

SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC
CO 05/2022

In the matter between:

THE REPUBLIC

Prosecution

and

HILDA ANENA

1st Accused

(Present/Represented by Mr Somasundaram Rajasundaram)

and

KEVIN GERALD QUATRE

2nd Accused

(Present/Represented by Mrs Alexia Amesbury)

Neutral Citation: *Republic vs Anena & Or* (CO 05/2022) [2022] SCSC (22nd July 2022)
Before: Adeline, J
Summary: Application to be remanded to bail on stringent conditions.
Heard: 28 July 2022
Delivered: 22 July 2022

ORDER

Application for the 2nd accused to be remanded to bail on stringent conditions that would effectively warrant a variation of the order of this court made on the 27th April 2022 in CM 26/2022 fails and is accordingly dismissed because the supporting affidavit does not disclose any change of circumstances since the order was made.

RULING ON MOTION

B Adeline, J

[1] By way of a formal charge sheet pertaining to CB 04/02/22 ANB, filed in court on the 14th February 2022, one Hilda Anena of Kampala, Uganda, the 1st Accused (now a

convict) who has already been sentenced, was indicted for one count of Importation of a Controlled Drug, Heroin (Diamorphine) (Count No 1) and in the alternative, she was also indicted for Trafficking in a Controlled Drug Heroin (Diamorphine) (Count No 2) in contravention of Section 5 of the Misuse of Drugs Act 2016, and Section 7 (1) read with Section 19 (1) of the Misuse of Drugs Act 2016 respectively.

- [2] Also indicted in the same formal charge sheet, is one Kevin, Gerard, Quatre the (2nd Accused) for the offence of 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 (Count No 3), and the offence of 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, (Count No 4).
- [3] On the 14th day of February 2022, the prosecution filed at the registry of this court as CM 26/22, a notice of motion supported by an affidavit sworn by one Police Inspector Juliette Naiken for an order of this court for the two accused persons to be remanded in police custody.
- [4] The application was filed pursuant to Section 179 of the Criminal Procedure Code read with Article 18(7) of the Constitution.
- [5] After hearing submissions made viva voce by learned counsels representing both parties, on merit, on the 27th April 2022, this court allowed the application, and accordingly remanded both accused persons in police custody. The 1st accused has since been convicted on her guilty plea and sentenced to serve a custodial sentence, whereas, the 2nd accused person has since been remanded in police custody awaiting trial.
- [6] On the 13th April 2022, the Republic filed an amended charge sheet in substitution to the one filed on the 14th February 2022. As per the amended charge, the charges against the 2nd accused, are;

(1) Count No 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”.

In the alternative;

(2) Count No 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 Second Schedule of the said Act”.

[7] It is now filed before this court, by way of notice of motion supported by an affidavit sworn by the 2nd accused dated the 23rd June 2022, an application for the 2nd accused to be remanded to bail on strigent conditions, which in effect, would warrant a variation of the order of this court made on the 27th April 2022 in CM 26/2022.

[8] After carefully perusing the affidavit evidence in support of the motion, and after giving due consideration to the averments made therein, I find, that the 2nd Accused/Applicant based his application on the following propositions;

- (i) That bail is his constitutional right, and he has a right to bail. He relies on Chang-Tave & Ors v/s The Republic CP 13/19.
- (ii) That there are no grounds or reasons for his continued detention in police custody because none of the reasons under Article 18 (7) of the constitution has been made out, except, that the offence allegedly committed by him is “serious in nature” which based on Roy Beehary v/s The Republic SCA 11/2009 cannot be a stand alone requirement.
- (iii) That the record of his past conviction in C 20 of 2016 should not be taken into account to determine whether he should be remanded in police custody or be remanded to bail because his past conviction is spent.

- (iv) That the proposition that if he is remanded to bail he will obstruct the course of justice because he will interfere with the 1st Respondent does not stand ground because the 1st Respondent is in prison
- (v) That under Article 19 (2) (a) of the constitution, he is innocent until either he pleads guilty to the charge, or he is found guilty to the charge; and
- (vi) That the Republic has not made out a prima facie case against him to justify denying him of his constitutional right to liberty under Article 18 (1) read with Article 18 (7) of the constitution.

[9] In answer to the bail application, the Republic has filed its objections, making references to the ruling of this court on the 27th April 2022. In particular, learned state counsel for the Republic stated the following;

- (i) That the accused had to show to the court that there has been a change in circumstances since the ruling was last made, but it has not done so.
- (ii) That in the Republic vs Hoareau [2011] SCCA 23, the Court of Appeal stated, that;

“It will be misconceived to argue, that once a person has been charged before a court, he can be committed to custody only for a period of 15 days before, or during the hearing, and he should as of right be released thereafter”.

- (iii) State counsel for the Republic, also stated, that although the case of Beehary vs R SCA 11 of 2009 makes it clear that the seriousness of the offence cannot be the sole ground to remand an accused in police custody, in the same case, the court added that the following;

“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 his liberty. They do not

in themselves provide grounds for refusing bail... The seriousness of the offence and the severity of the sentence are not irrelevant to the assessment of the risk of a defendant absconding or re-offending”.

[10] I have carefully perused the 2nd accused’s affidavit in support of his application to be remanded to bail on stringent conditions. I have to agree with the Republic, that the averments made in the affidavit do not disclose any change of circumstances since the making of the order by this court for the remand of the 2nd accused in police custody in CM 26/2022. Therefore, I will not repeat the findings of this court in CM 26/2022 that led to the making of the order for remand.

[11] This court is being constantly reminded, that every person charged with an offence has a right to bail. That is very true because such right to bail emanates from the constitutional right to liberty under Article 18 (1) of the constitution. What this court is not often reminded of, is that under the provisions of the very same constitution, precisely under Article 18 (7), bail can be denied after the court has properly ascertained that compelling reasons exist in law and on the facts which justify its denial. (See *Esparon vs The Republic* [2014] SLR 331)

[12] Therefore, as much as the right to liberty under Article 18 (1) of the constitution is not an absolute right because it has limitation, it is equally the case, that the right to bail is also non-absolute because there are circumstances that warrant the taking away of this right. In fact, Article 18 (7) (b) and (c) in particular, being the most relevant to the facts and circumstances of this case, set out clearly the circumstances when the right to liberty can be denied.

[13] Furthermore, by virtue of Section 179 of the Criminal Procedure Code, this court is lawfully empowered, at its discretion, and upon an application being made, to commit the accused to prison, or to release him upon him entering into a recognisance with or without sureties, and or with other conditions as the court may find necessary for the accused to surrender himself to the custody of this court when he is required to do so.

[14] In this court's ruling in CM 26/2022, I quoted the House of Lords in *O (FC) Appellant vs Crown Court at Harrow (Respondent)*, an appeal from the High Court of Justice, when the court quoted and endorsed a short passage from the court's decision in *Ilijko vs Bulgaria*, one of the Strasbourg case law, when the following was stated;

“84. The court reiterates 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 rule of respect to individual liberty... where the law provides for the presumption in respect of the factors relevant to the grounds for continued detention ... the existence of the concrete facts ought to outweigh the rule of respect for individual liberty must nevertheless convincingly demonstrated”

[15] When this court made its order to have the 2nd accused remanded in police custody in CM 26/2022, it did so on the basis, that it was satisfied, that the averments in the affidavit in support of the application for remand of the accused in police custody, established a prima facie case against him in reliance on the case of *Beehary vs The Republic SCA 11 of 2009*. Adducing evidence of a prima facie case against an accused person in respect of an application of this nature, is in my considered opinion, more important than adducing evidence relating to the grounds upon which a request for remand is sought. It is also my considered opinion, that if the Republic, through the prosecutor cannot establish a prima facie case, that almost certainly means, that the police did not have probable cause to support the arrest of the 2nd accused in the first place.

[16] It must be remembered, that as per the amended charge, the 2nd accused in this case has been charged with the serious offence of Conspiracy to Commit the Offence of Importation of a Control Drug, or in the alternative, Conspiracy to Commit the Offence of Trafficking in a Controlled Drug, both carrying long prison sentences and big fines if convicted, ranging from life imprisonment plus a fine of up to 1 million rupees, or life imprisonment plus a fine of up to 750,000 rupees with indicative minimum sentence for aggravated offence of 20 years imprisonment. One of the aggravating factors that support

a more heavy sentence under Section 48 (1) of the Misuse of Drugs Act 2016, is the degree if commercial element, as in the present case, links with the offence of importation.

[17] In essence, 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 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.

[18] All these considerations, including the facts and circumstances of this case, were taken into account when this court made its order for the 2nd accused to be remanded in police custody in CM 26/2022 on the 27th April 2022, and that the averments in the supporting affidavit to the application for the 2nd accused to be remanded to bail on stringent conditions, disclose nothing new which this court did not consider when it made the order for continued detention in the first place.

[19] That being the case, therefore, it is the finding of this court, that there is no evidence of any change of circumstances that would warrant a variation of the court order made on the 27th April 2022 for the 2nd accused to be remanded to bail on strict bail conditions.

[20] Therefore, the application for the 2nd accused to be remanded to bail on stringent conditions that would warrant a variation of the order of this court made on 27th April 2022 in CM 26/2022 remanding the 2nd accused in police custody fails, and is accordingly dismissed.

Signed, dated and delivered at Ile du Port 22 July 2022.

B Adeline, J