

**ROLAND TIMO .V. REGINA**

**High Court of Solomon Islands  
(Palmer CJ.)**

**Criminal Case No. 408 of 2004**

**Date of Hearing: 8<sup>th</sup> September 2005  
Date of Judgment: 23<sup>rd</sup> September 2005**

**K. Averre for the Applicant  
R. Barry for the Respondent/Crown**

**Palmer CJ.:** This is a bail application by Roland Timo ("**the Applicant**") in respect of two sets of offences for which he has been charged with. The first set of offences relate to:

- (i) Demanding with menaces contrary to section 295 of the Penal Code,
- (ii) Conspiracy to murder contrary to section 218 of the Penal Code,
- (iii) Assault occasioning Actual Bodily Harm contrary to section 245 of the Penal Code, and
- (iv) Intimidation contrary to section 231 of the Penal Code.

He was committed to stand trial in the High Court in October 2004 but the information was not filed until 26<sup>th</sup> August 2005. That matter is now listed for trial in August 2006.

The second set of offences relate to demanding money with menaces and receiving property. That case relates to the money obtained from the Malaita Provincial Government in November 2000. It is likely those matters will be dealt with in the Magistrates Court sometime after April 2006 as one of the co-accused Mr. Jimmy Lusibaea will be on trial in the High Court up until April 2006. Mr. Averre points out that a number of men charged for this offence enjoy bail including Mr. Kwaiga who has a murder charge and his remand not sought despite those additional charges. Those second set of offences although mentioned do not form the substance of this bail application.

The focus of this bail application is on the more serious charge of Conspiracy to murder which carries a maximum penalty of 10 years. Prosecution opposes bail on the grounds that if released there is real risk to interference with witnesses and or absconding. Prosecution relies on previous offences committed by the Applicant for which he has been charged with, tried and convicted. Learned Counsel Mr. Barry also submits that prosecution case at its highest cannot be described as weak and raises the risk of interference to witnesses if released on bail. He also says that risk of fleeing the jurisdiction increases and points out that the serious nature of the crimes he has been charged with and past history indicates a desire to avoid conviction.

Mr. Averre on behalf of the Applicant has provided extensive written submissions on why bail should be granted in favour of his client. In summary he reminded the court of its discretionary power to grant bail<sup>1</sup>. Learned Counsel also quoted from the **Amnesty International's Fair Trials Manual**<sup>2</sup> ("**the Manual**"), which contained discussion on the issue of pre-trial detention and presumption of release pending trial, which I quote as follows:

*"People awaiting trial on criminal charges should not, as a general rule, be held in custody. In accordance with the right to liberty and the presumption of innocence*

<sup>1</sup> Section 5(3) of the Constitution; *Taisia v. DPP* (unreported) CRC 226-01 Kabui J.; *Kelesiwasi v. Regina* (Unreported) CRC 24-04.

<sup>2</sup> Chapter 1.5

..., there is a presumption that people charged with a criminal offence will not be detained before their trials. International standards explicitly recognise that there are, however, circumstances in which the authorities may impose conditions on a person's liberty or detain an individual pending trial. Such circumstances include when it is deemed necessary to prevent the suspect from fleeing, interfering with witnesses or when the suspect poses a clear and serious risk to others which cannot be contained by less restrictive means<sup>3</sup>."

Learned Counsel also quoted from the Human Rights Committee which stated that "pre-trial detention should be an exception and as short as possible"<sup>4</sup>. The right to presumption of innocence considered in the Manual at Chapter 15.1 was also referred to:

*"The right to presumption of innocence required that judges and juries refrain from prejudging any case. It also applies to all other public officials. This means that public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial<sup>5</sup>."*

Apart from the other offences for which this Applicant has been charged with, the Conspiracy to murder charge carries a maximum of 10 years; the demanding with menaces carries a maximum of five years; assault causing actual bodily harm also five years and intimidation three years. All the charges relate to offences alleged to have been committed in relation to Raju Kanniappa ("**Raju**") between 25<sup>th</sup> July and 21<sup>st</sup> August 2003. It is not disputed that the parties initially were business partners. Some friction developed later between Tony Whittal ("**Whittal**") and the Applicant on one part and Raju on the other.

From the outset this bail application can be distinguished on its facts from other bail applications. Most bail applications coming to court pertain to murder related charges. This bail application relates to less serious offences; the most serious and on which this bail application has been focused being the conspiracy to murder charge.

Bail is a right protected by law<sup>6</sup> and is discretionary<sup>7</sup>. It is important to appreciate that save for murder or treason, where bail is rarely given; it is not to be unreasonably withheld<sup>8</sup>. The onus lies with prosecution in this instance to satisfy this court on the balance of probabilities that bail should not be granted. Substantial grounds<sup>9</sup> need to be shown that the accused will not appear at his trial if released on bail or that valid grounds exist for depriving him of his liberty.

