



IN THE SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION]

Case No 3 of 2017

IN THE MATTER of an application for
bail pursuant to s. 80(3) of the Criminal
Procedure Act 1972 and s. 80A of the
Criminal Procedure (Amend) Act 2016

BETWEEN

SAMARANCH ENGAR

Applicant

And

THE REPUBLIC

Respondent

Before: Crulci J

For the Applicant: S. Valenitabua
For the Applicants: L. Tabukuro

Date of Hearing: 25 May 2017
Date of Judgment: 31 May 2017

CATCHWORDS – *Murder Charge – Bail Application – Constitution Articles 5 and 10 – section 80(3) Criminal Procedure Act 1972 – section 80A of the Criminal Procedure (Amendment) Act 2016 – BAIL REFUSED*

RULING

Introduction

1. Samaranch Engar ("the Applicant") is charged with murder pursuant to section 55 of the *Crimes Act 2016*
2. The deceased was a 19 year-old female who was found in a room used by the Applicant, her ex-boyfriend. It is alleged that the deceased had been carried into the room, unconscious and under the influence of alcohol, at around 5:00 pm on Saturday 10 December 2016.
3. The deceased had been out drinking with friends from about 10:00 pm the Friday night before. She and the Applicant had had an altercation during the evening of the 9 December 2016 which, according to some witness statements, involved the Applicant putting his hands around the neck of the deceased. After this the Applicant did not meet up again with the deceased until the late afternoon on the Saturday when she was asleep in the back seat of a vehicle.
4. After the deceased was carried seemingly asleep or unconscious into the bedroom used by the Applicant he remained there with her and she did not wake or regain consciousness.
5. Some hours later the deceased's mother and sister arrived, with the mother initially assaulting her daughter, not realising that she was in fact deceased. There followed unsuccessful attempts to revive her.
6. An autopsy report shows that the deceased had a high blood alcohol level, and the cause of death was determined to be compression to the neck.
7. The Applicant applied for bail filing the motion and accompanying affidavit on 19 May 2017 and a written submission on 23 May 2017. The Respondent gave oral submissions to the Court and filed an affidavit in opposition on 25 May 2017, and written submissions on the 26 May 2017. The Applicant filed a response on the 29 May 2017.

Relevant Law

8. The Constitution of Nauru

Protection of personal liberty

Article 5

5. (1.) No person shall be deprived of his personal liberty, except as authorised by law in any of the following cases:-
 - (a) in execution of the sentence or order of a court in respect of an offence of which he has been convicted;

- (b) for the purpose of bringing him before a court in execution of the order of a court;
- (c) upon reasonable suspicion of his having committed, or being about to commit, an offence;

....

Provision to secure protection of law

Article 10.

10 (1.) No person shall be convicted of an offence which is not defined by law.

(2.) A person charged with an offence shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court.

(3.) A person charged with an offence-

(a) shall be presumed innocent until proved guilty according to law;

...

9. Section 55 of the *Crimes Act 2016*

55 Murder

A person commits the offence of murder if:

- (a) the person intentionally engages in conduct; and
- (b) the conduct causes the death of another person; and
- (c) the person intends to cause, or is reckless about causing, the death of that or any other person by the conduct.

Penalty: Life imprisonment

10. Section 80 of the *Criminal Procedure Act* ("the Act") 1972

80 Bail in certain cases

(1) Subject to the provision of section 21 of this Act, where any person, other than a person accused of murder or treason, is arrested or detained without warrant by a police officer or attends or is brought before the District Court and is prepared at any time while in custody of the police officer or at any stage of the proceedings before the Court to give bail, he may in the discretion of the police officer or the Court be admitted to bail with or without a surety or sureties.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(3) Notwithstanding anything contained in subsection (1) of this section, a judge of the Supreme Court may in any case direct that any person be

admitted to bail with or without sureties or that bail required by the District Court or a police officer be reduced or any requirement as to sureties be varied.

11. Section 11 of the Criminal Procedure (Amendment) Act 2010 inserted section 80A into the Act, which provides as follows:

80A Considerations for bail

A person charged with an offence is entitled to bail, either conditionally or unconditionally, and the Court in considering whether to grant bail or remand a person in custody will take into consideration the following:

- (a) the strength of the prosecution's case;
- (b) the circumstances, nature and seriousness of the charge;
- (c) the likelihood that the person may continue to commit offences if granted bail;
- (d) the protection of the person from the public; and
- (e) the public interest and the protection of the community.

Case Law

12. The decision of Eames CJ in *Atto v Director of Public Prosecutions*¹ is the only Nauruan decision identified that addresses the issue of bail for a Defendant charged with murder. His Honour found² that s 80(1) of the Act contained a presumption against bail in a case of a murder charge, however, "By section 83(3) a judge may grant bail, even on a charge of murder, but with a presumption against bail, the applicant must show exceptional circumstances justifying bail".
13. His Honour referred to the principles governing an application for bail set out in the decision of Chetwynd J of the High Court of the Solomon Islands in *R v Henry Gwao*³. That case sets out the equivalent provision in the Solomon Islands, being s 106 of the Criminal Procedure Code (SI), which is in identical terms to s 80 of the Act in Nauru. That case also set out the statement of Ward CJ in *R v Kong Ming Khoo*⁴ that "The effect of Section 106 is that bail in murder cases will only be granted in exceptional circumstances", and that, while the court must consider all the same considerations as with any bail application, "the effect of section 106 in a case involving a charge of murder or treason means that it is only in rare cases that bail will be granted".

