as to date he is still awaiting the witness statement of the former accused in this case. This has not been forthcoming despite his insistence, something which he said has delayed his client's chance to plead anew in the case. All these, in his submissions, shows a change of circumstances resulting from the prosecution and not by the acts or omissions of his client. Something which should be taken in favour of enlargement on bail.

[10] Learned counsel for the Republic on the other hand objected to the delays being attributable to the prosecution and he insisted that the reasons for the court's decision in this case regarding the incarceration of the accused still remains relevant to date and therefore he pressed for denial of bail.

[11] I have given careful consideration to the Motion before the court and its supporting affidavit. I have given the same consideration to the written submissions of the Republic, whilst bearing in mind that the latter being submissions does not carry the same evidential weight as the affidavit of the Defence. I also gave close attention to the arguments presented by Learned counsels in their oral submissions.

[12] Having done so, I find that the reasons that I found justifying the detention of the accused in this case on the 21st of June last year are still pertinent and relevant to date. The offences charged are on a prima facie basis still very serious both on their alleged facts and the ultimate penalties imposable in cases of convictions. For these reasons, I am still of the view that there are substantial grounds to suspect that, if enlarged, all three accused persons may abscond or otherwise interfere with vital evidence or witnesses in this case. As far as I see, this has not changed since the three accused were indicted in this case.

[13] The only things that have changed is that the trial dates, as originally fixed with the consent of all parties in this case, had to be changed. However, the record reflects that this change occurred for reasons that can be attributable to both parties in this case. I

say that without impugning the rights of the 1st accused to elect a counsel of his own choosing, as no adverse inference can be drawn on the exercise of such rights. As a result of this change, I note there is more effluxion of time between the time the accused were charged and the time that they would be tried, something which may be a determining factor in the consideration of change of circumstances . However, in my view we are not there yet in this case as a new trial date still needs to be fixed and there are other considerations to be given before the court can make a determination on this aspect of the case.

[14] For these reasons, I find no merits in the motion for bail and it is accordingly dismissed.

Signed, dated and delivered at Ile du Port on the 4 February 2022

Govinden CJ