#### **Whether the accused will abscond?**

Prosecution submits that if the Applicant is released on bail he may abscond. There was suggestion of some earlier attempt to travel to Australia. However I understood that to refer to an earlier application in which the Applicant had sought to indicate to the court in a previous bail application of his business interests and ties which may necessitate his travel to Australia. That was the subject of an open application before the court but was rejected it seems. I am not satisfied that can be relied on as a justifiable ground for opposing bail. In any event if his passports or travel documents should be retained by the court, the possibility of risk of flight to a foreign jurisdiction like Australia, New Zealand or other Pacific country is removed. Apart from that the risk of flight must be

<sup>3</sup> Article 9(3) of the ICCPR, Principle 39 of the Body of Principles, Rule 6 of the Tokyo Rules; see also Article 7(5) of the American Convention, Article 5(3) of the European Convention.

<sup>4</sup> Human Rights Committee General Comment 8, para. 3.

<sup>5</sup> Human Rights Committee General Comment 13, para. 7

<sup>6</sup> section 5(3)(b) of the Constitution

<sup>7</sup> section 106(1) and (3) of the Criminal Procedure Code.

<sup>8</sup> John Mae Jino and John Gwali Ta'ari v. Regina

<sup>9</sup> Wells Street Magistrates' Court; Ex parte Albanese (1982) 74 CrAppR 180 [[1981] 3 AllER 769; [1981] 3 WLR 694; [1981] CrimLR 771] per Ralph Gibson J.

weighed against the fact this accused has fixed address in the jurisdiction and extensive business interests and property plus community ties. I note he has offered a surety provided by Dr. Judson Leafasia a prominent member of the Community and leading figure in Government. Also I note in the file there are affidavits from Reverends Michael Maeliau and Festus Suruma who have also indicated willingness to act as surety for the Applicant if granted bail. I am not satisfied on the balance of probabilities the Applicant will abscond or fail to turn up for his trial if released on bail.

### **Seriousness of the offence alleged to have been committed.**

The charge of conspiracy to murder is classified as a felony, meaning a serious offence, carrying maximum penalty of ten years. In relation to bail applications, the standard to be applied falls below the bar of 'exceptional circumstances' required for murder or treason charges. When considering the level of seriousness, the circumstances of each case/offence should be inquired into.

The charge of conspiracy to murder relate to a plan by the Applicant and Whittal to have Raju eliminated; to "make him disappear". Robert Ledi ("Ledi") was supposedly to be the hit man. The conspiracy was alleged to have been arranged in the morning of 15<sup>th</sup> August 2003 in the Applicant's Office at the NPF Plaza. The question whether there existed a conspiracy, an agreement to commit murder may become an issue at trial where it is clear on the statement of Ledi, the key witness, that implementation of the plan depended on his agreement. At page 4 paragraph 4 he states: "I have no intentions of following through with Tony and Rolland's plans. But I could not tell them that to their face." According to his statement he was to return the next day and confirm the plan to them but he never did. He did not warn Raju either of any intentions or plans by those two men to kill him until a chance meeting at the NPF Plaza some three months later when he told Raju about their plans. Only then was the matter reported to Police.

Section 218 of the Penal Code provides as follows:

*"Any person who conspires with any other person to kill any person ... is guilty of a felony, and shall be liable to imprisonment for ten years."*

The crucial element in a conspiracy to commit murder is an **agreement** to commit the offence. In this instance, the crucial link/person in the conspiracy plan is the hit man himself, who from the beginning it seems had made up his mind not to get involved. The plan or arrangements of the Applicant and Whittal that day was to enlist Ledi carry out their plans or intentions. It was dependent on his agreement or concurrence. Where Ledi has stated that he had declined from the outset not to get involved or participate in their deviant plans and never returned to confirm their plans or arrangements on the agreed date, it raises the question whether that still amounts to conspiracy to commit murder or merely negotiations between them falling short of conspiracy? That scenario can be contrasted to the situation where there was initial agreement, for example, plotting a robbery but there was a change of mind and that person later withdrew from the criminal enterprise<sup>10</sup>. In **R. v. Anderson**<sup>11</sup> the defendant had been charged with conspiracy to effect a jail escape. He had agreed to participate by providing equipment to cut through the bars, but had claimed in his defence that he had never intended for the plan to be carried out, and had not believed that it could succeed. The House of Lords rejected his defence and upheld conviction.

