**Police v MOHAMED Shakeel Ahmed Yousuf Abdul Razack**

**2015 BRC 19**

## POLICE v/s MOHAMED Shakeel Ahmed Yousuf Abdul Razack

**Provisional Cause Number: 9486/15**

# IN THE BAIL AND REMAND COURT

In the matter of:-

**POLICE**

**v/s**

## MOHAMED Shakeel Ahmed Yousuf Abdul Razack

**Ruling**

The Applicant stands provisionally charged under three counts of an information with:

1. Conspiracy to commit murder in breach of Section 109 (1) of the Criminal Code (Supplementary) Act
2. Procuring revolver used in the commission of Murder in breach of section 38(2) of the Criminal Code
3. Possession of Revolver carried off, abstracted and obtained by means of a crime in breach of Section 40 of the Criminal Code.

The Applicant has moved to be admitted to bail. The Applicant was represented at the hearing. The Respondent was also represented by State Counsel.

ASP Ruhomah, the Enquiring officer (EO) was called upon by the Respondent to resist the present application and enumerated the grounds of objection as follows:

1.Risk of absconding

2.Risk of interfering with witnesses

**Facts and circumstances of the case:**

The nature of the evidence against the applicant consists of a statement given by one Mrs Swaleha Joomun and one Mr Oozeer.

**Principles relating to bail**

At the outset, the Court bears in mind the sacrosanct principle of presumption of innocence and the Constitutional rights of the applicant to enjoy freedom and liberty.

**Section 3 of the Bail Act** reads as follows:

*"Notwithstanding any other enactment and subject to section 4, every defendant or detainee shall be entitled to be released on bail."*

**Section 4 (1) of the Bail Act** reads as follows:

*"A Court may refuse to release a defendant or a detainee on bail where –*

*(a) it is satisfied that there is reasonable ground for believing that the defendant or detainee, if released, is likely to-*

*(i) fail to surrender to custody or to appear before a Court as and when required;*

*(ii) commit an offence, other than an offence punishable only by a fine;*

*(iii) interfere with witnesses, tamper with evidence or otherwise obstruct the course of justice, in relation to him or to any other person;*

*(b) it is satisfied that the defendant or detainee should be kept in custody*

*(i) for his own protection;*

*(ii) in the case of a minor, for his own welfare; or*

*(iii) for the preservation of public order;*

*(c) the defendant or detainee, having been released on bail, has –*

*(i) committed an act referred to in paragraph (a); or*

*(ii) breached any other condition imposed on him for his release:*

*(d) the defendant or detainee is charged or is likely to be charged with a serious offence;*

*(e) there is reasonable ground for believing that the defendant or detainee has –*

*(i) given false or misleading information regarding his names or address; or*

*(ii) no fixed place of abode;*

*(f) a detainee has failed to comply with section 12(2).*

**Section 4 (2) of the Bail Act** reads as follows:

*"In considering whether or not to refuse bail on any ground mentioned in subsection (1), the Court shall decide the matter by weighing the interests of society against the right of the defendant or detainee to his liberty and the prejudice he is likely to suffer if he is detained in custody, taking into account every consideration which, in its opinion, is relevant, including –*

*(a) the period for which the defendant or detainee has already been in custody since his arrest;*

*(b) the nature and gravity of the offence with which the defendant or detainee is or is likely to be charged and the nature and gravity of the penalty which may be imposed on him;*

*(c) the character, association, means, community ties and antecedents of the defendant or detainee, including any non-compliance with any condition imposed for his release on bail with respect to any other offence; and*

*(d) the nature of the evidence available with regard to the offence with which the defendant is charged."*

The case of **Maloupe v/s The District Magistrate of Grand Port and Anor [2000 SCJ 223]** makes it clear that the present Court should refrain from delving into "*..the precise evidence available to the police and to conclude as to whether it amounts to a prima facie case… Witnesses in the course of the hearing of an application for bail should only be allowed to depone as to the nature i.e the kind of evidence available (including external circumstances which have a bearing on its quality...*"

The case of **Maloupe v/s The District Magistrate of Grand Port and Anor [2000 SCJ 223]** Also went on to state the following:

"*the rationale of the law of bail at pre-trial stage is, accordingly, that a person should normally be released on bail if the imposition of the conditions reduces the risk of absconding, risk to the administration of justice, the risk to society to such an extent that they become negligible having regard to the weight which the presumption of innocence should carry in the balance. When the imposition of the above conditions is considered not to be likely to make any of the above risks negligible, then bail is to be refused*".

The present bench bears in mind that the right balance is to be struck between the Constitutional right of the accused to enjoy freedom and the interest of society at large.

As stated in the case of **Deelchand v The Director of Public Prosecutions and Others (2005) SCJ 215**, as follows:
*"In all countries where human rights are respected, the function of the law of bail is likely to be the same, being to reconcile, as stated in Labonne v The D.P.P.* (*supra,* at para 2.2)*, "on the one hand the need to safeguard the necessary respect for the liberty of the citizen viewed in the context of the presumption of innocence and, on the other hand, the need to ensure that society and the administration of justice are reasonably protected against serious risks which might materialise in the event that the detainee is really the criminal which he is suspected to be."*

**In Islam v Senior District Magistrate, Grand Port District Court [2006] SCJ 282** at para 37, it was held as follows:

*"Pre-trial bail is not a form of punishment to any individual. It is a form of partial and temporary restriction of his liberty with a view to disabling him against antisocial behaviour".*

**Strength of the evidence**

Without delving into the merits of the case or making a detailed evaluation of the available evidence, the Court in assessing the quality of such evidence notes that it is based on allegations made by one Mrs Swaleha Joomun, whose version is based on what was stated to her by her husband who passed away and one Mr Oozeer who had given a statement against the applicant, but then retracted. The version of Mr Oozeer is purportedly based on the version given to him by one Mr Bahim Coco, who also passed away.

**Analysis of the grounds of objection**

- **Risk of absconding**

The Respondent relied on the fact that the charges are of a serious nature and carry a custodial sentence. However, this is not the only element to be considered when deciding whether this

ground should be allowed to stand and are not conclusive reasons to deprive the applicant of his liberty. The gravity of the charge is not an automatic reason for refusing bail.

The seriousness of the offence and the severity of the penalty are only considerations and or factors to be weighed in the balance in reaching a decision as to whether a person should be detained or not (**Labonne v Director of Public Prosecutions [2005] SCJ 38**)

The case of **Deelchand v The Director of Public Prosecutions and Others (2005) SCJ 215** referred to the case of ***Neumeister v Austria (1968) 1 ECHR 91 (27 June 1968)***,as follows:

"*the severity of the sentence which the defendant would be likely to incur, if convicted, does not of itself justify the inference that he or she would attempt to evade trial if released from detention…other factors, specially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial.*"

Therefore, it is incumbent upon the Court to delve into the personal circumstances of the applicant, which may have a bearing over whether the applicant is likely to abscond.

It has not been stated whether the applicant has a clean record. In the circumstances, the Court can only infer that the applicant boasts of a clean record. The applicant has a fixed place of abode, he is a member of the Legislative Assembly, elected on three occasions, namely in 2005, 2010 and 2015. He comes from a well-known family. He is married and has three children.

He has cooperated with the police and never refused to come to the police when requested to do so, in relation to the present matter. He attended the police station voluntarily this morning. The applicant has undertaken under solemn affirmation to remain at the disposal of the police as he has been since 1996. The applicant has submitted his diplomatic passport to the PIO and has undertaken to hand in his passport to the relevant authorities.

The Court takes the view that the applicant has strong family ties.

The enquiring officer conceded during cross-examination that the ground of objection is based on apprehensions.

In the light of the above and given that no evidence was ushered in regarding the character of the applicant, which would indicate that he is likely to abscond, I find that the Respondent has failed to substantiate the ground on which its fear is based.

- **Interference with witnesses**

It is the contention of the Respondent that if released, the applicant is likely to interfere with witnesses who have given statements in the Ghorah Issac case.

In the case of **Deelchand v The Director of Public Prosecutions and Others (2005) SCJ 215,** the following was held with regard to the present ground of objection:

*"It would be preposterous to hold the view that in each and every application for bail, it would suffice that an enquiring officer should express his fear that the applicant would interfere with one or more witnesses for the accused to be denied bail on that ground. To satisfy the court that there is a serious risk of interference with a witness, satisfactory reasons, and appropriate evidence in connection thereof where appropriate, should be given to establish the probability of interference with that witness by the applicant."*

The following extract from "**Bail in Criminal Proceedings" (1990), Neil Corre**, was also referred to in the same case as follows:

*"The exception's most common manifestations are in cases where:*
*(a) the defendant has allegedly threatened witnesses;*
*(b) the defendant has allegedly made admissions that he intends to do so;*
*(c) the witnesses have a close relationship with the defendant, for example in cases of domestic violence or incest;*

*(d) the witnesses are especially vulnerable, for example where they live near the defendant or are children or elderly people;*
*(e) it is believed that the defendant knows the location of inculpatory documentary evidence which he may destroy, or has hidden stolen property or the proceeds of crime;*

*(f) it is believed the defendant will intimidate or bribe jurors;*
*(g) other suspects are still at large and may be warned by the defendant*

*The exception does not apply simply because there are further police enquiries or merely because there are suspects who have yet to be apprehended".*

The Court notes that the enquiring officer admitted that the ground of objection is based on apprehension. Without delving into the merits of the case, the Court took note of the following:

- All the persons with whom the applicant is likely to interfere with have either already been prosecuted in relation to the Ghorah Issac case or they have already passed away.
- Mrs Swaleha Joomun does not reside permanently in Mauritius and stays in the UK. It has come to light that since 1996 to date, she has already given statements. I also observed that the version of Mrs Swaleha Joomun lies in the statement given to her by her husband before he passed away.

The Court finds that the Respondent has failed to substantiate this ground of objection

**Assessment**

I am of the view that the Respondent has failed to satisfy this Court as to the facts and circumstances which exist in this particular case, upon which its apprehensions, under grounds I and II are based. I am further of the view that any risk enunciated by the Respondent can be reduced to an acceptable level by the imposition of the following conditions. The Court is consequently not ready to deprive the Applicant of his freedom to be at large.

Accordingly I order the applicant to be admitted to bail under the following conditions:

- The Applicant is to furnish a surety of Rs 100,000 (cash)
- The Applicant is to enter a recognizance in the sum of Rs 1,000,000 in his own name

Given that the cash office is closed, the applicant is released on parole today and is warned to appear before the District Court of Port-Louis (Division II) tomorrow 24 November 2015 at 10 a.m to abide by the above-mentioned conditions.

Mrs Manjula Kumari Boojharut

(District Magistrate)

Delivered on 23 November 2015