S Selvamsylvester v Public Prosecutor
[2005] SGHC 158

Case Number : Cr M 13/2005

Decision Date : 31 August 2005

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Udeh Kumar s/o Sethuraju (S K Kumar and Associates) for the applicant; Hay Hung Chun and Paul Quan (Deputy Public Prosecutors) for the respondent

Parties : S Selvamsylvester — Public Prosecutor

Criminal Procedure and Sentencing – Bail – Application to court for grant of bail for non-bailable offences punishable with life imprisonment – Scope of High Court's discretion under s 354(1) read with s 352(1) Criminal Procedure Code to grant bail for non-bailable offences – Whether application for bail should be denied as "reasonable grounds" for believing applicant guilty of offences punishable with imprisonment for life existing – Sections 352(1), 354(1) Criminal Procedure Code (Cap 68, 1985 Rev Ed)

31 August 2005

Kan Ting Chiu J:

1 Can bail be offered for all offences, bailable and non-bailable? This question came up in the applicant's criminal motion for bail, and there is no consensus on that.

2 Bail applications are governed by the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"). A bailable offence is defined in s 2 of the CPC as:

> an offence shown as bailable in Schedule A or which is made bailable by any other law for the time being in force, and "non-bailable offence" means any other offence.

3 Section 351(1) of the CPC provides:

> When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a court and is prepared at any time while in the custody of the officer or at any stage of the proceedings before the court to give bail, that person shall be released on bail by any police officer in such cases as are specified in orders issued by the Commissioner or Police or by that court.

In other words, bailable offences are bailable as of right.

4 "Non-bailable" means that there is no right of bail, but it does not mean that no bail can be offered. Bail is discretionary, and s 352(1) of the CPC provides:

> When any person accused of any non-bailable offence is arrested or detained without a warrant by a police officer or appears or is brought before a court, he may be released on bail by any police officer not below the rank of sergeant or by that court …

5 However, this discretion to grant bail does not apply to all non-bailable offences, as s 352(1) continues:

> … but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

6 There is a school of thought that the words "he shall not be so released" do not create an absolute prohibition, and do not apply to the High Court. This arises from reading s 354(1) of the CPC which states that:

> The High Court may, in any case whether there is an appeal on conviction or not, direct that any person shall be admitted to bail or that the bail required by a police officer or Magistrate's Court or District Court shall be reduced or increased.

7 In *Re K S Menon* [1946] MLJ 49, A J Bostock-Hill (President) in dealing with ss 388 and 389 of the Federated Malay States Criminal Procedure Code (the equivalent provisions to our ss 352 and 354(1)), agreed with a submission that a judge of the High Court has complete discretion to grant bail free from the limitations of s 388. He explained at 49:

> This has been held by a Full Bench in India to give the High Court absolute discretion in granting bail, free from the limitations of the discretion prescribed by section 388. (see *King Emperor v. Nga San Htwa*, and *King Emperor v. Joglekar*). I respectfully agree with this ruling. Also in the first of the above two cases, Rutledge C.J. says,
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> > Though the discretion is absolute the High Court must exercise it judicially, and since the Legislature has chosen to entrust the initial stage of dealing with questions of bail to Magistrates and while giving Magistrates an unfettered discretion of granting of bail in all cases except two classes, i.e. cases punishable with death and cases punishable with transportation for life, the High Court ought not to grant bail in such cases except for exceptional and very special reasons.

8 I have difficulty in following this reasoning. Section 352(1) states that when a person accused of a non-bailable offence appears or is brought before a court, that court may release him on bail. A person facing a charge triable in the High Court will appear in the Subordinate Courts and the High Court. In the usual case, he will be dealt with in the Subordinate Courts until he is committed to stand trial in the High Court, then his case is transferred to the High Court. He may also, as in the case of the applicant, apply to the High Court for bail even before his committal. When the section prescribes that in a case where there are reasonable grounds to believe that the person is guilty of an offence punishable with death or life imprisonment he shall not be released, that should mean that neither the Subordinate Courts nor the High Court shall release him.

