

SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC 368

CM26/2022

(Arising out of CO05/2022)

In the matter between:

THE REPUBLIC

(Represented by Ms. Corine Rose)

Applicant

vs

HILDA ANENA

(Present / Represented by Mr. Rajasundaram)

1st Respondent

and

KEVIN GERARD QUATRE

(Present / Represented by Mr. Clifford Andre)

2nd Respondent

Neutral Citation: *Republic v. Anena and Quatre* (CM26/2022 (arising in CM26/2022))

[2022] SCSC 368

(27 March 2022)

Before: B. Adeline, Judge

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

Heard: 14 March 2022

Delivered: 27 April 2022

ORDER

Application by way of a notice of motion supported by affidavit made pursuant to Section 179 of the Criminal Procedure Code – The Prosecution has tendered evidence of a *prima facie* case against the accuseds / respondents – The ground relied upon have been made out for continued detention in police custody – Article 18 (1) read with Article 18 (7) (b) and (c) of the constitution – There are compelling reasons why the accuseds/ respondents should be denied bail, and effectively, deny their right to liberty – The application to remand the accuseds / respondents in police custody succeeds, and accordingly, this Court orders, that they be further remanded in police custody.

RULING

B. Adeline, J

[1] By way of a formal charge sheet pertaining to CB04/02/22 ANB filed in Court on the 14th February, 2022 one Hilda, Anena of Kampala, Uganda (“the 1st accused”) who is presently in Seychelles, is charged with the offence which statement reads as follows;

COUNT 1

“Importation of a Controlled Drug contrary to Section 5 of the Misuse of Drugs Act, 2016 and Punishable under the Second Schedule of the said Act”.

The particulars of the offence as summarily narrated in the formal charge sheet read as follows;

“In that Hilda Anena of Kampala, Uganda on the 02nd February 2022, at the Michel Holiday Apartment, Les Mamelles, Mahe was found importing into Seychelles a controlled drug, namely, Heroin (Diamorphine) with a net weight of 999.98 grams”.

[2] In the alternative to Count 1, as specified in the formal charge sheet, the same Hilda Anena is also charge with the offence which statement reads as follows;

COUNT 2

“Trafficking in a Controlled Drug contrary to Section 7 (1) read with Section 19 (1) of the Misuse of Drugs Act, 2016 and Punishable under Section 7 (1) as specified in the Second Schedule of the said Act”.

The particulars of the offence as summarily narrated in the formal charge sheet read as follows;

“In that Hilda Anena of Kampala, Uganda on the 02nd February 2022, at the Michel Holiday Apartment, Les Mamelles, Mahe was found trafficking in a controlled drug, namely Heroin (Diamorphine) with a net weight of 999.98 grams by way of selling, brokering, supplying, transporting, sending, delivering or distributing the said drug”.

- [3] Also charged by way of the formal charge sheet before this Court, is co-accused Kevin, Gerard, Quatre of La Louise, Mahe, Seychelles (“the 2nd accused”) who is charged with the offence which statement reads as follows;

COUNT 3

“Conspiracy to commit the offence of Importation of a Controlled Drug contrary to Section 16 (a) read with Section 5 of the Misuse of Drugs Act, 2016 and Punishable under Section 5 as specified in the Second Schedule of the said Act”.

The particulars of the offence as summarily narrated in the formal charge sheet read as follows;

“In that Kevin Quatre of La Louise, Mahe, being a citizen of Seychelles along with other persons unknown to the Republic, on or around the 02nd February 2022, at the Michel Holiday Apartment, Les Mamelles, Mahe conspired with one Hilda Anena of Kampala, Uganda by agreeing with one another to pursue a course of conduct, that if pursued would amount to or in the commission of an offence under the Misuse of Drugs Act, 2016 by one or more of the parties to the agreement, namely, the offence of importation of a controlled drug namely, Heroin (Diamorphine) with a net weight of 999.98 grams.

- [4] The same Kevin, Quatre is also charged in the same formal charge sheet, which statement of the offence reads as follows;

COUNT 4

“Conspiracy to commit the offence of Trafficking in a Controlled Drug contrary to Section 16 (a) read with Section 7 (1) of the Misuse of Drugs Act, 2016, and Punishable under Section 7 (1) as specified in the 2nd Schedule of the said Act”.

