BEN PENAI -V- REGINA

IN THE HIGH COURT OF SOLOMON ISLANDS
(Faukona J)

Criminal Case No: 413 of 2008.

In the matter of: An Application for bail

BETWEEN:	**BEN PENAI**	*Applicant*
AND:	**REGINA**	*Respondent*

Date of Hearing: 23rd September 2010
Date of Ruling: 1st October 2010

Mr. Volenitabua for the Applicant
Ms. Kesaka and Mr Barry for the Crown

RULING ON APPLICATION FOR BAIL

1. Faukona J: This is the second occasion whereby which the applicant applies for bail. The application is to invoke the discretionary power of this Court pursuant to Section 106(3) of Criminal Procedure Code and Section 5(3) of the Constitution to grant bail. The applicant has been remanded at Rove Correctional Centre since 6th October 2008 after he was charged for murder on the 4th October 2008.

2. The first application for bail was heard on 12th December 2008 after the Central Magistrates court had committed the applicant to stand trial in the High Court on 25th November 2008.

3. It would appear the above sections vested wide discretionary power upon the High Court to grant bail unconditionally, or on condition as the circumstances merit. The test is whether or not it is probable that the accused will appear in Court on the

trial date, see Taisia v DPP[1].

4. A significant point in any bail application is what is entrenched in Section 5 (3) of the constitution, which makes it very clear that any person detained for an offence, and who is not release, be brought to court without undue delay; and his charge be tried within reasonable time. Should it not be the case, then he is entitled to be released either unconditionally or upon reasonable condition. In addition Section 10 (1) emphasises fair hearing by an independent and impartial court. By the same Section, subsection 2 (a), that such person shall be presumed innocent until proved, or has pleaded guilty. That presumption guarantee in favour of the accused, who is charged with an offence, who enjoys the right to bail should the legal requirements under the law are not complied with.

5. In a murder case bail can only be granted by the High Court. Bail is a right protected by law, and granting of bail requires exercise of discretionary power of the Court. That means it is not to be unreasonably withheld. In other word the discretionary power must be exercised with reasonableness, depending on the merit and the circumstances of the case.

6. The onus is on the prosecution to satisfy the court on the balance of probabilities that an accused should not be granted bail, see Wells street Magistrates Court; Exparte Albanese (2). That view has been adopted in this jurisdiction by His Lordship Palmer CJ in Kwaiga v Regina (3).

[1] (2001) SBHC 73; HC-CRC of 2001 (9 October 2001)
[2] (1982) 74 Cr App R 180.
[3] (2004)SBHC 93;HC-CRC 33of 2004

7. In a Charge of murder normally bail will be refused as Kabui J said in Taisia v DPP (4).His reasons were because of the seriousness of the charge with a mandatory life imprisonment attached to it. His Lordship further stated because of that the risk of absconding is imminent even to the extent of jumping bail.

8. Quite apart from that, the High Court can grant bail in what the defence Counsel pointed out as in exceptional circumstances. In R v Kong Ming Khoo (5) Ward CJ stated that Section 106 is that bail in murder cases will only be granted in exceptional circumstances. This affirms the prosecution assertion that in such unusual and extra ordinary circumstances, require the accused to demonstrate before granting of bail. The onus is on the accused to demonstrate exceptional circumstances warranting bail. The Counsel rely on R v Kong Ming Khoo (6) as above and Sisifiu v R (7)

9. What then are the exceptional circumstances. In Taisia v DPP (8) Kabui J on paragraph 2, page 2 and 3 refer to various murder cases where the Court had granted bail to the accused based on the premise of exceptional circumstances.

10. However a bench-mark decision was made by Palmer CJ in the case of Kwaiga v R (9) where he stated on page 2 paragraph 2 (in part).

"Notwithstanding what was said by this Court in Regina v Kong

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[4] Ibid
[5] (Unrep. 1991 decision of Ward CJ)
[6] Ibid
[7] (2003) SBHC 19.
[8] Ibid.
[9] (2004) SBHC 93; HC-CRC 333 of 2004.

Ming Khoo and Regina v Dickson Maeni 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 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"

11. On the same paragraph the court pointed out that the burden of proof still lies on the Prosecution to proof on the balance of probabilities that an accused should not be granted bail.

12. On each and every application for bail, be it murder or treason, must be considered on the circumstances of each case, and on its own merit. That should sum up any exceptional circumstances that an applicant relies on.

13. On the issue of fresh application for bail, the Court should only consider any new considerations which were not before the Court on the previous occasion when bail was refused, see R v Nottingham Justices, Exparte Davis ([10]). I noted the Counsel for the applicant is well versed with that.

14. In his submission papers, though other issues are included, he confines himself to two major issues. One is the issue of unreasonable delay, and secondly is the issue of the condition of Rove prison. Noted from the submissions as well, the issues as personal circumstances and family ties had already been considered by the previous application. It remain therefore that this court will only consider two issues as above.

[10]((1980) 2 ALL ER 775.

15. The Prosecution has objected to the application and relies on the risk of flight, risk of reoffending, risk of interfering with prospective prosecution witnesses, seriousness of the charge and the weight of prosecution evidence which is moderate to strong. The bulk, if not, all of these had been raised in the previous application.

