

**The Republic v Emmanuel & Or  
(2004) SLR 11**

Ronny GOVINDEN for the Republic  
Danny LUCAS for the First Accused  
Frank ELIZABETH for the Second Accused

**Ruling delivered on 12 November 2004 by:**

**PERERA J:** A joint application for bail has been made by both Accused in this case. Mr. D. Lucas, Learned Counsel for the First Accused relied on the following grounds –

- (1) That the Accused had been on remand for over one year.
- (2) That the Prosecution has not adduced reasons why the Accused should be further remanded
- (3) That the prohibition placed in Article 18(7) (a) of the Constitution to the granting of bail in cases of treason or murder is limited to the jurisdiction of the Magistrates' Court. This sub Article of the Constitution appears as Section 101(5) (a) of the Criminal Procedure Code, as amended by Act no. 15 of 1995.

Mr. F. Elizabeth, Learned Counsel for the Second Accused adopted the grounds urged by Mr. Lucas, but in addition relied on a subjective circumstance, namely that the wife of the Second Accused had given birth to a child and that being a Psychiatric patient, she had left the home leaving the baby and a 19 month old child, and that her whereabouts are unknown.

Considering the three grounds cumulatively, the accused are on remand since September 2003. Their trial commenced before a Judge and jury on 8 March 2004. But the trial was aborted as Counsel appearing for them withdrew from the case on account of some disagreement relating to instructions. Thereafter their applications for legal aid were unduly delayed by the Registry until on 3 September 2004 when the two Counsels appearing now were assigned by me. Be that as it may, the trial in the case has been fixed for 21 March 2005 as no other earlier dates are available in the Court calendar.

Once charged, mere delay would not be a relevant factor to grant bail. The original application for remand was made, inter alia on ground (b) of Section 101(5), namely the seriousness of the offence for which the Accused have been arrested or detained. In the present case, both Accused stand charged with the offence of murder, which is the most serious offence in the Penal Code. Once the Court has remanded an Accused on this ground, the Prosecution need not canvass the same ground each time as further remand is considering by the Court. As was held in the case of *R. v Slough Justices, ex*

*parte Duncan* (1982) Cr. App. R. 384, the Court should not hear arguments as to fact or law which it has previously heard unless there has been such a change of circumstances as might have affected the earlier decision. To do otherwise would be to Act in an appellate capacity. The seriousness of the offence of murder does not diminish with the effluxion of time. Section 101(5) (a) of the Criminal Procedure Code merely limits the jurisdiction of the Magistrates' Court to consider applications for bail in cases of treason or murder. Consequently, this Court has jurisdiction to grant bail to Accused charged with murder.

However, where an offence is punishable with a mandatory sentence of life imprisonment or a sentence of death, a Court would be cautious due to the great possibility that the Accused would abscond or "jump bail". In the case of *Ngui v Republic of Kenya* (1986) L.R.C. (Const) 308, the Accused was charged with Robbery with violence, an offence carrying the mandatory death penalty in Kenya. He sought bail. The High Court held that although they had the jurisdiction to consider the application for bail on merits, yet as a general rule bail should not be granted where the offence charged carries a mandatory death penalty as the temptation to abscond or "jump bail" is great, and that this was the practice also in England in cases of murder although the death penalty has been abolished.

Section 101(5) of the Criminal Procedure Code, however requires "substantial grounds for believing that the suspect will fail to appear for his trial.....". A charge for the offence of murder, which carries a mandatory sentence of life imprisonment, is in itself a substantial ground for believing that the Accused would abscond.

As regards the personal grounds urged by the Second Accused, the Court has great sympathy if the assertions be true. However there are institutions like the department of Social Services that can assist the family if he makes representations directly or through his lawyer. These personal factors have no bearing when considering bail in this case.

Accordingly the joint applications for bail are devoid of merit, and hence are hereby dismissed.

**Record: Criminal Side No 85 of 2003**