

"K" .V. REGINA

High Court of Solomon Islands
(Palmer CJ)

Criminal Case Number 368-05

Date of Hearing: 31st August 2005
Date of Judgment: 16th September 2005

Ms. M. Swift for the Applicant
P. Little for the Respondent (Crown)

Palmer CJ.: This is a bail application by a Juvenile Offender (hereinafter referred to as "K") who is about 17 years at this point of time. He has been charged with one count of murder and one count of being a member of an unlawful society.

K was with a group of other members of the Guadalcanal Liberation Front ("the GLF") who accused Brother Patteson Gatu ("the Victim") and other Melanesian Brothers (more commonly referred to as "Tasius") as Government spies. They were apprehended sometime in the afternoon of 24th April 2003. Two of the brothers following a confrontation were shot and killed that afternoon. The other four were held captive overnight before being escorted to the beach near Pite Village on the morning of 25th April 2003 and shot beside a grave that had been dug earlier on for them by the GLF. The Victim was shot by K.

K was arrested in or about October 2003 and has been in custody since it seems. He was committed to stand trial at the High Court together with three other co-defendants on 18th March 2004. The Director of Public Prosecutions filed information on 13th April 2005. On 4th March 2005 the original case (CRC 320-323/04) was given a trial date to commence on 11th July 2005. At the trial date however, an application was lodged for severance of his trial as a juvenile. This was granted by the court and a new trial date now fixed for 3rd July 2006, taking all factors into account regarding listing of cases.

He now comes to this court for bail. It has oft been repeated by this court that in murder cases, rarely is bail granted save in exceptional circumstances. See *R v Kong Ming Khoo*¹:

"Section 106 makes it dear, when the charge is murder or treason, it is only exceptionally that bail is granted. Mr. Young seeks to distinguish between good reason, special circumstances and exceptional circumstances. I am afraid I do not feel such distinctions apply in this case. The effect of Section 106 is that bail in murder cases will only be granted in exceptional circumstances. However, whilst that places a heavier burden on the defence, the same considerations apply as in any bail application. The court must consider them all but bear in mind that the effect of section 106 in a case involving a charge of murder or treason means it is only in rare cases that bail will be granted."

He relies on two grounds, delay in listing of trial date and his youth, as amounting to exceptional circumstances. He submits through his Counsel Ms. Swift, that bail is warranted in his case.

1. Delay

Section 5(3)(b) of the Constitution imposes requirement that "... any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be

¹ Unrep. Criminal Case No. unknown of 1991, Ward CJ at page 2

released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.” (Emphasis added)

Our Constitution recognises the importance of having accuseds brought to court for trial as soon as possible within a **reasonable time**. If the delay is deemed unreasonable, the court must consider releasing the accused on bail.

Learned Counsel Ms. Swift also cites an extract from the **Amnesty International Fair Trials Manual**² (“**the Manual**”) which sets out relevant standards supporting the issue of rights of an accused to trial within a reasonable time or release pending trial. The Manual was also raised before this court in an earlier bail application in *Roddy Seko v Regina*³ (“**Seko’s Case**”), was considered and the standards set out there, adopted as useful guidelines to assist the court in determining the issue of delay. At page 3, this court stated as follows:

“The Manual sets out two standards; the first one applicable to detainees, that those in detention are to be brought to trial within a reasonable time or released. This is based on the presumption of innocence⁴ and the right to personal liberty⁵, which requires that anyone held in custody is entitled to have their case given priority and to have their proceedings conducted with particular expedition. The second set of standards relates to those arrested and or detained, that they have a right to have their trials held without undue delay. The main purpose is to minimise unduly prolonged uncertainty and that evidence is not lost or undermined.

