BARREAU v REPUBLIC

(2011) SLR 378

B Hoareau for the appellant
V Benjamin, State Counsel, for the respondent

Judgment delivered on 2 December 2011

Before Domah, Fernando, Twomey JJ

FERNANDO J:

This is an appeal against an order of remand made by the Supreme Court dated the 20 May 2011 remanding the appellant, who has been arraigned before the court on two counts of possession of controlled drugs, namely 1.41 grams of heroin and 0.112 grams of cannabis herbal material to custody for a period of 14 days pursuant to section 179 of the Criminal Procedure Code.

The grounds of appeal are as follows:

i. The judge erred in law in holding that the case *of Republic vs Wilven Cousin*, Cr 10 of 2011 could be distinguished from the present case and thus remanding the appellant in custody.

ii. The judge erred in law in remanding the appellant in custody in view of the circumstances of the case, more specifically the fact that the appellant has been charged with possession of a controlled drug only.

The appellant had thus prayed that his appeal be allowed and he be released on bail.

The 1st ground of appeal has been based on paragraph 6 of the ruling of the trial judge which reads as follows:

> It has been stated in Rep vs Wilven Cousin, Criminal side No. 10 of 2011, that like cases should be treated. alike unless there are exceptional circumstances. In that case reference was made to similar applications decided by this Court where the accused had been released on bail because they had been charged with possession of a controlled drug, such as *Republic vs Jimmy Labrosse* Cr No SS of 2010, *Republic vs Kevin Labrosse and Mervin Labrosse* Cr No. 77 of 2010. However I wish to distinguish the *Republic vs Wilven Cousin* Cr No. 10 of 2011 case from the one at hand. In the present case there are two different types of drugs and amounts as indicated in the two counts above. Although the offences .preferred are of possession of illicit drugs, in both counts the amounts, which emanate from the same transaction and should be treated together, are substantial to justify such charges unlike in the *Wilven Cousin* case were the Court found the second count to be vague as it could not even state the exact weight of the heroin allegedly found on the accused.

We are in a difficulty to understand the trial judge when he sought to distinguish *Republic vs Wilve*n *Cousin* from this case on the basis of the amount of drugs found in the possession of the appeliant. Obviously the amounts will always differ and the issue to have been considered was the nature of the charge that was levelled against the apellant, namely possession, which was the same as in *Wilven Cousin's* case. Also in our view the amount of drugs that were found in the possession of the appellant, namely 1.41 grams of heroin and 0.112 grams of cannabis herbal material are not 'substantial' by themselves to justify refusal of bail. We therefore uphold the 1st ground of appeal.

As regards ground 2 it must be said, as we have already stated in the case of *Steve Hoareau* CR SCA 28/2010, that the seriousness of the offence is a determination the court would have to make, taking into consideration the maximum penalty the Legislature has decided to impose for its commission, the likelihood of the maximum sentence being imposed, whether the sentence is mandatory or not, the manner the offence has been committed, the impact the commission of such offences has on society and the economy, the age of the offender and whether the offender has a propensity for commission of offences similar to the one before the court. It is a consideration of all these factors that makes an offence serious or not serious. The seriousness of the offence constitutes one factor but need not necessarily be the sole factor for determination of bail. In the case of *Roy Beehary v The Republic* SCA 11 of 2009 this Court said:

> The overriding rationale in favour of such an interpretation may be found in the fact that were that not the case, the State by a mere change in the law and by merely creating an offence as a serious offence would end up by precluding the court from adjudicating on the bail application of any person. That would be an evil precedent for a democratic system in that by a simple and innocuous legislative device categorizing a particular charge to be serious and non-bailable offence, the jurisdiction of the court to determine matters of bail in those cases would be ousted. The result would be that the court would become a rubber stamp of the legislator ....

The minimum sentences that may be imposed on conviction for the two offences ranges between 5 to 3 years, respectively, for a first offender with the possibility that the court may, if it considers that there are exceptional reasons for not imposing the minimum term of imprisonment, impose such other term of imprisonment, as it thinks fit. The trial judge appears to have overlooked this fact when he said that the charges herein "attract heavy sentences which could easily induce the accused not to return into the hands of Court in case he is released on bail." Had the trial judge taken the issue of sentence the appellant is likely to receive in the event of a conviction into consideration he may not have refused bail on the basis of the possibility of the appellant absconding. We are therefore of the view that the appellant should succeed on this ground of appeal.

The respondent in his skeleton arguments has stated that the appellant's case before the. Supreme Court is at the stage of completion of the prosecution case with only the forensic analyst remaining to testify on 14 December 2011.In the circumstances we are of the view that the appellant should make a fresh application for bail when the case comes up before the Supreme Court in 5 days time for

continuation of his trial. This is because as we stated in the case of *Roy Beeharry* SCA 11 of 2009

> (a) the trial court would be more au fait with the facts and circumstances of the case than the appellate court;
> (b) the trial court would best be able to evaluate the risks involved in the release to secure the defendant's presence before itself;
> (c) the trial court would be the best judge in assessing what conditions will apply to secure the defendant's presence on the day of trial;
> (d) the trial court would be able to directly examine the defendant to gauge his plight. The appellate court is bereft of the many advantages which a trial court has, proceeding as it does from a record of proceedings.....

We therefore leave it to the Supreme Court to determine the status of the appellant, depending on the state of the case at the close of the prosecution, bearing in mind what we have said in this appeal.