9 If the construction adopted in *Re K S Menon* is applied, the High Court which is prohibited from releasing the person under s 352(1) of the CPC may nevertheless release him under s 354(1). Instead of creating an inconsistency with s 352(1), s 354(1) should be read in harmony with it. Section 354(1) should be read to empower the High Court to grant or vary bail for persons whose cases are still being dealt with by the police officers and the Subordinate Courts. Its purpose is to enable a bail application to be made to a High Court any time after a person has been arrested. This construction allows the two sections to operate in harmony, without over-extending the effect of s 354(1) and placing the High Court beyond the scope of s 352(1).

10 In my view, therefore, all cases fall into three classes where bail is concerned:

(a) for bailable offences, where bail has to be offered;

(b) for most non-bailable offences, where there is a discretion to offer bail; and

(c) for non-bailable offences where there appear reasonable grounds for believing that the accused person has been guilty of an offence punishable with death or imprisonment for life, where no bail may be granted.

11 This leads to the next area of controversy: What constitute "reasonable grounds"? Earlier cases on this point came to different conclusions. In *R v Chan Choon Weng* [1956] MLJ 81 which dealt with s 416(1) of the Criminal Procedure Code of the Straits Settlements (equivalent to our s 352(1)), Spencer Wilkinson J stated at 82:

> In my opinion there is no doubt in law that where an accused is charged with an offence punishable with life imprisonment a Magistrate has no power under section 416(1) to grant bail whether that offence is or is not also punishable with death.

12 In *Ad'at bin Taib v PP* [1959] MLJ 245, however, Neal J took a stricter view than Spencer Wilkinson J. He stated (at 245–246):

> Section 416(1) of the Straits Code is similar in terms with our section 388(i) [s 352(1) of the CPC]. It will be noted that the terms used in the Criminal Procedure Code do not refer to the charge but to the question of reasonable grounds for believing the guilt in respect of a particular offence. In my opinion, there is a wide distinction between the charging of an offence and of there being reasonable grounds for believing guilt. It may well be that in the initial stages of a criminal prosecution the fact that the Public Prosecutor has elected to charge a man with an offence coming within the proviso of section 388(i) may provide *prima facie* evidence of such reasonable grounds, but the law still remains that there must be reasonable grounds for believing the guilt. As I said, I am inclined to the view that the statement of the law by Mr.Justice Spencer Wilkinson, to which I have referred, is an incorrect one, but for purposes of deciding the application before me, it is unnecessary for me to go that far.

13 I am also inclined to the view that Spencer Wilkinson J's construction was incorrect. The decision to charge a person is made by the police, with or without reference to the prosecution authorities. The courts have no part at all to play in that decision. The mere fact that the decision has been made cannot be relied on by the police or prosecution authorities, much less the courts, as reasonable grounds for believing that the person charged is guilty.

14 Furthermore, if it was intended that a person shall not be released once he has been charged with those offences, the provision could have stated that in those terms. I therefore hold that the provision must be given its natural meaning and that "reasonable grounds" contemplate something more than the mere fact of the person having been charged.

15 What then would constitute the requisite reasonable grounds? The provision itself offers no guidance. "Reasonable grounds" by their nature cannot be listed exhaustively, but there must be some material for the reasonable grounds to be based on. It should be sufficient that there be some material, *eg*, admissions or confessions, medical or scientific evidence like DNA test results or finger print examination results, eye witnesses' evidence, or circumstantial evidence, which if assumed to be true, would point towards the person's guilt.

16 The material does not have to be tendered at a preliminary hearing or sub-trial. It should be

sufficient that the Prosecution discloses to the court and the accused person the material which, if assumed to be true, would constitute reasonable grounds for believing that the person charged is guilty.

17 In the present case, the applicant was charged with seven offences, four of them under s 377 of the Penal Code (Cap 224, 1985 Rev Ed) which are punishable with life imprisonment. Initially, the prosecutor submitted that the applicant could not be released because he had been charged. When I expressed reservations over that, the prosecutor disclosed that the applicant had made four cautioned statements to those four charges, and that three of those statements were positive statements, meaning that he had admitted to the charges. On my direction, copies of the four statements were supplied to the applicant's counsel. After reading them and taking his client's instructions, counsel did not dispute that three of those statements were incriminatory.

