

REGINA -v- CHRIS MAE

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Criminal Case No. 289 of 2005

Date of Hearing: 14th September 2005.

Date of Ruling: 16th September 2005.

R. Barry for the Crown.

K. A terre for the Applicant.

RULING

Kabui, J. Chris Mae is currently in custody in the Rove Prison. He had been charged and convicted for demanding with menaces and was sentenced to two years and half imprisonment. That sentence had been fully served and he should have been released. He however has not been released because he is being kept in remand for one offence of robbery committed in Honiara in 2001. He promises in his affidavit to abide by any conditions that the Court may impose if the Court grants him bail. That is all that he has told the Court.

The law is clear on the right to bail but that right has to be earned by Mae in this case. That is, he has to show by evidence that he can be trusted to appear in Court on the appointed time or cannot interfere with witnesses.

The decision to grant bail or not is a matter for the discretion of the Court. That discretion is and cannot be exercised in a vacuum. Certain factors do impact upon the mind of the judge or magistrate to influence the exercise of the court's discretion. One factor is the nature of the offence. Mae is charged with robbery. That is a serious offence. It carries a maximum penalty of life imprisonment under section 293(1) of the Penal Code (the Code). The evidence against Mae comes from Tony Sipolo and his wife, the victims of the robbery. They are eye witnesses. Mae is likely to go to prison if he is convicted of the robbery. Re-offending is said to be unlikely though no one can tell Mae's disposition in this regard. Interfering with witnesses is not an issue though is a relevant issue in any bail application. The main issue of contention is risk of flight. Mae says in his affidavit that he has community ties in Honiara, meaning he has a brother living at Kola Ridge with whom he can stay. Will Mae attend his trial in November if he is released on bail on conditions? He was bailed before by the Magistrate Court and honoured the bail conditions then. This is his strongest argument. This argument is however inherent with speculation in that there is nothing to stop Mae choosing not to attend court this time around. On the other hand, it is evidence of his disposition

to obeying the law. There is a rather delicate balance between respecting Mae's right of innocence until proven guilty and the need for the law to be enforced in the public interest. However, there is another point for me to consider in this case. It is to do with the protection afforded by the Constitution to persons who are detained whose trial is being delayed beyond a reasonable time.

Does the question of discretion apply under section 5(3) of the Constitution where the accused is detained and his trial does not take place within a reasonable time?

It is indeed the case that Mae has been in custody for this offence since June, 2004 and by this month, he will have been in custody for fifteen months. His trial is fixed for November 21st November 2005 in approximately two months time. If I do not release him, by the date of his trial, he will have been in custody for this offence, seventeen months. If his trial does not proceed in November, he will surely be in custody for longer than seventeen months.

Section 5(3) of the Constitution.

Subsection 3 is about the rights of any person who is arrested or detained by the Police and is not released immediately. That person must be taken immediately without undue delay before a court. If that person is not tried within a reasonable time, then, he or she must be released without conditions or with reasonable conditions no matter it is the case that further proceedings may be brought against him or her. The section states-

“(3) Any person who is arrested or detained-

- (a) for the purpose of bringing him before a court in execution of the order of the court; or**
- (b) upon reasonable suspicion of having committed, or being about to commit, a criminal offence under the law in force in Solomon Islands;**

and who is not released, shall be brought without undue delay before a court; and if 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 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.”

It seems to me the use of the word "shall" is imperative in this subsection. It removes any discretion that the court may have as far as the granting of bail is concerned to persons who are detained and are not tried within a reasonable time. The discretion that the court has is therefore one in deciding whether bail should be granted unconditionally or with conditions and not whether bail should be granted for bail is inevitable. Even the conditions imposed must be reasonable conditions and not oppressive ones.

The operative words in this section are "not tried within a reasonable time". The question is what is a reasonable time? I can find no local cases on this point. There are of course decided cases on the right to a fair hearing within a reasonable time under section 10(1) and (8) of the Constitution. (See **Director of Public Prosecutions v. Rolland Kimisi** (unreported), Civil Appeal No. 67 of 1990 and others in that category). In my view, the right to speedy trial under section 10(8) of the Constitution is not the same thing as a right to personal liberty of a person. Mae is not complaining about the delay of his trial but rather about his liberty being denied by long detention for fifteen months. He says he wants bail to vindicate his liberty under the Constitution whilst waiting for his trial to take place. In other words, if his trial cannot take place within a reasonable time, he should be granted bail. I think he is right. I think the section 5(3) of the Constitution of Solomon Islands has removed the discretion of the courts in granting bail where the trial of a person has not taken place within a reasonable time and the accused continues to languish in custody. Section 5(3) of the Constitution does not however affect normal cases for remand warrants in the Magistrates Courts or detention for legitimate reasons. But where the trial of a person does not take place within a reasonable time, the person must be released. The question of what is a reasonable time in a particular case must be decided by the court on the facts of the case. There can be no general rule as to what must be a reasonable time in all cases.

Conclusion.

The Constitution is the supreme law of this land. It must be followed. The personal liberty of a person is a fundamental right and freedom of all persons in Solomon Islands. It is a human right protected by the Constitution under sections 17 and 18 of the Constitution. It is one of the rights and freedoms entrenched in the Constitution. It is alive and jealously guarded by the Constitution. The courts will recognize it when it calls. I have considered the scenario that the flood-gates will be opened. So be it. The preamble to the Constitution claims that the Constitution belongs to the people. The people have spoken and the Constitution is their word. I cannot stand in their way to obstruct their wish. I will release MAE on the ground that his trial for the offence of robbery has not taken place within a reasonable time. The offence was committed in 2001 and subsequently investigated in early 2004. He was interviewed by the Police on 4th February 2004. He was committed to stand his trial in the High Court on 3rd November 2004.

The DPP filed the information against him on 9th June 2005, some seven months after his committal. That delay of seven months is unacceptable. He is expected to wait another five months before his trial commences in November, 2005. He has been detained all along in the interest of the public. I do not dispute that but his trial must commence within a reasonable time. A delay of fifteen months without trial is unconstitutional and flies in the face of the Constitution. I must grant bail and I do so accordingly. I will however impose the following conditions, that is to say -

1. Mae will not leave Honiara without the consent of the Court until his trial is over;
2. Mae will report twice weekly to the Central Police Station;
3. Mae will not contact or approach any Crown witnesses during his bail time.

I order accordingly.

F.O. Kabui
Puisne Judge