Conditions of Rove Prison

16. What the applicant deposes about the food and the conditions of Rove Prison is not new. It has been there for many years. Many accused persons who were charged for serious offences or even lesser charges are kept in the same custody. They have to experience such situation. It may appear differently from cells in Australia or Fiji, but that is what Solomon Islands can offer. The applicant cannot expect a cell block in Rove to be equated with his home residence where freedom and liberty reigns. Where he enjoys the beauty of hunting and fishing and harvest the toil of his lands.

17. Rove Prison is an institution provided by the state to accommodate suspects, accused and convictions. There can be no alternative. Each and everyone has been treated equally with no favours. They have to endure the same state of things. The applicant is no exception and is not indispensible to be treated differently, or accorded a special treatment. I noted that he is presumed innocent until proven guilty or has pleaded guilty.

18. For time being Rove Prison will never change in terms of provision, condition and structure. There may be a dream or a plan for a face lift, but that is still quite a distance away.

Meantime it cannot be said that the situation in Rove Prison is the same as the situation experienced in the case of R v John Robu, Henry Faramasi, Lency Maenu'u Peter Kaabe [11], where His Lordship Palmer CJ granted bail because the Rove Prison had become unsafe following the event of 5th June 2002. That is to say that a mass break-out of inmates was imminent and the accused and other persons in the remand cell were affected. It was an extra ordinary situation at that time.

19. The current situation faced by the applicant is not of a state that every inmates are affected. It's not a worst state or extra ordinary situation which will warrant bail.

Unreasonable Delay

20. The applicant is now 23 months on remand since arrested and 15 months after committal to the High Court. The information is just filed this morning, a copy of which is tendered to Court by the Prosecution in reply to the application.

21. Is 23 months in detention, without prosecution, an unreasonable delay; or is 15 months after being committed for trial, with no information filed to commence prosecution process, an unreasonable delay. Is it the kind of delay the Constitution endeavour to cure by provision of Section 10 (1), fair hearing within reasonable time; and if not, and the accused continue remain in remand, the Court may then exercise it's discretionary powers under Section 106 (3) of CPC to admit accused on bail and be released unconditionally or upon reasonable condition by Section 5 (3) of Constitution. Whether the delay is for 23 months or 15 months; by reasonable

[11] Criminal Case No 117 of 1999.

standard, that is unacceptable delay, in particular where the presumption of innocent principle is inevitably a threshold. The gist in upholding the principle in the Constitution is to recognise a person's liberty which can only be removed in certain cases. That liberty cannot be tampered with by unreasonable prolonging of initiating prosecution process. In furtherance, there is no guarantee that the applicant's case be listed and heard this year.

22. This takes us to the next issue of non filing of information. The Crown argued that prosecution process does not commence by filing an information in the High Court. In fact the process commence earlier than that. He states, once the committal papers are received by the Registrar, he should list first date for direction or preliminaries be sorted out. The information can be filed later allowing time for amendments of charges where necessary.

23. The applicants Counsel is quite vigorous with assurance relying on the case of Kwaiga v R [12] and R v Ainas Buga and others where both their Lordships affirmed that filing of an information is a process whereby which a case is commenced in the High Court.

24. I accepted the fact that15 months after the committal there was no information filed by the prosecution until this morning. In fact, as per se, the information was dated 23/6/2009 and is filed this morning, 15 months later. Whatever attributed to delay, is a question the Prosecution alone will answer. But it does prompt more questions than answers. Whilst that may be so, I also noted, with interest, the argument advance by the

[12] (2009) SBHC 53; HCS9-CRC 115 of 2009 (5/10/2009)

Prosecution. However, on reading Section 234 of CPC which clearly states that the Registrar of the High Court upon receipt endorse on or annex to every information filed, and deliver every copy to the officer of the court or police officer for service. If there is no information filed, how would the Registrar effectively serve necessary documents on parties. What information will parties expect to receive. If in the absence of any information, which expectantly will contain the charge and a list of probable witnesses; how would parties know what the final charge will be and a number of witnesses the prosecution intends to call. In my opinion the Courts are right to suggest that filing of an information is crucial for further progress of the case, as it is the process by which a case is commenced, see Kwaiga v R [13]. The same is adopted by Mwanesalua J in the case of R v Buga [14].

25. In the circumstances I have alluded above, taking into account all the possible risks, I have decided the ground for delay is so overwhelmingly unreasonable. In all respect defy the rights of the accused as accorded to him by the Constitution. In that respect I am satisfied that bail should be granted on the following conditions. The conditions imposed herein will, in my view, cater for the risks.

1. That the applicant be bailed in the principle sum of $1000.00.

2. That Samson Dawea the applicant's surety be in the sum of $1000.00 principle.

3. That the applicant resides at Mbokonavera heights in the house of Samson Dawea until completion of trial.

4. That the applicant reports to Central Police Station every

[13] Ibid
[14] Ibid

Mondays, Wednesdays and Fridays between 8:00 am and 4:00 pm.

5. That the applicant shall not leave Honiara town boundary from Lunggariver to Whiteriver river.

6. That a curfew be imposed on the applicant not to leave Mr Dawea's house from 6:00 pm to 6:00 am.

7. That the applicant shall not interfere with any of the prosecution witness in this case.

The Court: