

SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC 262

CM43/2022

(Arising out of CR12/2022)

In the matter between:

THE REPUBLIC

(Represented by Mrs. Gulmette Leste)

vs

ANN WANJURU MWAI

(Present / Unrepresented)

1st Respondent

MARCUS FRED

(Represented by Mr. Clifford Andre)

2nd Respondent

and

MICHAEL FRED

(Represented by Mr. Clifford Andre)

3rd Respondent

Neutral Citation: *Republic v. Mwai and Fred* (CM43/2022 (arising in CR12/2022))

[2022] SCSC 262

(18 March 2022)

Before: B. Adeline, Judge

Summary: Application by the Prosecution to remand the accused persons / respondents in police custody

Heard: 11 March 2022

Delivered: 18 March 2022

ORDER

Application for accused persons to be remanded in police custody – Section 179 of the Criminal Procedure Code read with Article 18 (1) of the Constitution – Prosecution has to adduced sufficient evidence of a *prima facie* case against the accused persons – Grounds had to be made out – Guidelines in the case of Beharry followed – The application is allowed, and accordingly, the 1st, 2nd and 3rd accused are remanded in police custody to be caused to re-appear before this Court on the 23rd of March 2022 at 03:00 p.m.

RULING

B. Adeline, J

[1] By way of a formal charge sheet pertaining to CB No 35/2022, filed in Court on the 9th March 2022, one Anne, Wanjiru, Mwai (“the 1st Accused”), a self-employed Kenyan national who is presently in Seychelles, is charged with the offence which statement reads as follows;

COUNT 1

“Importation of a Controlled Drugs contrary to and punishable under Section 5 of the Misuse of Drugs Act, 2016 read with the Second Schedule referred thereto in the said Act”.

The particulars of the offence as summarily narrated read as follows;

“Ms. Ann Wanjiru Mwai, a self-employed Kenyan national, holder of passport BK057445, on the 23rd February 2022, at the Seychelles International Airport, imported into Seychelles a Controlled Drugs, namely, 498.76 grams of cocaine with an average percentage purity of 59%”.

[2] Also charged, as featured in the same formal charge sheet, is one Marcus, Jackson, Fred (“the 2nd Accused”) of Aux Cap, Mahe, Seychelles. The statement of the offence of which he is charged reads;

COUNT 2

“Trafficking in a Controlled Drug contrary to and punishable under Section 7 of the Misuse of Drugs Act, 2016 as specified in the Second Schedule referred thereto in the said Act”.

The particulars of the offence as summarily narrated, read as follows;

“Mr. Marcus, Jackson Fred, a 35 year old of Aux Cap, on the 24th February, 2022 at Intendance was found trafficking in a Controlled drug, namely, cocaine with a total net weight of 498.76 grams with an average percentage purity of 59% by way of selling, brokering, supplying, transporting, sending, delivering or distributing the said drug”.

[3] Also charged with similar offence as the 2nd accused as featured in the formal charge sheet, is Michael, Emmanuel Fred, a 19 year old, also of Aux Cap, Mahe, Seychelles. The statement of the offence reads;

COUNT 3

“Trafficking in a Controlled Drug contrary to and punishable under Section 7 of the Misuse of Drugs Act, 2016 as specified in the Second Schedule referred thereto in the said Act”.

The particulars of the offence as summarily narrated, read as follows;

“Mr. Michael, Emmanuel Fred, a 19 year old of Aux Cap, on the 24th February 2022, at Intendance was found trafficking in a Controlled drug, namely cocaine with a total net weight 498.76 grams with an average percentage purity of 59% by way of selling, brokering, supplying, transporting, sending, delivering or distributing the said controlled drug”.

[4] In accordance with Section 179 of the Criminal Procedure Code, reads with Article 18 (1) of the Constitution, the Prosecution now file this application by way of Notice of Motion supported by an affidavit as CM43/2022, which affidavit is sworn by the Investigation Officer into the alleged offences allegedly committed, one Stenio Cadeau, a Police Officer presently attached to the Anti-Narcotic Bureau (“ANB”) of the Seychelles Police Force. By this application, an Order of this Court is being sought to remand in police custody the 1st, 2nd and 3rd accused.

[5] Succinctly, the facts of the Prosecution’s case for remand of all the three accused persons in police custody as deponed by Police Officer Stenio Cadeau, are that, on the 23rd February 2022, while ANB Officers were performing their routing duties at the

Seychelles International Airport, flight ET879 from Addis Abba carrying a total of 84 passengers landed at 1427 hours. Of the 84 arriving passengers, 44 of them were body scanned. One of those passengers scanned was the 1st accused, a Kenyan national and holder of passport number BK057445 whom foreign bodies were found in her stomach. As she went through Immigration formalities, the 1st accused stated, that she has arrived in Seychelles for a seven day holidays, and that she will be staying at Les Tourelle Apartment during her stay in Seychelles. The 1st accused had in her possession USD1100 and a visa card.

[6] A physical search was carried out in the 1st accused luggage but nothing illegal was found. As she was being questioned by ANB Officers, the 1st accused confessed of having swallowed 45 cylindrical shaped bullets, and indicated that she was willing to cooperate with ANB Officers to have the person who was to come and collect the drugs arrested. Following the approval of the Commissioner of Police, the 1st accused was escorted to Les Tourelle Apartment at Aux Cap where ANB Officers mounted a controlled delivery operation.

[7] While at Les Tourelle Apartment, at around 1745 hours, in the presence of ANB Officers, the 1st accused sent a WhatsApp message to someone in Addis Abba whom she addressed as Afam Amanda. The message reads, "I have arrived". In reply, Afam Amanda said, "ok good". As per Police Officer Cadeau's deposition, that Afam Amanda who apparently is in Addis Abba, is the person he believes, gave the cylindrical shaped bullets to the 1st accused to bring to Seychelles, and she was expected to be paid USD 300 after successful delivery.

[8] At around 1810 hours, on that very same day, the 1st accused excreted 14 cylindrical shaped bullets suspected to be controlled drugs which ANB Officers took possession. 10 minutes later, the 1st accused received a video call from Afam Amanda. ANB Officers could not see the face of Afam Amanda. They could only hear the conversation between the 1st accused and him. Afam Amanda asked the 1st accused whether she was ok, and what she thought about the apartment. The 1st accused told him that she has paid USD 150 as cancellation fee. Later in the evening, at around 1949 hours, the 1st accused received another WhatsApp text message from Afam Amanda. Their conversation was over whether the 1st accused have had something to

eat. At around 2155, hours the 1st accused excreted another ten cylindrical shaped bullets which ANB Officers took possession.

[9] Police Officer Stenio Cadeau deponed, that in the morning of the 24th February 2022, the 1st accused excreted another 21 cylindrical shaped bullets which ANB Officers, once again, took possession. At around 0920 hours, the 1st accused received another WhatsApp text message from Afam Amanda who told her, that the person who is meant to come and collect the drugs has been contacted. At 1139 hours, the 1st accused received a text message from a local number 2573544, who told her that he is Christ. After few minutes later, the 1st accused received an audio voice message recording from Christ who told her that he is coming. At 1224 hours the 1st accused received another text message from local number 2573544. The person who spoke to her told her to take the bus and to come to town which the 1st accused did.

[10] While in town, the 1st accused received another WhatsApp text message which told her to buy a sim card at Cable and Wireless and then to sit on the bench at the Victoria Museum. The 1st Accused was then told to stand outside Barclays Bank close by. As ANB Officers observed the 1st accused as they followed her, they noticed that Adeyeri Adebayor was following her. The 1st accused was then asked to go to the Victoria bus terminal which she did. Adeyeri Adebayor was seen following her to the Victoria bus terminal. The 1st accused was then told to take a bus. She boarded the bus heading to Intendance. Adeyeri Adebayor was seen boarding the same bus.

[11] In the evening of Thursday the 24th February 2022, at Les Tourelle Apartment, the 1st accused received a video call from Afam Amanda who told her to go to the bus stop which she did. She waited there for 55 minutes but nobody came to meet her. She then returned to her apartment. Whilst there, the 1st accused received another audio WhatsApp message from Afam Amanda who told her that the person who will come and collect the drugs from her will now book a room at the same Lou Tourelle apartment where she is staying.

[12] At around 20:00 hours, the 1st accused received another text message from Christ on local mobile number 25735544. Christ asked her to come outside the gate at the apartment.

The 1st accused immediately proceeded to the gate where she saw a red Hyundai i30, and handed over a blue biodegradable bag containing a decoy made of cling film and white flour to the driver who was later identified as the 2nd accused, Marcus Fred. The 1st accused then returned to her apartment.

[13] ANB Officers who were on standby were given the task to intercept the red Hyundai i30 which they did immediately thereafter by following it until it stopped. Once stopped, ANB Officers introduced themselves to the driver and asked the driver to get out of the motor vehicle. They identified the driver as Marcus Fred. In the front passenger seat of the vehicle, the Hyundai i30, was Michael Fred, the 3rd accused. ANB Officers conducted a search in the vehicle. They found nothing. At around 2105 hours, the 2nd accused Marcus Fred, and the 3rd accused Michael Fred, were arrested for the offence of Conspiracy to Import a Controlled Drug. They were both cautioned and informed of their Constitutional right.

[14] ANB Officers carried out a search in the area where the red Hyundai i30 had stopped in search of the blue biodegradable bag that contained the decoy. They could not find it. The 1st and 2nd accused were taken to the ANB station to carry out other formalities following their arrest. Later in the evening of Thursday 24th February 2022, at around 0000 hours, the controlled delivery operation was called off, and the 1st accused was taken to the Anse Aux Pins Police Station, where in her presence, an ANB Officer slightly cut opened one of the cylindrical bullets and found to contain a white powdery substance suspected to be controlled drug, heroin. The same was placed in the evidence bag and sealed in the presence of the 1st accused. All the cylindrical shaped bullets were seized, tested and weighed. They were found to be cocaine and weighed 498.76 grams with an average purity of 59%, a class A drug.

[15] As to the grounds upon which the Prosecution pressed for remand, the first amongst others, is that the offence of which the 1st, 2nd and 3rd accused have been charged is serious, in that, the offence of Importation of a Controlled Drug carries a maximum sentence of life imprisonment, and a fine of 1 million rupees, whereas, the offence of Trafficking in a Controlled Drug carries a maximum sentence of life imprisonment and a fine of 750, 000/- rupees. The second of these grounds, is that the amount of controlled drugs (cocaine) has a high commercial value and had the drugs reached the

local market they would have caused more detrimental effect in our society. The third of these grounds, is that the 1st accused has no fixed abode in Seychelles, nor any affinity to Seychelles, and given the serious nature of the offence against her, there are reasonable grounds to believe, that if released on bail, she may attempt to flee the country.

[16] In his oral submission in response to the Prosecution's application to have the 2nd and 3rd accused remanded in police custody, learned defence Counsel strenuously objected to the Prosecution's attempt to have his clients remanded in police custody. In express of his strong opposition to the application for remand, learned Counsel began by stating, that based on Article 18 (7) of the Constitution, the 2nd and 3rd accused should be released unconditionally, or with conditions acknowledging that they may also be remanded in police custody. Learned Counsel contended, that as such, "remand is not the rule, remand is the exception to the rule", which he said means, that his client should be remanded to bail.

[17] In his attempt to scrutinise the affidavit evidence which the Prosecution sought to reply upon in support of their application for remand, learned Counsel contended, that the telephone number 2573544 mentioned in paragraphs 8 and 9 of Police Officer Stenio Cadeau's affidavit has not been linked to the 2nd and 3rd accused. Learned Counsel submitted, that the person who is linked to such phone number is Christ, and nobody knows who is he. Learned Counsel also took issue with the blue biodegradable bag containing the decoy made of cling film and white flour mentioned in paragraph 9 of the affidavit in support of the motion for remand. He stated, that this is a lie because if, as deponed by Police Officer Cadeau, the 1st accused handed over the same to the driver of the red Hyundai i30 which he said was Marcus Fred, then the ANB Officers who supposedly were on standby and who searched inside the red Hyundai i30 and in the vicinity where they stopped the red Hyundai i30, they would have seen it and would have been able to make it available.

[18] Learned Counsel submitted, that there was no decoy and as such, no decoy was given to the anybody, not even to Christ whom the Prosecution said is the 2nd accused, Marcus Fred, who is not Christ and doesn't know who is Christ. Learned Counsel also submitted, that the affidavit the Prosecution rely upon to remand the 2nd and 3rd

accused persons in police custody does not even say where the red Hyundai i30 was stopped by ANB Officers, and at the time they were searching inside the red Hyundai i30, where was it. Learned Counsel also took issue with the supposingly red Hyundai i30 itself, which apparently, was being driven by the 2nd accused, Marcus Fred. Learned Counsel stated, that even if in his affidavit Police Officer Stenio Cadeau mentions a red Hyundai I30, he makes no mention of the number plate of the red Hyundai i30 which would have been expected of him, and the ANB Officers who arrested him, for record purposes.

[19] Learned Counsel submitted, that even the 1st accused cannot say what was the registration number of the red Hyundai i30 that came to the gate at Les Tourelle Apartments to collect the decoy that never existed. This, according to Learned Counsel, shows that “there is no nexus to anything not even to the 2nd and 3rd accused”. In his own words, he had this to say;

“the Court cannot condone the lacking of the authorities in doing their job”.

