

**The Republic v Kate
(2004) SLR 100**

Ronny GOVINDEN for the Republic
Anthony JULIETTE for the Accused

Ruling delivered on 19 May 2004 by:

RENAUD J: The accused person stands charged with the offence of sexual assault contrary to and punishable under Section 130(2)(d) and punishable under section 130(1) of the Penal Code. The particulars of the offence are that “Gerard Kate of Ma Joie, Mahe, on the 24 April 2004 at Port Launay, Mahe, sexually assaulted A by penetrating the vaginal and anal orifices of A for a sexual purpose”. The accused has not pleaded to the charge yet. When the accused appeared before Court on 29 April 2004 he was remanded in custody until today 12 May 2004.

Learned Senior State Counsel, Mr. R. Govinden appearing for the prosecution has filed an application before Court applying for an order for the further holding of the accused in remand custody under Section 179 of the Criminal Procedure Code. The reasons for the application are:

- (a) The accused is charged with a very serious offence which is punishable with a maximum custodial sentence of 20 years, this seriousness was further aggravated by the following factors:
 - (i) The accused was armed with the knife which he used to threatened the virtual complainant with during the commission of the sexual assault.
 - (ii) The accused committed the assault per annum and vaginum.
 - (iii) The accused committed the assault despite the presence and hearing of other persons.
- (b) The main eye witnesses of the Prosecution and virtual complainant is known to the alleged accused and Counsel is instructed that she is in fear that in the event that the accused is enlarged on bail he would harm, threatened or otherwise intimidate her. An affidavit from the virtual complainant was attached to the application.

Mr. A. Juliette, Learned Counsel for the accused submitted to the Court that his client ought to be released on bail pending trial. He submitted that the accused is deemed to be innocent until proved guilty as Article 19(2)(a) of the Constitution provides. Further, he emphasised that it is incumbent on the Court to release the accused as called for in Article 18(7) of the Constitution, albeit, on stringent conditions.

Mr. Juliette in opposing the application invited the Court to release the accused on bail albeit with the imposition of very stringent conditions that the Court could possibly make. He further invited the Court not to rely on the affidavit of the virtual complainant as this could be self-serving and amounts to the Court believing the complainant before she testified and is cross-examined in Court. Further, Mr. Juliette contended that the contents of the complainant's affidavit are mere speculations and are not based on any ascertained facts in support of such mere speculations. It may be true that the complainant may be traumatized, but this is the case of any virtual complainant, he said. Secondly, Mr. Juliette vehemently argued that there is no evidence before the Court on which the Court could base itself to determine that the accused had indeed committed such offence. There is only the affidavit of the Learned prosecuting Counsel. Mr. Juliette further argued that the mere fact there is a piece of paper whereon it is written a serious charge against the accused person is again not a proper basis on which the Court should act. The charge could very well be unfounded and fictitious and at the end of the day the accused would be found to have been remanded for no valid cause.

Mr. Govinden, Learned Counsel of the Republic, opposed the submissions of Mr. Juliette on the ground that the application for remanding the accused is in accordance with the provision of the constitution and it is not a breach of his rights. He submitted that the Court may not grant bail and remand a person if the Court is satisfied that to do so would be proper in view of the circumstances which Article 18(7) (a) to (f) of the Constitution spells out. Mr. Govinden emphasized that the offence with which the accused is charged is indeed a very serious charge and as such it warrants the necessity for remand. Mr. Govinden assured the Court that the charge against the accused is not fictitious and is based on available evidence that would be laid before the Court at the trial. He agreed, however, that these are his averments and he has deponed thereto in his affidavit in support of the application.

From a reading of Articles 18(2) and 18(7)(b) of the Constitution, and Sec.101(5)(b) of the Criminal Procedure Code Cap.54, I have no doubt that this Court has the power to restrict a person's constitutional right to liberty without violating such right, after having regards to any one of the circumstances set out Sec. 101 (5) (b) of the Criminal Procedure Code Cap.54 which is a reproduction of Article 18(7) (a) to (f) of the Constitution. The Court can remand any person accused of the offence of murder, treason or any other serious offence notwithstanding Article 19(2)(a) of the Constitution deeming the person to be innocent until proven guilty.

Indeed, the Court has the power to remand an accused person in custody if the accused is charged with a serious offence. However, the Court has to be satisfied that the accused before the Court is the right person who is alleged to have committed the offence and secondly that the alleged offence with which the accused is so charged is not frivolous or fictitious but is made in good faith based on reasonable facts available and that such available facts would eventually be laid before the Court.

The person having personal knowledge of the available facts on which the charge

against the accused is based is Mr. Octobre who was the Police Officer in charge of the investigation of the case and who testified in person before the Court and subjected to cross-examination, asserted that he has sufficient reasonable evidences in his possession that would eventually be laid before the Court in support of the serious charge against the accused and further the charge is not frivolous and fictitious.

The seriousness of an offence does not mean only offences that carry hefty fines and/or a long term of imprisonment; or minimum mandatory sentence or fines; but must also be considered in a broader perspective, including the prevalence of the offence; the prevailing tendency of such crime; the necessity to root out or curb the vice; the negative impact of the offence on the virtual complainant and the view taken by society of such offence; whether the offence is the act of a sole individual or a possible conspiracy involving other parties who may be directly or indirectly, openly or secretly involved; the circumstances and manner the alleged offence took place; among other considerations.

Remand is not a form of punishment or admonishment of the accused for the offence he/she is alleged to have committed. It is simply a transitory stage prior to the time when trial proper is to take place. During the intervening period an accused may be remanded, based on the face of the charge laid against him/her before the Court. If the Court is of the view that the alleged offence is so serious that the accused ought to be removed from society and be made to live apart because of the untoward manner in which the accused has conducted himself in society, that is when the Court will remand the accused. When considering whether to remand an accused or not, the Court must always have regard not only to the constitutional rights of liberty of the accused, but also to the fundamental rights of other members of society to live securely and peacefully.

The accused is charged with the offence of sexual assault and using or threatening violence in the process. It is alleged that he committed the sexual assault by penetrating both the vaginal and anal orifices of the victim whilst brandishing a threatening weapon during the process, and, without being deterred by the presence and hearing of other persons. When viewed in the light of the factors enumerated above, this Court is led to no other conclusion but that the offence with which the accused is charged cannot be considered less than a very serious offence indeed. This Court will therefore order that the accused be remanded in custody until the completion of the trial.

I accordingly order that the accused be remanded for a further 14 days, that is up to 2 June 2004 at 9 a.m. when he will have to appear again before this Court.

Record: Criminal Side No 50 of 2004