REPUBLIC OF KENYA

Watoro v Republic

High Court, at Nairobi April 14, 1991

Porter J

Criminal Application No 166 of 1991

Criminal Practice and Procedure *– bail pending trial – paramount consideration in granting of such bail - whether seriousness of the offence in terms of sentence to be meted out on conviction a relevant factor in an application for bail.*

Constitutional Law – *presumption of innocence – mere charging of an accused with an offence not a relevant factor in deciding bail application.*

The applicant was charged with three counts of sedition all of which it was alleged he had committed by printing a seditious document with different intents.

It was urged on behalf of the accused that he ought to be presumed innocent and this ought to have a bearing on the relevance of the maximum sentence which the offence carried.

The defence counsel further submitted that the Court ought to bear in mind the prosecution's case and that what his client was charged with was a fair comment within the meaning of section 56 and 57 of the Penal Code.

Held:

1. The paramount consideration in bail applications is whether the accused will turn up for his trial.

2. The seriousness of the offence in the terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion.

3. It would be wrong to leap to the conclusion that the accused was guilty merely because he had been charged and to decide the bail application on that basis.

4. Nevertheless, the seriousness of the offence has a clear bearing, which the Court ought to bear in mind, on the factors influencing the mind of an accused facing a charge in respect of that offence is to whether it would be a good thing to skip or not.

Application refused.

Cases

No cases referred to.

Statutes

1. Penal Code (cap 63) sections 56(1)(b), 57(1)(c)

2. Criminal Procedure Code (cap 75) sections 36, 37, 123(3)

Advocates

Mr Thiong'o for the Applicant.

April 14, 1991, **Porter J** delivered the following Ruling.

In this case the applicant is charge with 3 counts of sedition c/s 56 (1) (b) as read with s57 (1)(c) of the Penal Code, in each of which counts it is alleged that the applicant printed a seditious publication which appears to be the same document in each count, with different intents. It would seem that these counts should be in the alternative.

The application before me is under s 123(3) of the CPC for bail pending trial, which has been refused by the learned Chief Magistrate. I have no doubt whatever that bail can be granted in respect of such an offence.

The objection brought by the State to the granting of bail is due to the likelihood of the applicant absconding since the offence carries a maximum sentence of 10 years.

Mr Thiongo points out as to his client:

> 1. That one of his co-accused was at one stage released on bail the state not objecting on a previous occasion when charged under the same section.
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> 2. That the applicant was kept in custody for 9 days before being brought to court, and the provisions of s 36 & S 37 of the CPC were not followed since I am exercising a discretion in this matter Mr Thiongo seeks my sympathy which he is entitled to do based on this failure.
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> 3. That the applicant has no previous convictions and has served the country well in the civil service.
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> 4. That the applicant is suffering from pains in the chest for which he saw a doctor last Christmas. An ECG chart is attached to the application. I am afraid I do not understand it, and Mr Thiongo did not want to call further evidence on the matter.

All of these matters I will bear in mind. I would also bear in mind what I have said on many occasions before, that each case depends upon its own facts: it does not necessarily follow that because one person has been released upon bail in respect of an offence, then every person so charged shall be released as a matter of course. For example it may be that the frequency of alleged offences causes sufficient concern for the Courts to begin to think that more serious sentences are likely: which would directly affect consideration of the likelihood of the accused answering to bail.

I wish the State during investigations would in particular bear in mind the provisions of s 37 of the CPC which appear to be ignored in every case as a matter of practice. This section is not affected by the provisions of the constitutional amendment. Because it establishes the Court as a central registration for prisoners arrested without warrant, it is a method of establishing.

> 1. The reason for arrest without warrant (which is relevant in murder and treason cases (see s 37) and in those cases to which the sonstitutional amendment applies) and
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> 2. The whereabouts of any person arrested without warrant

3. Whether the Court should interfere when bail has been refused under s 36.

Failure to comply with this section leaves a nasty taste in the mouth of the Courts which may result in a doubt in respect of admissions made while under arrest, and may also result in forcing the family and friends to chase around police station after police station trying to arrange for representation and medical facilities if necessary. In some cases this leads to applications for writs of *habeas corpus* which would have been totally unnecessary if s 37 had been followed.

As to the law, Mr Thiongo had the following to draw to my attention:-

1. There is a presumption of innocence, and this has a bearing on the relevance of the maximum sentence which the offence carries.

I think I have made it clear over a number of rulings in bail applications that I take the view on authority that the paramount consideration in bail applications is whether the accused will turn up for his trial. The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion.

If the presumption of innocence were to be applied in full, there could never be a remand in custody (save in murder or treason cases) on the ground of the seriousness of the offence because the Court so acting would have to assume that the accused as innocent, and therefore that no sentence would follow.

What I think is important for the Court to bear in mind, and the reason for the caution to remember the presumption of innoncence, is that it would be wrong to leap to the conclusion that the accused was guilty merely because he had been charged and decide the bail application on that basis.

Nevertheless the seriousness of the offence has a clear bearing, which the Court ought to bear in mind, on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not; and such a possibility is not out of the question: it has happened before, and in similar cases.

I do not mean to say that because other people have decided to leave business, family and friends for other climes rather than to face prosecution, this applicant will do so: that decision depends on all the prevailing circumstances of the application. All I mean to say is that the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow a conviction.

2. Then Mr Thiongo argued the strength of the prosecution case, which is another mater to be borne in mind in a bail application. The main force of his argument was to imply that available to his client in any trial which might follow was the defence of what I would refer to as a shorthand, as fair comment, the nature of which is indicated in the proviso to the section. What he puts forward is quite true: such a defence is available: it is also true that people have a right to discuss matters of public importance, so long as in doing so they do not breach the wide terms of s 56 and s 57, but the mere fact that Mr Thiongo refers to a defence implies that as at present advised this Court can take it that it cannot be said at this stage that a prima facie case cannot be established.

This is a bail application: it would be totally inappropriate for me to try to guess what would happen in a trial of this offence, and also totally inappropriate to start calling and considering evidence.

To take a recent example, Mr Nowrojee argued before me in an application for bail by a co-accused of the applicant that there were problems with the consent to prosecute which meant that the charge could not be proceeded with: as it happens I ruled against him, but clearly such

a problem, if it existed, would militate against a remand in custody, and it would be obvious on the face of the record before the Court during the bail application.

In this case there are obvious oddities in the consent to prosecute, although they are not sufficient at this stage to negate the prosecution case on the basis of what is now before me. I cannot make any other comment on the strength of the prosecution case: in terms of the consideration I must make of the the whole application, I will have to leave such consideration out of account.

3. Mr Thiongo also reminds me that just because a coaccused has been remanded in custody, it does not necessarily follow that this applicant should be so remanded. I am well aware of that: the considerations are completely different: and this is yet another example of the fact that each case must be treated on its own merits.

In this case what is alleged is that the applicant was involved in the dissemination of material which was seditious, as the printer: in the event of a conviction the courts are bound to take such close involvement seriously, and the applicant must be aware of that.

I bear in mind the medical difficulties of the appellant, but I do not consider them as having been shown to be anything that the Prison authorities cannot deal with in the ordinary course.

Weighing everything which has been said before me together, and bearing the presumption of the applicant’s innocence to the extent I have outlined above, nevertheless I am of the view that the seriousness of the offence in all the circumstances is such that there is a very real risk that if released upon bail the applicant would be sorely tempted to abscond (I follow the wording of Hancox CJ as he then was), and I am therefore constrained to refuse bail in this case.