[20] Learned Counsel did emphasise, that an identification should have been carried out because the 2nd and 3rd accused are not Christ. He stated, that an identification exercise would have enabled the 1st accused to identify the person to whom she allegedly gave the decoy, which he said, there was none. This was necessary, according to Counsel, given that it is deponed by Police Officer Stenio Cadeau, that in the local telephone text message which the 1st accused apparently received, she was to give the drugs to Christ, not to Marcus Fred.

[21] Learned Counsel reiterated, repeatedly, that there is nothing in the affidavit in support of the motion linking the 2nd and 3rd accused with the offence of importation or conspiracy to import drugs, or of drugs trafficking of which the 2nd and 3rd accused have been charged. As regards to the 3rd accused, Learned Counsel stated, that he was simply a passenger in that red Hyundai i30 which had no registration number.

[22] Learned Counsel submitted, that there is no indication of some sort of communication between the 1st accused and the 2nd or 3rd accused. He explained, that if the averments in the supporting affidavit is to be believed, the only communications have been

between Afam Amanda and the 1st accused, and Afam Amanda and Christ, and the 1st accused and Christ. Learned Counsel summed up his scrutinisation of the affidavit evidence in support of the motion by the Prosecution, stating, that “*the Court cannot condone the unprofessionalism of the ANB to curtail the Constitutional right and freedom of a person*”.

[23] Commenting on the grounds being relied upon by the Prosecution for remand of the 2nd and 3rd accused in police custody, learned Counsel stated, that although the offences of Importation of a Controlled Drug, and Trafficking in a Controlled Drug are serious offences that carry a maximum sentence of life imprisonment, there is no evidence of either the 2nd or 3rd accused having committed either of these two offences as there is no nexus between the offences and them, and no drugs were found on them. Learned Counsel also stated, that the fact that the drugs seized have a high commercial value cannot be a consideration for remand in police custody in the instant case because the drugs have nothing to do with the 2nd and 3rd accused, as “nothing was found with them, not even the blue biodegradable bag”.

[24] As to the suggestion that offences of this nature are on the rise in this country, learned Counsel conceded, that this is an undeniable fact, but said, that the 2nd and 3rd accused are not responsible for the rise as they are not responsible for the importation of the drugs, which on account of the affidavit evidence have not been linked to them. Learned Counsel moved the Court to remand the 2nd and 3rd accused to bail on strict bail conditions if the Court is tempted not to release them on unconditional bail.

[25] To decide whether the 2nd and 3rd accused should be remanded in police custody or be remanded to bail with or without conditions, it is necessary, at the outset, to put the application in perspective. The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is determined by way of application of the law, and to a large extent, by the facts and circumstances of each particular case. But at the same time, the right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the state of the burden of keeping the accused pending the trial, and at the same time, to keep the accused constructively in the custody of the Court whether before or after conviction, to ensure that he will

submit to the jurisdiction of the Court and be in attendance thereon, whenever his presence is required.

[26] Therefore, an application of this nature, seeking to have the accused / respondents remanded in police custody, strikes at the core of the most important Constitutional right afforded to every person. This is the right to liberty guaranteed under Article 18 (1) of the Constitution. There is a plethora of rulings, such as in *Esparon v. The Republic* SCA 1 of 2014, where the Courts have emphasised, that the right to liberty can only be interfered with in exceptional circumstances where the Prosecution has satisfied the Court that there are substantial grounds to remand the accused in police custody.

[27] In consideration of these matters, the Court must always be reminded, that under Article 19 (2) of the Constitution, “*every person who is charged with an offence is innocent until the person is proved guilty*”. That is the premise upon which the application to have the 2nd and 3rd accused remanded in police custody is to be decided in the light of the material laid before this Court, particularly, the averments in the supporting affidavit to the motion.

[28] It is, therefore, imperative of the Prosecution, in an application for remand in police custody as the instant one, that when relying on an affidavit in support, the averments therein must establish a *prima facie* case as regards to the existence of the conditions under Article 18 (7) (a) to (e) of the Constitution if the application is to succeed. This, infact, is in line with the requirements of the guidelines spelt out in *Beharry vs. The Republic* SCA 11 of 2009, in which case, the Court said the following;

“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 purpose of ensuring that the defendant appears on a subsequent trial date. The seriousness of the charge requires the consideration of the facts of each particular case and the evidence of the Prosecution gathered so far. This is independent of consideration such as whether there maybe interference with witnesses or there is a breach of bail conditions”.