The particulars of the offence as summarily narrated in the formal charge sheet read as follows;

“In that Kevin Quatre of La Louise, Mahe, being a citizen of Seychelles along with other persons unknown to the Republic, on or around the 2nd of February 2022, at Michel Holiday Apartment, Les Mamelles, Mahe conspired with one Hilda Anena of Kampala, Uganda, by agreeing with one another to pursue a course of conduct that if pursued would amount to or in the commission of an offence under the Misuse of Drugs Act 2016 by one or more of the parties to the agreement, namely the offence of trafficking in a controlled drug namely heroin (Diamorphine) with a net weight of 999.98 grams, by way of selling, brokering, supplying, transporting, sending, delivering or distributing the said controlled drugs”.

[5] There is now, before this Court, an application pending trial, brought by way of Notice of Motion supported by an affidavit by the Prosecution (now “the Applicant”) under Section 179 of the Criminal Procedure Code read with Article 18 (1) of the Constitution filed in Court as CM26/2022. The grounds of the application as presented and supported by the affidavit of the Applicant sworn by the investigating Officer, Police Officer Juliette Naiken, are *interalia*, as follows;

- (i) The seriousness of the offences of which both of the accuseds / respondents have been charged, in that, they carry a maximum of life

imprisonment on conviction, plus in respect of Importation of a Controlled Drug, a fine of SCR 1 million and in respect of trafficking in a Controlled Drug, a fine of SCR 750, 000/-.

- (ii) The offences of which the accuseds / respondents have been charged is prevalent and is on the rise in our country, endangering or threatening the peace, public Order and the tranquillity of our society, giving rise for the need to protect society within the current legal framework.
- (iii) Importation and Conspiracy to import Controlled Drugs into Seychelles involve people with different stake, both locally and internationally, that require in dept investigation into the drug network of organised criminal groups to which the accuseds / respondents belong to.
- (iv) that the 1st accused / 1st respondent who is a foreign national has no fixed place of abode in this country, thus there are substantial grounds for believing, that should she be remanded to bail, she will abscond and will not appear for trial.
- (v) that the 1st accused / 1st respondent being a foreign national with no fixed place of abode, necessitates that she be kept in Police custody for shelter and her own safety as well as for her own protection.
- (vi) that if the 2nd accused / 2nd respondent is released on bail, there are substantial grounds for believing, that he will commit similar offences while on bail, having done so, although in a previous case, CR20 of 2016, he was convicted of similar offence, and his phone number

2530303 is registered in evidence in an ongoing case before the Court, filed as CR113 of 2021.

- (vii) that there are substantial grounds to believe, that if the 2nd accused / 2nd respondent is released on bail, he may obstruct the course of justice by interfering with witnesses, particularly, the 1st accused / 1st respondent as was the case when She was hospitalised when many people attempted to see her although that was her first visit to Seychelles, and only the 2nd accused / 2nd respondent knew that she was in Seychelles.

[6] Learned Counsel for the 1st accused / 1st respondent did not object to the application, and therefore, made no submission oral or otherwise.

[7] In his oral opposing submission in response to the Prosecution's application for the 2nd accused / 2nd respondent to be remanded in Police custody, learned defence Counsel took issue with the fact, that after repeated demands, and after two occasions that his client has been remanded in police custody for 14 days, he still has not been served with the documents pertaining to the charges against his client. Learned Counsel stated, that the failure to serve him with the docket, means, that although he would have wished to be able to make a "frank and full disclosure objection", he is unable to do so.

[8] Learned Counsel contended, that given that the application has been made under Article 179 of the Criminal Procedure Code, he should have been served with the available documents, if any, and that would have enabled him to make a stronger case for his client not to be remanded in police custody, but instead, to be remanded to bail on stringent bail conditions. Learned Counsel cited the ongoing case of ACCS vs. Mukesh Valabhji and others, emphasising on the CJ'S ultimatum for the Prosecution to

serve defence with documents that are readily available, and others to follow as and when they become available. Learned Counsel urged the Court not to condone the Prosecution's behaviour in this respect.