The Manual then sets out a number of factors which the Human Rights Committee and regional bodies consider to be relevant matters in examining or assessing the reasonableness of a period of pre-trial detention:

- (i) *the seriousness of the offence alleged to have been committed;*
- (ii) *the nature and severity of the possible penalties;*
- (iii) *the danger that the accused will abscond if released;*
- (iv) *whether the national authorities have displayed “special diligence” in the conduct of the proceedings, considering the complexity and special characteristics of the investigation;*
- (v) *whether continued delays are due to the conduct of the accused (such as refusing to cooperate with the authorities) or the prosecution.”*

I adopt those same factors as useful guidelines in assisting this court in assessing the question whether bail should be granted in this case but bearing in mind that this is a juvenile and having regard also to the provisions of the Juvenile Offenders Act which apply.

(i) The seriousness of the offence alleged to have been committed.

It cannot be denied the offences for which K has been charged with extremely serious. It included voluntarily joining an unlawful society whose acts had been responsible for many atrocities committed and secondly the killing of an innocent member of the Melanesian Brotherhood on a mission to look for their colleague brother who had also been captured by the same group. The facts

² Amnesty International Publications, 1 Easton Street, London WC1X8DJ, United Kingdom at Chapter 7 page 49

³ *Roddy Seko v. Regina* CRC 350-05, 1st September 2005

⁴ see section 10(2)(a) of the Solomon Islands Constitution.

⁵ See section 5(3)(b) of the SI Constitution.

⁶ European Court, *Tomasi v. France* 27 August 1992 241 A Er. A para. 84; *Abdoella v. The Netherlands*, (1/1992/346/419), 25 November 1992.

of the case taken at its highest and this has not been disputed at this point of time, showed the killing was done in military execution style or fashion; the Victim told to stand in front of his grave so that when he was shot he would simply fall into his grave. There is direct evidence that the fatal act was done by K including a taped statement of interview dated 2nd October 2003 in the presence of his lawyer and a Social Welfare worker from the Social Welfare Office, where clear admissions have been made to the killing. It has been intimated that the defence of duress would be run at his trial. It should also be borne in mind though that there is material which discloses that this accused chose out of his own free volition to join up with the GLF.

The circumstances surrounding the commission of the offences were extremely serious; the lives of six Melanesian brothers have been cut off without any serious and genuine efforts taken in having the facts determined properly. They were never given any proper chance to explain themselves, no investigations, only execution at the word of those men that K had deliberately and intentionally chosen to follow and join up, gang up with. This accused has tasted the power of the gun and know what it is to kill an innocent member of a church society/organisation whose primary role has nothing to do with murders and killings. The risk to the public in this case is greater if this accused is released.

(ii) The nature and severity of the possible penalties.

Murder is one of the most serious crimes in our Penal Code (cap. 26) and attracts a mandatory sentence of life imprisonment. The likelihood of a conviction and imposition of a life sentence in this case cannot be described as remote or not likely. It is a real possibility which faces K from the time he was arrested and charged to date. What needs to be borne in mind throughout is that this offence was committed in the company of other adults in a group, as members of the GLF and entailed the use of high level violence with a high powered rifle which this accused had in his possession. These are all aggravating factors and have direct bearing/influence on the activities of K at that time, despite his age.

Whilst the maximum sentence which can be imposed for the offence of being a member of an unlawful society is only three years, it should be borne in mind that the evidence against K in this instance is fairly clear and direct including an admission that he voluntarily joined this group. The possibility therefore of a custodial sentence being imposed is again not remote.

(iii) The danger that the accused will abscond if released.

K relies on the affidavit of Catherine Kejoa (an aunty of his) filed on 24th August 2005 in support of his bail application who has offered the home of her family at Rifle Range, Honiara to look after him if released on bail with an offer of surety of \$500.00. These however have to be balanced with the risk of absconding if released, based on the seriousness of the offences and the real possibility of life imprisonment if convicted after trial. As a young person and where the offences were committed together as a group or in the company of adults⁷, imprisonment is not excluded by law⁸. The stakes and risks naturally are raised and cannot be ignored by this court in the exercise of its balancing exercise whether bail should be granted or not.

(iv) Conduct of Proceedings and accused.