[29] Article 18 (7) of the Constitution reads;

“(7) 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 proceedings preliminary to a trial except where the Court, having regard to the following circumstances, determine otherwise,.” (Stated at 8 (7) (a) – (f)).

There can be no disagreement with Counsel, therefore, that “remand is not the rule, remand is the exception to the rule”.

[30] Having said that, it is necessary to briefly comment on certain aspects of Learned Counsel’s submission for his client to be remanded to bail with or without conditions. It is undisputed, that as per the affidavit evidence, the local telephone number 273544 has not been linked with the 2nd and 3rd accused but to Christ instead, whom we don’t know who he is, although, one can speculate, that it could have been Marcus Fred who identified himself to the 1st accused as Christ in their telephone conversation. Furthermore, there is no indication that the Prosecution rely on the conversation between the 1st accused and Christ in pursuance of this application for remand of the 2nd and 3rd accused in police custody.

[31] The fact that the Prosecution have been unable to produce the biodegradable bag containing the decoy made of cling film and white flour, because as learned Counsel submitted, it never existed and is unavailable, has no bearing on whether this application should succeed or not, because it is not the basis upon which the application for remand of the 2nd and 3rd accused in police custody is being sought. If one is to believe, that the same was handed over to the person who came at the gate at Les Tourelle Apartments driving the red Hyundai i30, one can only speculate, that the same could have been thrown through the window of the red Hyundai i30 when it was being followed by ANB Officers prior to the arrest of the 2nd and 3rd accused.

[32] The fact that the affidavit does not disclose the registration number of the red Hyundai i30, and where it was stopped by ANB Officers, does not affect the strength of the

application to remand the 2nd and 3rd accused in police custody. This is because the 2nd and 3rd accused were arrested after the ANB Officers had mounted a controlled delivery operation. The ANB Officers' prime task was to apprehend the person who had come to collect the drug although he ended up collecting the decoy. The fact that ANB Officers' identified the driver of the red Hyundai i30 as Marcus Fred, is one of the reasons upon which the application for remand of the 2nd and 3rd accused in police custody is being sought.

[33] Therefore, while I would agree with learned defence Counsel for the 2nd and 3rd accused, that the affidavit in support of the motion to remand the 2nd and 3rd accused in police custody does not disclose all the detailed facts that he expected, the question that calls for an answer, is whether the averments in the affidavit provide sufficient evidence necessary for the application for remand of the 2nd and 3rd accused to succeed. It is clear, on account of the affidavit evidence, that there was an operation by ANB Officers to apprehend the person who was to come and collect the drugs from the 1st accused who had cooperated with them the moment she was apprehended at the Seychelles International Airport, and throughout the controlled delivery operation.

[34] Adducing evidence to prove a *prima facie* case against an accused in respect of an application of this nature, is considered to be more important than adducing evidence relating to the grounds upon which the Prosecution seek to have the accused remanded in police custody. Once enough facts have been adduced that give rise to the existence of circumstances that would justify the Court exercising its powers under Article 18 (7) (a) to (e) of the Constitution, that is it. The Court would then proceed to establish whether the grounds for remand in police custody are made out.

[35] Therefore, on account of the affidavit evidence, I am satisfied, that the Prosecution have adduced sufficient evidence of a *prima facie* case against the 2nd and 3rd accused for them to be remanded in police custody. In the case of *Beeharry v. The Republic* SCA 11 of 2009, 326, in recognition that bail is a Constitutional right, the Court sets out the necessary guide lines to be employed when determining whether an accused should be remanded in police custody or remanded to bail. The Court stated the following;

- (i) “The prime concern in a bail application is that once a Court is properly seised of a case, the presence of the accused needs to be secured in a manner which respect the fundamental principle of innocent until a finding of guilty 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 their liberty. They do not in 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 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 the purposes of ensuring that the defendant appears on the day of trial.
- (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 witness, needs protection, has breached bail before, and may offend”.

[36] Having considered these guidelines, as well as all the conflicting interests in the application, I am satisfied, that the Prosecution have proved a *prima facie* case against the 1st, 2nd and 3rd accused, and that sufficient grounds have been made out to detain the 1st and 2nd and 3rd accused in police custody. I therefore allow the application, and accordingly, I remand the 1st, 2nd and 3rd accused in police custody to be caused to re-appear before this Court on the 23rd March 2022 at 03:00 p.m.

Signed, dated and delivered at Ile du Port on 18th March 2022

B. Adeline

Judge of the Supreme Court