[9] On the merit of the application, learned Counsel had very little to say and did not do enough to challenge the Prosecution's affidavit evidence to sway the balance towards remanding his client to bail on stringent bail conditions. For example, commenting on paragraph 12 of the affidavit, learned Counsel stated, that "there is no law in Seychelles that say you cannot stop on the main road", and then went on as to say, "that in fact, the ANB Officer, as stated, never saw or never heard that the 1st accused was instructed to enter the car", and that this is insignificant for the purposes of determining whether this application should succeed or not.

[10] As to the law, and how he thinks the law should be applied, Learned Counsel emphasised, that the Court's approach when considering an application made under Section 101 of the Criminal Procedure Code to remand a suspect in police custody should be different than one made under Section 179 of the Criminal Procedure Code, because the latter is made after the suspect has been charged as in the instant case. In his own words, learned Counsel had this to say;

"..... so one need to look at the charge and the affidavit whether there are supporting averments made by the deponent in respect of the charge which the person has been charged". He stated, that "there are no supporting averments in the affidavit in support of the motion to support the charges that have been levelled against his client".

[11] Learned Counsel made similar point in respect of Article 18 (7) of the Constitution, contending, that the averments in the affidavit should support the "criteria" required

under Article 18 (7) (a) – (f) for the Court to remand the 2nd accused / 2nd respondent in police custody and deny him his right to liberty, which he said, the supporting affidavit fails to do. Learned Counsel remarked, that when considering an application to remand an accused person in police custody for offences such as conspiracy to commit the offence of Importation of a Controlled Drug, for example, no Court in Seychelles will not find a *prima facie* case against the accused as the basis to grant the application. Learned Counsel added, that “it is a wrong custom or wrong practice just to consider *prima facie*” without looking at it in “relation to the charge”.

[12] It must be emphasised, at the outset, that an application for remand or bail, strikes at the core of one of the most important constitutional rights afforded to every person. This is the right to liberty under Article 18 (1) of the Constitution. That being the case, therefore, the grant or refusal to grant bail lies within the discretion of the Court. The grant or denial of bail, is regulated by law, primarily, by Article 18 (7) of the constitution, and to a large extent, by the facts and circumstances of each particular case. At the same time, it is well settled law, that the right to bail is not to be denied merely because of public sentiments. Article 179 of the Criminal Procedure Code indicates, that 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 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.

[13] This application to remand the 1st and 2nd accuseds / 1st and 2nd respondents in police custody, is being considered in the light of Article 19 (2) (a) of the Constitution,

which says, that “every person who is charged with an offence is innocent until the person is proved guilty or pleaded guilty. That being the case, therefore, this Court has to proceed on the premise that the 1st and 2nd accuseds / 1st and 2nd respondents have to be remanded to bail unconditionally, or upon reasonable conditions for reappearance in Court at a later date for proceedings preliminary to trial, unless the facts and circumstances of this application as put before it by way of affidavit evidence, persuade this Court to decide to remand the 1st and 2nd accuseds / 1st and 2nd respondents in police custody.

[14] If the 1st and 2nd accuseds / 1st and 2nd respondents are to be remanded in police custody this will effectively deny them of their right to bail, and in a wider perspective, their constitutional right to liberty. This begs the question, whether, based on facts and circumstances of the instant case, they can be remanded in police custody, thus their right to bail denied, and their constitutional right to liberty curtailed. As regards to bail, it is well settled by case law, *Esparon v. Republic* [2014] SLR 331, for example, that “bail may be denied, only after the Court has properly ascertained, that compelling reasons exist in law and on the facts which justify its denial. This has to be shown by the Prosecution by first of establishing a *prima facie* case against the 1st and 2nd accuseds / 1st and 2nd respondents.

[15] In respect of the permitted scope of the denial of the right to liberty, the House of Lords in *O (FC) Appellant vs. Crown Court at Harrow (Respondent)*, an appeal from the High Court of Justice, quoted and endorsed, a short passage from the Court’s decision in *Ilijkov vs. Bulgaria* one of the Strasbourg case law, as follows;

“84. The Court reiterates that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public

interest which notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty where the law provides for a presumption in respect of factors relevant to the grounds for continued detention....., the existence of the concrete fact outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated”.

