LESLIE KWAIGA -v. REGINAM

High Court of Solomon Islands
(Palmer CJ)

Criminal Case No. 333 of 2004

Date of Hearing: 6th August 2004
Date of Judgment: 9th August 2004

M. Bird Samuels for the Applicant/Defendant
R. Barry and S. Balea for the Respondent/Prosecution

Palmer CJ: This is the third application of this Applicant ("**the accused**") for bail. The first one was heard by this court on 30th December 2003 by way of an appeal to the decision of the Magistrates Court denying the accused's application for bail. This was dismissed. His second bail application was heard on 17th February 2004. This was in relation to the offences of abduction and concealing, intimidation and conspiracy to defeat the course of justice. That application for bail was granted by the court. He was re-arrested however as he came out of jail on a charge of murder and remanded in custody. The Applicant has complained against the manner in which he was re-arrested. I do not know if he has lodged any formal complaints with the Police but the proper course would be to do so and allow the Police to answer any complaints he seeks to raise about their conduct. He has since been in remand until today. He now comes to court for bail.

The rights to bail emanate from the right to secure protection of the law, that where a person has been charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law – section 10(1) of the Constitution. That same section provides in paragraph 10(2)(a) that such person shall be presumed innocent until he is proved or has pleaded guilty. That presumption of innocence correlates to the presumption of liberty enshrined in section 5(1) of the same Constitution that a persons liberty may only be removed save for the various circumstances set out in that section. That presumption tilts in favour of an accused who had been charged with an offence by way of a prima facie right to bail – see section 5(3)(b) of the Constitution and section 106 of the Criminal Procedure Code ("CPC"); see also the case of **R v. Perfili**[1].

In murder cases while bail may only be granted by the High Court it is important to bear in mind this presumption of innocence and presumption of liberty reflected in a prima facie right of an accused to bail; this must always be the starting point in any bail applications. The burden of proof however still lies with the Prosecution to show that on the balance of probabilities an accused should not be granted bail. Notwithstanding what was said by this court in **Regina v. Kong Ming Khoo**[2] and **Regina v. Dickson Maeni**[3] that bail will only be granted in exceptional circumstances or rarely given, the court is obliged to carefully consider each application for bail on its merits. It is important to appreciate that simply

[1] (unreported) HCSI-CRC 30-92 per Muria ACJ at p.3
[2] (unreported) HCSI-CRC – 91 per Ward CJ at page 2
[3] (unreported) HCSI-CRC 117-99 at p. 1 per Palmer J.

because an accused has been charged with the offence of murder it does not necessarily follow that he should be denied bail. The presumption of innocence and liberty do not permit such presumption to be made.

In considering bail, the court is involved in a risk assessment. This entails assessing how much risk society should bear on one hand by granting bail and how much the accused should bear on the other by being remanded in custody or on conditional bail. If the risks are high such that society should not be exposed to that risk, then bail normally would be refused and the accused made to bear that risk by having his presumption of innocence and liberty curtailed even in the absence of a lawful conviction in a court of law.

This risk assessment however is not as easy as it sounds because it entails a prediction of future behaviour, requiring the balancing of and measurement of what the defendant is likely to do in the future; which cannot be 100% accurate. Further much of that prediction is measured by what had happened in the past, which can be quite unreliable and prejudicial against the accused. In many instances as well, much of what is relied on by the prosecution is based on his interpretation of what the police had said had happened. It is important therefore that the courts do not lose sight of the purpose and requirements of bail and what it entails. It is not what the police says which dictates whether bail should or should not be granted. It is the balancing of the risk assessment by the Court after hearing both sides which determines at the end of the day which way the discretion of the court will fall.

Whether the accused will abscond while on bail.

It has not been denied by the accused that the charge of murder is a serious offence; as a practicing lawyer at the time of his arrest he was well aware of this factor. He is well aware of the fact that if convicted he faces a mandatory life sentence for murder and lesser custodial sentences for the other offences. I have pointed out however that that alone is not sufficient to deny an accused bail, if there are circumstances which justify otherwise. I note a charge of murder raises the stakes high, in this case the risk of absconding, bearing in mind that a conviction will ultimately mean a mandatory sentence of life imprisonment, but that must be balanced with what is said on behalf of the accused. The mere fact he is charged with very serious offences does not mean what is said on his behalf should now be given lesser weight, in preference to what police have to say. They must be given equal emphasis; in fact the scales of justice have always tilted in favour of the accused from the beginning by virtue of the presumptions of innocence and liberty enshrined in our Constitution and reflected in the criminal law process that this country had adopted from England.

I note the circumstances surrounding the abduction and murder of Selwyn 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 Suu. 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.