18 I did not conduct a trial-within-a-trial to determine whether those cautioned statements were voluntary and were admissible. That issue should be ruled on by the trial court. If there was a dispute whether the statements were incriminating, I would have read them because a statement can only be a reasonable ground for the purpose of the provision if it is positive. I did not do that as there was no dispute.

19 On the basis of the disclosure and production of the cautioned statements and counsel's acknowledgment of their effect, I ruled that the applicant could not be released.

20 However, as the relationship between ss 352(1) and 354 of the CPC is not conclusively settled, I also dealt with the application on the assumption that I have the discretionary power to grant bail to the applicant.

21 The accused faced seven charges for offences committed against one young boy whom I shall identify as "B", one under s 354 of the Penal Code for outraging modesty, two under s 377A for committing acts of gross indecency, and the four under s 377 for engaging in carnal intercourse.

22 The onus is on the applicant to persuade me to exercise the discretionary power in his favour. Counsel for the applicant complained that the charges were lacking in particulars in respect of time. In the first s 377 charge, the offence was alleged to be committed "sometime in 2002" when B was eight years old. In the second charge, the offence was also alleged to be committed "sometime in mid 2002" but B was stated to be nine years old. In the third charge, the offence was "sometime in mid 2002" when B was eight years old, and in the fourth charge, the offence was "sometime in 2002" when B was eight years old.

23 Counsel complained that references to "sometime in 2002" and "sometime in mid 2002" are too vague for the applicant to defend himself. The prosecutor's response was that those were the best particulars available. He pointed out that B was only eight or nine years old when the events took place several years ago, and the charges reflected what he could now recall. He also pointed out that the applicant had been able to respond to the charges without further particulars.

24 I think that while B may not be able to do better, the Prosecution can. The second and third charges described B to be nine years and eight years old in mid-2002. In the other two charges, he was described as being eight years old at the time of the offences which are alleged to have taken place "sometime in 2002". If B was nine years old in mid-2002, it can be inferred that the two offences committed "sometime in 2002" when B was eight years old must have taken place before mid-2002. But the confusing references to B being eight years and nine years old in mid-2002 prevent

the deduction from being made. This is a matter on which the Prosecution can and should clarify.

25 There is another aspect to the issue of particulars. All the four charges identified the places where the alleged events took place – a specific toilet, a specific flat, and a specific office. I asked the prosecutor if particulars of the time of the day in which the alleged events took place are available, *eg* in the morning, afternoon or evening. B may remember that a particular event took place before or after school, during the day or night. If these particulars are available, they should be stated in the charges to mitigate the lack of exact dates.

26 In the course of the hearing, I was told that the applicant had not applied for particulars as to the time of the offences. If he had asked for them from the Prosecution, and did not receive sufficient particulars to his satisfaction, he can apply for them in court. At that time a determination would be made on his entitlement to the particulars and on the validity of the charges. However, the complaint of the lack of particulars before me did not assist his application for bail.

27 There was another time-related complaint, that there is a delay in prosecution as the offences were alleged to have taken place in 2002, three years ago. I was not informed when the investigations commenced, but I was told that the accused was arrested in June 2005. While trials of offences alleged to have taken place three years or more previously are unusual, they are not unprecedented even by prevailing norms. Each delay must be considered on its own facts. I do not agree with counsel that the delay has been such that a fair trial is not possible.

28 The other grounds raised in support of the application are that the applicant needs to be on bail to effectively prepare for his trial, that he is the sole breadwinner of his family and his business will suffer in his absence, and that he is unlikely to abscond or interfere with prosecution witnesses if he is released on bail.

29 I took all the matters counsel raised into consideration. However, I also took into account the fact that the applicant is facing charges of outraging modesty, committing acts of gross indecency and engaging in carnal intercourse against the order of nature, and that he had made positive statements in relation to three charges of carnal intercourse against the order of nature. On the balance, I found that he had not made out a case to be offered bail.