- [16] In *Beharry v. Republic* SCA 11 of 2009, the Court formulated a set of guidelines to guide the Court in its approach in considering an application of this nature. The Court endorsed the proposition, that 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 of individual liberty. Furthermore, perhaps most significantly, the Court indicated, that when considering an application of this nature, made pursuant to Section 179 of the Criminal Procedure Code, as the instant one, it is incumbent of the Prosecution to demonstrate the existence of a *prima facie* case which terms translates from Latin, as essentially, the case at first sight.
- [17] Thus, the Prosecution carrying the burden of proof, has to only present evidence to create a rebuttable presumption that the allegation as asserted is true. As such, the standard of proof that the Prosecution must satisfy the Court at a *prima facie* case stage, is lower than for proof that the accused is guilty. Having said that, in my considered opinion, if a Prosecutor cannot establish a *prima facie* case in a given case, that almost certainly means, that the police did not have probable cause to support the arrest of the accused in the first place.

[18] The first issue to be determined, is whether the Prosecution has tendered evidence of a *prima facie* case against the 1st and 2nd accuseds / 1st and 2nd respondents. As per the averments in the affidavits as deponed by Police Officer Juliette Naiken, in a nutshell, it was on the 02nd of February 2021 at 1437 hours, that flight ET879 landed at the Seychelles International Airport. Amongst the passengers exiting the Airport was the 1st accused / 1st respondent against whom the ANB Officer had received prior reliable information was smuggling suspected controlled drugs into the country. As she exited the arrival immigration post, she let it be known, that she was in Seychelles for the first time on a 7 day holiday, and that she has booked a room at Michel Holiday Apartment at Les Mamelles, where she would be staying for the duration of her holiday. At the airport, the 1st accused / 1st respondent was met by ANB Officers who interrogated her. A taxi was then hired that took her to her booked holiday apartment where she was allocated with room number 18.

[19] At 1948 hours, ANB Officers arrived at room 18 at the Michel Holiday Apartment. As they knocked the door and asked that it be opened, the 1st accused / 1st respondent answered and then opened the door. As ANB Officers entered the room, they introduced themselves to the 1st accused / 1st Respondent and proceeded to interrogate her. The 1st accused / 1st respondent confessed having swallowed 100 cylindrical shaped bullets of a controlled drug, stating, that she has already excreted some. The 1st accused / 1st respondent then handed over to the ANB Officer 14 cylindrical shaped bullets made of cling film which she removed from a black trolley bag. After the Commissioner of Police had authorised a controlled delivery operation to be conducted, the controlled drugs were substituted by a decoy.

[20] At 2023 hrs, the 1st accused / 1st respondent received an international phone call from one Soya from Uganda. In the telephone conversation between them in the Ugandan language, ANB Officers were told by the 1st accused / 1st respondent, that Soya wanted to know whether she needed anything for the guy in Seychelles who is coming to pick up the drugs to bring to her. Then followed a WhatsApp phone call from one Alur, whom the 1st accused / 1st respondent said was her brother-in-law, and another WhatsApp phone call from Soya enquiring about her shopping list to give to the guy who is coming to collect the controlled drugs.

[21] At 2155 hrs, the 1st accused / 1st respondent received another WhatsApp phone call from Soya, and they again spoke in the Ugandan language. According to the 1st accused / 1st respondent, Soya had told her to go to the main road and to walk towards the left hand side of the road, where someone in a white car will stop close by her and will call the name “Ania”, (a coded name), and to carry with her, her immigration document for identification purposes. Shortly after, at 2202 hrs, the 1st accused / 1st respondent received another WhatsApp phone call from Soya which conversation, the ANB Officers could hear from the phone’s speakers. Soya informed the 1st accused / 1st respondent that the car was outside, and the latter informed the former that she was on her way. ANB Officer then proceeded to the main road to take their position to identify the person who was coming to pick up the controlled drugs.

[22] At around 2212 hrs, ANB Officers observed, as the 1st accused / 1st respondent walked towards the main road and then stopped, and waited near the boundary wall of Michel Holiday Apartment. ANB Officers observed a white kia picanto, bearing registration number S7643 coming from the east of Mahe (from the Seychelles Breweries) heading towards Victoria that stopped close by the 1st accused / 1st respondent. As

they quickly and silently moved toward the white car, they heard a man's voice coming from inside the car, shouting, "Ania get in, get in". As the 1st accused / 1st respondent was about to get into the said car, an ANB Officer quickly removed the car key from the car's ignition. At that point, ANB Officers introduced themselves to the driver of the car who is well known to them as Kevin Quatre, the 2nd accused / 2nd respondent.

[23] The 2nd accused / 2nd respondent was asked by ANB Officers to get out of the car which he did, and was thereupon apprehended and restrained. Both the 1st accused / 1st respondent and the 2nd accused / 2nd respondent were taken to Room 18 of the Michel Holiday Apartment, where at 2220 hrs, the latter was formerly arrested. He was informed of the reasons for his arrest and of his Constitutional rights. He remained silent while there, the 2nd accused / 2nd respondent received a local phone call from telephone number 2857757. He answered the phone that was on speaker at the time. A male voice was heard calling the name of the accused, "Kevin". The 2nd accused / 2nd respondent answered, saying;

"Monn ganny en pti problem, mon a call ou".

[24] Thereafter, the 2nd accused / 2nd respondent received several phone calls from the same phone number 2857757, but he did not answer them. The 2nd accused / 2nd respondent was then taken to the ANB Office to complete other necessary formalities. A search in car S7643 was carried out. ANB Officers found in the trunk of the car 42 yoghurts, one packet of bread, four packet of Milk and one packet of cookies, all of which were seized as exhibits.

[25] On the 03rd February 2022, at 0900 hrs, the 1st accused / 1st respondent in the presence of ANB Officers, excreted a total of 21 cylindrical shaped bullets, then at 0950 hrs, she

excreted another 16 cylindrical shaped bullets followed by 7 cylindrical shaped bullets at 1020 hrs. At 1100 hrs she excreted 1 cylindrical shaped bullet, at 1145 hrs 3 cylindrical shaped bullets, at 1353 hrs 11 cylindrical shaped bullets, at 1525 hrs 8 cylindrical shaped bullets at 1700 hrs, 2 cylindrical shaped bullets at 1750 hrs, and 1 cylindrical shaped bullets at 1858 hrs. All the cylindrical shaped bullets suspected to be controlled drugs were counted and added up in the presence of the 1st accused / 1st respondent then seized and kept by ANB Officers.

[26] As per the affidavit evidence, on the 1st February 2022, the 1st accused / 1st respondent was taken to the Seychelles Hospital to be examined by a doctor following her complaint that she was having palpitation and was not feeling well. There, she had a CT scan and 1 cylindrical shaped bullet was spotted in her stomach area. She had to undergo surgery to remove the same, and at 1725 hrs, ANB Officers received from a nurse at the Casualty Theatre, 1 cylindrical shaped bullet removed from the body of the 1st accused / 1st respondent. The same was kept in the possession of ANB Officers as exhibit.

[27] At 1830 hrs, a total of 100 cylindrical shaped bullets made of cling film suspected to be controlled drugs was taken to the ANB station. They were then sent to the SSCRB for testing, and the test result confirmed the presence of Heroin (Diamorphine) with a net weight of 999.98 grams. The 1st accused / 1st respondent was then arrested for the offence of importation of a controlled drug. She was then cautioned and informed of her constitutional rights. She opted to remain silent.

[28] On account of the affidavit evidence laid before this Court, I am satisfied, that the Prosecution has proved a *prima facie* case against the 1st accused / 1st respondent and the 2nd accused / 2nd respondent for their continued detention in police custody. In

fact, on account of the facts and circumstances that led to the arrest, charge and prosecution of the 1st accused / 1st respondent and the 2nd accused / 2nd respondent, it would have taken Counsel for the accuseds / respondents an uphill struggle to convince this Court otherwise.

[29] Having found a *prima facie* case against the accused / respondents as a prerequisite, it now remains for this Court to establish, whether the grounds which the Prosecution seeks to rely upon to justify continued detention of the accused / respondent in police custody are made out, that would warrant the making of the Order being sought for by the Prosecution, thus denying them their right to liberty under Article 18 (1) read with Article 18 (7) (a) – (f) of the constitution. The first and most significant issue to be determined, is whether there are compelling reasons both in law and on the facts before this Court, to justify denial of bail.

[30] The first ground which the Prosecution seeks to stress upon is the fact that the offences of which the accuseds / respondents have been charged are very serious given the penalty range that they are likely to face if convicted. For example, the offence of Importation of a Controlled Drug carries a maximum sentence of life imprisonment and a fine of SCR 1 million, whereas, the offence of Trafficking in a Controlled Drug carries a maximum sentence of life imprisonment and a fine of SCR 750, 000/-. Although it is well settled law, that the seriousness of the offence on its own cannot justify remanding the accuseds / respondents in police custody, the seriousness of the offence is still relevant for the purpose of determining an application made under Section 179 of the Criminal Procedure Code. That is because the more serious are the offences, the heavier are the penalties and a greater likelihood that the accuseds / respondents will not surrender to custody of the Court for trial. In fact, because of the

seriousness of the offence or offences, there is a greater possibility of interference with Prosecution witnesses to obstruct the course of justice.

[31] The second ground which the Prosecution seeks to rely upon is with regard to the 1st accused / 1st respondent. She is a foreign national who has no fixed abode in this country, and is not being accommodated by anybody, anywhere. In other words, she is homeless during her stay in Seychelles awaiting for trial. Because of her condition, therefore, there are substantial grounds for believing, that the 1st accused / 1st respondent will fail to appear before this Court for trial if she is remanded to bail. In essence, the case for the Prosecution, is that, by remanding the 1st accused / 1st respondent in police custody, she will have somewhere to stay, albeit, with her liberty restricted, and that would guarantee that she would be made available for trial.

[32] The third ground which the Prosecution seeks to rely upon is with regard to the 2nd accused / 2nd respondent. The Prosecution argued, that there are substantial grounds for believing, that if he is not remanded in police custody, he is likely to commit similar offences which offences are not only serious, but also, are having a negative impact on the country's socio-economic development. The Prosecution based its reasoning on the fact that the 2nd accused / 2nd respondent was convicted before the Supreme Court of a similar offence in 2016 in CR20 of 2016, and that, there is an ongoing matter before the Supreme Court in respect of similar offences in CR113 of 2021 in which his personal phone number has been linked to the facts of the case.

[33] The fourth ground which the Prosecution seeks to rely upon is again with regard to the 2nd accused / 2nd respondent. The Prosecution argued, that there are substantial grounds for believing, that if the 2nd accused / 2nd respondent is remanded to bail, he may interfere with witnesses, notably, the 1st accused / 1st respondent, and therefore,

obstruct the course of justice. According to the Prosecution, the basis for such belief stems from the fact, that when the 1st accused / 1st respondent was admitted in hospital, although this is her first visit to Seychelles, many people attempted to see her when as far as the Police is aware, the only person in Seychelles who knew of her being in Seychelles is the 2nd accused / 2nd respondent.

[34] In the final analysis, therefore, on account of the facts and circumstances of this case as laid before this Court by way of affidavit evidence, I am persuaded, that this is a case where continued detention of the 1st accused / 1st respondent and the 2nd accused / 2nd respondent is justified, the grounds for further detention having been made out. In fact, looking at facts and the whole circumstances of this case, and a wider picture, there are specific indications of a genuine requirement of public interest which, notwithstanding the fact that under Article 19 (2) (a) of the constitution “every person who is charged with an offence is innocent until the person is proved guilty or has pleaded guilty, outweighs the rule of respect to individual liberty.

[35] For the aforementioned reasons, the application to remand the accuseds / respondents in police custody succeeds, and accordingly, this Court orders that they be further in police custody.

Signed, dated and delivered at Ile du Port on 27th April 2022.

B. Adeline
Judge of the Supreme Court