The original case was styled the Six Melanesian Brothers Case, as it entailed the murder of six members of the Melanesian Brotherhood Orders of the Church of Melanesia. It was given high profile status and trial dates fixed for 11th July 2005 as early as 4th March 2005. A directions hearing was fixed for 10th June 2005 at 3.30 pm. There was ample time to have the issue of a separate trial raised either prior to the directions hearing or at the directions hearing as a pre-trial issue. This was not done until the commencement of the trial hence delaying trial. It also meant a new trial date had

⁷ Section 21 Penal Code

⁸ Section 16(i) or (j) Juvenile Offenders Act [cap. 14]

to be fixed for this accused following ruling of the court in favour of a separate trial. The net effect is simply further delay in the listing and hearing of this accused's case. No fault therefore can be attributed to the various authorities including the court in not having attended to this case with "special diligence", considering the complexity and special characteristics of the investigation.

If any fault is to be apportioned in the delays to this case that must lie with the accused in failing to have the issue of a separate trial raised as a pre-trial issue well in advance.

The listing of court trials is quite tight and therefore any preliminary issue should as much as possible be raised well before trial date commences so that the trial judge can attend to and make any rulings well before the trial dates commence avoiding unnecessary delays, which in certain cases may take as much as 12 months or more.

I am not satisfied this is a case where the continued delay is attributable to the Prosecution in its investigative work or the court and therefore the submission for delay in the listing of this case as an exceptional circumstance or ground must be dismissed.

2. Youth

The youthfulness of this accused in coming to court for trial is not an exceptional circumstance. This is not the first time young persons⁹ have come before this court or the Magistrates Courts. There is specific legislation, the Juvenile Offenders Act which provides clear and useful guidelines for the courts in this country when dealing with young offenders. The various international Human Rights Conventions referred to (the Universal Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all forms of Racial Discrimination and Convention on the Rights of the Child ("CRC")), must be read subject to the domestic legislation and the Constitution. Much of what is contained in those Conventions and international instruments are already well reflected in our domestic legislation. For instance, Article 37 of the CRC which provides as follows:

"(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age ...".

Our Constitution in section 7 provides for protection from inhuman treatment. In so far as the possibility of release applies to sentences of mandatory life sentences, the Constitution equally provides in section 45 a mechanism whereby the Governor-General may grant inter alia pardons on the advice of a Committee on the Prerogative of Mercy set up to assist him in the discharge of his duties under this provision. It cannot be said therefore that a mandatory life sentence of imprisonment for murder contravenes Article 37 of the CRC. If convicted, at the appropriate time, this accused may be eligible for consideration together with others for pardon. It must be borne in mind, that the offences for which this accused had been charged with were committed in the company of adults.

In so far as paragraph (b) of Article 37 provides:

"(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity of the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;"

It is important to bear in mind that such requirements are more than adequately catered for in the Juvenile Offenders Act, the Constitution, the Penal Code and the Criminal Procedure Code which set out how the criminal process in this country is to be carried out. It has never been suggested or raised that his liberty has been deprived unlawfully or arbitrarily. He has been duly arrested charged

⁹ see section 2 of the Juvenile Offenders Act – definition of a young person as between 14 – 18 years.

and detained for one of, if not the most serious offence under our Penal Code; being the murder of one of the six Melanesian Brothers and for joining an unlawful society that has been notorious for many atrocities and crimes committed in the Weather-Coast part of Guadalcanal and other parts of the country. The crimes he has been charged with cannot by any standards be described as not serious and his case not given priority as required. A trial date has now been given and he will have his day and turn in court at the appropriate time. I am not satisfied the delay in his case can be described as unreasonable in any way.

As regards appropriate/suitable facilities for the detention of juveniles at Rove Prison, I have been informed that there is a dedicated juvenile unit and that this accused had been given the opportunity to stay there but had elected to remain in the main detention centre, preferring to stay with his father who I understand is also in detention. Any suggestions therefore that Rove Prison does not have any separate facility for juveniles and submissions of possible contamination while in the adult prison centre, given his personal choice, cannot be sustained.

I am not satisfied bail should be granted in this case. The accused is to remain in custody at a place of detention for juveniles at Rove Prison or some such other suitable arrangement which the Prison Authorities may have put in place already whether by choice or not.

The Court.