In this case it would seem that the conspiracy was yet to be completed; in the organisation or negotiation stages, yet to be sealed; that the non-concurrence of Ledi was of a substantial nature and that whilst the Applicant and Whittal had intentions to have Raju killed, the *actus reus* of agreement had not been secured. In the absence of Ledi's concurrence, the plan amounted to mere intentions; that is, the existence of *mens rea* but

<sup>10</sup> see *R. v. Gortat and Pirog* [1973] Crim. App. 648 (Cussack J.)

without the *actus reus* of agreement; the plan was still in the making, in the initial stages. But even if such argument may not be accepted, it may well play some role in mitigation.

In so far therefore as seriousness of the offence of conspiracy to murder is concerned, the particular circumstances in this case seem to indicate a lesser level of seriousness and that it has to be balanced with the associated risk to the public if the Applicant is released on bail; whether that risk is enhanced. With respect I am not satisfied that that is the case here.

On the issue of probable outcome of the case, that is the possibility of a conviction and whether imprisonment is likely to be imposed, that has to be balanced with flight risk or whether his liberty curtailed further for another year pending trial. There is material which shows that there is element of animosity between Raju and the Applicant and Whittal after their business relationship turned sour later. There is also material which showed that prior to reporting to Police, Ledi had earlier in April 2004 made demands for compensation for a bus alleged to have been damaged in an accident involving the Applicant and for which the Applicant was held responsible. The veracity of Ledi as a witness it seems will be contested at trial and a real possibility exists that his reliability will be reduced, further reducing in turn the likelihood of conviction and possibility of imprisonment of this Applicant. In my respectful view the balance weighs in favour of his liberty pending trial.

### **Commission of further offences**

In the court below, the Applicant was convicted and sentenced on 7<sup>th</sup> October 2004 to 18 months imprisonment in respect of a demanding money with menaces offence, and 2 months imprisonment (to be served consecutively) on attempting to interfere with a witness, contrary to section 121 of the Penal Code. It has been suggested that the previous conviction supports Prosecution's assertions that the risk of further offences being committed remains a real risk. Unfortunately that submission overlooks the fact that this Applicant has been punished, (has served time in prison for those offences) and should be given the benefit of the doubt that he has been rehabilitated, has learnt his lessons the hard way serving time behind bars and will be deterred from further commission of offences or similar offences. To think otherwise defeats the very purpose for which justice is meted out by the courts. Those offences for which he had been jailed occurred in September 2001 and if anyone needs convincing of the long arm of the law, I do not think this Applicant would not by now have appreciated that fact. In my view bearing in mind that his trial is now listed for August 2006 for four weeks, the balancing of the risks must weigh in his favour.

### **Interference of witnesses**

It is not disputed this Applicant has a previous conviction for attempting to interfere with a witness in an earlier case and for which he has served time for two months. I do not need to repeat he is entitled to be considered afresh on the merits in this bail application. Having served time, he is entitled to be given the benefit that he has learnt the hard way and that further reduces any possibility of interference with witnesses if released on bail.

There is some suggestion earlier of an attempt by Alex Bartlett, his brother to communicate with Ledi but it is not clear if it was in relation to this Applicant's case now or something else. Ledi again had rightly refused to talk to him and that was the end of the matter. Nothing further can be gleaned from that supposed 'interference' incident. There is no suggestion of any further "attempts" to communicate with him. Alex Bartlett who is still in custody and has been so for some time now, would not have failed to appreciate as well, the importance of staying away from the wrong side of the law and so even if he is released, I doubt very much if he will bother to try anything. Ledi has amply demonstrated that he has no interest in talking or communicating with the Applicant or

any of his associates in anyway; the possibility of intimidation or interference is fairly remote or minimal.

The intended victim of the offence, Raju is also out of the jurisdiction having been extradited to Australia. The risk in my view of interfering with him or other potential witnesses is minimal and this must fall in favour of the Applicant.

### **Decision**

I am not satisfied it has been established on the balance of probabilities that bail should not be granted in this case and I do so, on the following conditions:

1. **A cash deposit of \$3,000.00 is paid to court.**
2. **Resides at his family home at Ngossi.**
3. **Reports weekly to Central Police Station not later than 10.00 am each Fridays until trial or further orders.**
4. **Provides a surety of \$500.00 for his attendance to court on the trial date.**
5. **Surrenders passport to court and not to apply for any new passport or travel document.**
6. **Not to leave Honiara City without consent of the court.**
7. **Not to approach any prosecution witnesses directly or indirectly. Any communications to be done through his lawyer.**
8. **Not to contact or associate with other co-accused.**
9. **To appear for his trial at the High Court on 7<sup>th</sup> August 2006 at 9.30 am.**
10. **To appear at the Central Magistrate's Court on 6<sup>th</sup> October 2005 at 9.00 am.**

**THE COURT**