It has not been disputed that the accused has a fixed address; that his family resides at King George Sixth School and that his wife is a teacher at the said school. If it had been anticipated that he would abscond, he had plenty of time to do that prior to his arrest, especially when his wife is from another country. He could easily have sought to take refuge somewhere else if he had wanted to run away from what was going on in the country or would take place, but he has not done that and remained throughout with his family at their family home at King George. Apart from the assertion set out by David Fraser Capper in his affidavit filed 22nd July 2004 to the effect that the accused has a lot of influence and intimidatory presence in the community, it has not been denied that he has strong community ties – see affidavit of Rev. George Buga filed 29th December 2003[4], affidavit of Mary Kejoa filed 12th July 2004, affidavit of Winston Kanapala filed 12th July 2004, and affidavit of Raymond Tagi filed on the same date. This must be weighted in his favour.

The accused is a well known lawyer as far as his employment history is concerned, co-running the firm of crystal lawyers with learned Counsel Maelyn Bird Samuels. Again if it was sought to be suggested that this factor implies that there is greater risk of absconding, the time to do that was before his arrest. He could easily have sold or closed his firm, packed up and left. Again he did not do that. He has much at stake in the country and there are no suggestions whatsoever that he would do that. He has repeated in his statements that he would fight out in court to clear his name from the allegations raised against him. As a lawyer he is fully aware of the consequences if found guilty. I have considered whether the risks are greater for society if he is released on bail, that he will escape, but with respect I am unable to so find.

On the question of strength of evidence, it is clear that despite the fact that there are statements of witnesses which place the accused at his house at the time Moses Suu arrives with the deceased and at Mount Austin with others, there is also clear conflicting evidence from others who were with the same group who deny his presence, apart from others. The presumption of innocence means that the accused is not required to produce statements of his intended witnesses or to say anything at all other than to disclose perhaps the nature of his defence. The accused however has gone beyond that in this case and has adduced evidence from his list of witnesses which he will be calling to contradict the evidence that prosecution will be tendering. Taking all those evidence into account without seeking to make any conclusion as to their veracity or credibility, the prosecution case taken at its highest cannot even be said to be overwhelming. I note there is evidence of others in the same group who implicate him, but that must be balanced with the evidence of others who also contradict those witness statements. The time for assessment of that conflicting evidence will come during trial but the fact that there are already clear conflicting statements from the same group of people involved in the abduction, kidnap, assault and murder of the deceased, that conflict, in so far as it is to be considered for purposes of this bail application, must for all purposes swing in his favour. When the onus or burden of proof and presumption of innocence is borne in mind the benefit of this clear contradictions and inconsistencies must go in favour of the presumptions of liberty of the accused.

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[4] filed HCSI-CRC 345-03

I note he has indicated that he is prepared to provide surety or security for his attendance if required by the court and that he is willing to abide by any other restrictions to be imposed by this court.

On the issue of commission of further offences, apart from the current offences for which this accused has been charged with and the allegations that he is a member of the Supreme Council of the Malaita Eagles Force which he consistently denies throughout, he has no previous convictions, has a clean bail history, has not absconded on any previous bail situations and no history of breaches of any past or present court orders.

One of the objections of prosecution to bail is the fear or concern expressed of his interference with witnesses or the course of justice. This arises from the influence that he holds or has through his associations with the Malaita Eagles Force. Apart from that fear there is no evidence to show that this accused has actually sought to threaten or coerce anyone; no evidence of expressed threats and no likelihood of such occurring if released on bail. There is no past history of interference with witnesses as well which must go in his favour. Further it is important to bear in mind that the prosecution witnesses are more or less those in the same group who were involved in the abduction, kidnap, assault and murder of the deceased or associated to some extent with the tragic events of the deceased's death. There are no indications that any of them have been threatened or sought to be influenced in anyway by this accused. The prosecution list of witnesses has been completed. Any potential interference will thus be minimized. This accused is well aware of the list of witnesses for prosecution and therefore is aware as to which persons he should steer clear or keep away from. He is well aware of the consequences of any breach. He has his own witness list too which he will be required to have ready and prepared for his defence if and when the information is filed.

This brings me to address the issue of delay in the filing of the information in respect of this case which is yet to be done despite the fact that the accused had been committed to the High Court for the offence of murder since 2nd April 2004. The filing of an information under section 233 of the CPC is crucial to the further progress of this case before this court as it is the process by which a case is commenced. Until that is done, no action can be taken by the Registrar of High Court, especially in relation to the listing of this case. The delay lies with prosecution and any such delays must be viewed in favour of the accused in this bail application.

In the circumstances I am satisfied bail should be granted but with the following conditions:

1. **That a cash deposit of $5,000.00 is paid by the accused for his attendance in court at a time and date to be specified.**

2. **That a surety of $5,000 be provided to ensure the accused appears in court at a time and date to be specified.**

3. **That he does not approach, talk to or interfere with any of the prosecution witnesses already identified on the list of potential witnesses.**

4. That he reports to Central Police Station not later than 10.00 a.m. each Friday.

5. That he does not leave the town boundary.

6. That he surrenders his passport or any other travel document.

7. That he resides at his family home at King George Sixth School.

8. That from 6.00 p.m. to 6.00 a.m. he remains at his home at King George Sixth School.

The Court.