¹ *Atto v Director of Public Prosecutions* [2011] NRSC 16

² *Ibid.*, at [4]

³ *Regina v Gwao* [2011] SBHC 1

⁴ *R- v- Kong Ming Khoo* unreported Criminal case 1991

14. The principles guiding the granting of bail were considered by Madraiwiwi CJ in *Dabwido v Republic*⁵. The offences charged in that matter were 'Being in a security restricted area contrary to s 107(2) of the Civil Aviation Act 2011, unlawful assembly contrary to ss 61 and 62 of the Criminal Code 1899 ("the Code"), riot contrary to ss 62 and 63 of the Code, and disturbing the Legislature contrary to s 56 of the Code'.
15. His Honour referred to the observations of Palmer CJ in the High Court of the Solomon Islands decision of *Kwaiga v Regina*⁶ relating to the constitutional presumptions of innocence and liberty, and the obligation to carefully consider each application on its merits, notwithstanding what was said by the Court in *Kong Ming* that bail will only be granted in "exceptional circumstances" or "rarely given".
16. Palmer CJ noted as follows in relation to the evidence against the applicant:

"I note the circumstances surrounding the abduction and murder of Solwyn Saki ("the deceased") were extremely serious. That however must be balanced with the level of participation which prosecution has sought to impute upon this accused. There is no evidence to implicate him as having masterminded the operation. It was initiated by others. He was brought into the scene by others who said he was at his house and giving instructions for the deceased to be taken to Mt. Austin. He was seen conversing with Jimmy Rasta, Malcolm Lake and Moses Su'u. The implication was that he was a secondary party to the decision to kill the deceased. On the other hand, he has continued to deny his involvement from the beginning and has produced a list of witnesses and statements in support of his case. There were also others from the same group who deny his involvement or presence at those times. These must be balanced together with the personal circumstances of the accused."

Submissions of the Parties

17. Counsel for the Applicant submits that Madraiwiwi CJ in *Dabwido* distinguished Eames CJ's ruling in *Atto* by addressing constitutional provisions applicable to the issue of bail. Counsel further submits that in applications for bail where constitutional issues are raised, *Dabwido* ought to be followed.
18. The Respondent opposes the granting of bail and submits that *Dabwido* ought not to be followed, given that the offences charged were not murder or treason. It is submitted that this Court should follow the approach laid down by Eames CJ in *Atto*, which emphasises the overriding importance of the "exceptional circumstances" requirement.

⁵ *Dabwido v Republic* [2015] NRSC 7

⁶ *Kwaiga v Regiam* [2004] SBHC 93

Considerations

19. The Constitution is the supreme law of Nauru, and enshrines the protection of fundamental rights and freedoms of all peoples on Nauru. These rights encompass those charged with offences and deprived of their liberty according to law.
20. The *Crimes Act 2016* places the offences of murder and treason outside the province of the District Court to consider bail; section 80(3) of the Act provides that bail can only be granted for an accused charged with either of those offences by the Supreme Court.
21. This Court is asked by the Applicant to grant him bail and to clarify the approach to be applied when considering bail in such cases.
22. Each case is to be determined on its own facts. The starting point for all matters is the rights enshrined under the Constitution. An individual's right to the presumption of innocence is maintained throughout the process up until the matter is determined by the court. His or her rights to liberty and a speedy trial are considered in balance with the nature of the offence charged and the facts of the case.
23. The commonly used phraseology of 'exceptional circumstances' when considering the question of bail highlights that the offences of murder and treason are the most serious of criminal offences.
24. It is for the Respondent/ prosecution to outline to the Court under section 80A of the Act as to why in all the circumstances the accused should be remanded in custody, and for the Applicant/ defendant to show why in all the circumstances there exists a combination of matters which make it appropriate for bail to be granted. The more serious the charge, the more singular, cogent and 'exceptional' the factors to be considered in an application for bail need to be, to overcome the nature and seriousness of the charge in favour of the Applicant/ defendant being granted bail.
25. In *Kwaiga* the court noted that the prosecution case taken at its highest was not overwhelming and there was a delay of many months from the time the matter was committed to the High Court to the filing of the information against the accused. The filing of an information is a precursor to the Registry being able to set the matter down for hearing. The facts of *Kwaiga* are distinguishable from the Applicant's case.
26. *Dabwido* is distinguishable with the charges are not in the category or severity of murder or treason; however the principles outlined in that matter apply to all who appear before the courts.
27. In this matter there may be evidentiary and causation issues raised by the defence at trial. For the purposes of this Court's deliberations it is accepted by the Applicant that there was a substantial period of time when he was alone with the deceased. The cause of death is determined by the autopsy as

compression of the neck, an action that the Applicant was seen to carry out on the deceased the evening before. There has been some delay since the prosecution received the autopsy report and filed the information, however this has not yet reached the point where the delay would tip the scales in favour of the Applicant being granted bail pending his trial

28. The Court does note however that bail has been granted in other cases⁷ where the accused is charged with murder where it has been found that an unreasonable delay has infringed on the accused's constitutional rights. That point has not yet been reached in this case, but it is a matter that the Respondent/ prosecution should be mindful of.
29. Taking all the matters in consideration, the court is satisfied at this time that the Applicant should be remanded in custody.
30. The application for bail is refused.
31. The Applicant is to be remanded in custody and produced to the Court at a time notified to Counsel.



Judge Jane E. Crulci

Dated 31 May 2017

⁷ *Kwaiga v Reginam* [2004] SBHC 93; *State v Vusonitokalau* [1996] FJHC 144