PROVISIONAL CAUSE NO 177/2023

IN THE DISTRICT COURT OF BLACK RIVER

In the matter of:-

POLICE

V

RIKESH SUMBOO

BLACK RIVER DISTRICT COURT

Bail Ruling

The applicant is provisionally charged under section 3(1)(b), 6 and 8 of the Financial Intelligence and Anti-Money Laundering Act 2002 as amended by Act 9 of 2019. The applicant, through his legal representative Mr Trilochun, made an application for a bail hearing which was heard on the 27th and the 28th of February 2023.

The ICAC objected for bail to be granted on the grounds that, if bail is granted, the applicant might abscond, interfere with witnesses, tamper with evidence and for the applicant's own security.

Mr Arzamkhan, of Counsel, appeared together with Mr Bundhoo for the prosecution assisted by WPS Philogene.

The case of the Prosecution

Senior Investigator Rajoo Naiken was deputed by the ICAC to resist the bail motion. He testified to the facts and circumstances which led to the arrest of the applicant and thereafter substantiated the grounds of objection.

The facts and circumstances of the case

The applicant was arrested on the 6th of February 2023 on the suspicion of being a prête-nom for one Jean Hubert Celerine also known as Franklin. The said Franklin is suspected of being involved in drug business on the West Coast of Mauritius. He uses a prête-nom to launder the proceeds of his illegal activities. The applicant is suspected to be a prête-nom as well as acting as a facilitator in helping Franklin launder proceeds of crime. The applicant is also using other prete-noms himself. So far, the ICAC has gathered documentary evidence

and statement of witnesses against the applicant. Exhibits have also been secured. In the statements the applicant has given to the ICAC so far, he has implicated the said Franklin.

The Grounds of Objection

Risk of Absconding

Since the applicant is likely to be prosecuted for a serious offence eventually, he may be tempted to abscond for fear of a heavy sentence. The applicant has concealed properties in the name of several other people who have implicated the applicant in their statements. Based on the evidence gathered, there is a prima facie case of Money Laundering against the applicant. The applicant has a sister who lives in South Africa. The applicant is the owner of movable and immovable properties which are in the process of being attached. The applicant may abscond by illegal means. He is well-connected to skippers and owners of boats. He may arrange for funds by disposing of the properties that he has concealed in the names of prete-noms. The applicant has shares in a boat.

Interfering with witnesses and tampering with evidence

The applicant has chosen to keep his right of silence. If he is released, he will contact people and convince them to not give statements against him. 31 witnesses have so far been interviewed by the ICAC in connection with the present case. There are 10 witnesses who are yet to be interviewed. 6 people have been arrested up to now and other arrests are imminent. During the search at the applicant's house documentary evidence was secured. There are still some financial documents which have not been secured yet. The ICAC is interviewing witnesses every day and on the basis of these interviews other witnesses will be interviewed. There are documentary evidence which have not yet been identified and secured yet.

For the Applicant's own protection

The applicant may be a witness in other cases. If the applicant is released, his life may be in danger. He may be called as witness against Franklin and the said Franklin, although under arrest, has contacts outside.

Character and Antecedents

Applicant has a clean record and is not on bail.

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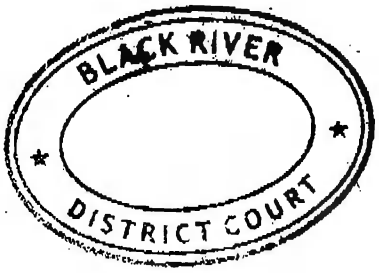
The case for the Defence

Defence Counsel established the following through cross-examination:

- The applicant has a right to keep silent and no adverse inference ought to be drawn from same
- The offence of money laundering usually attracts a fine upon conviction and rarely penal servitude
- The ICAC cancelled appointments when the statements of the applicant were meant to be recorded
- Applicant was denied the opportunity to write his statements in his own words following which he has since kept his right to silence
- Applicant made a complaint about the language used to his address by an officer of the ICAC when he expressed his wish to write his own statement
- The applicant has handed over several documents to the ICAC
- The applicant has handed over his bank statements, telephone and tablet to the ICAC but the devices have not yet been examined
- The ICAC has identified the documents they are looking for as well as the witnesses they need to interview in connection with the present case. But ICAC cannot say when they will be recording these statements as the enquiry is a complex one.
- Applicant is in a live-in relationship with one Mishri Gopaul
- Applicant has never absconded and has never lived abroad. He has a Mauritian passport only
- The applicant has never stated that his life is in danger
- The applicant is the legal owner pf properties which ICAC suspects belong to Franklin in reality
- Franklin is actually in the ICAC's custody

The Prosecution closed its case



The applicant deposed under oath and stated the following:

- Following a search at his dwelling house on 6/2/2023, he remitted several documents to the ICAC
- He remitted his phone and tablet to the ICAC voluntarily
- He has given 5 statements to the ICAC
- He will abide by all conditions that the Court shall deem fit to impose on him should he be granted bail

- He has a brother in Mauritius and a fiancée and he is not close to other people apart from these two
- He has been living with his fiancée for the past 3 years
- He denied being in danger and stated that he did not have enemies

Counsel for the ICAC established the following through cross-examination:

- The applicant does not mingle with too many people, only his brother
- The applicant has transactions with Franklin with respect of a house
- The enquiry has started only 3 weeks ago and all the assets of the applicant are subject to attachment orders

The Law

The law of bail pre- trial is set out in the Bail Act 1999. The Act sets out the grounds on which bail can be refused. Relevant extracts of Section 4 of the Bail Act provides as follows:

"4 Refusal to release on bail.

(1) A Judge or a Magistrate may refuse to release a defendant or a detainee on bail where –

(a) he is satisfied that there is reasonable ground for believing that the defendant or detainee, if released, is likely to – ...

(i) fail to surrender to custody or to appear before a Court as and when required;

(ii) (ii) commit an offence, other than an offence punishable only by a fine;

(iii) interfere with witnesses, tamper with evidence or otherwise obstruct the course of justice, in relation to him or to any other person

(2) In making a determination under subsection (1), the Judge or Magistrate shall have regard to such considerations as appear to the Judge or Magistrate to be relevant, including

(a) the nature of the offence and the penalty applicable thereto;

(b) the character and antecedents of the defendant or detainee;

(c) the nature of the evidence available with regard to the offence."

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The rule in relation to the law of bail pending trial was held to be as follows in the case of **Maloupe v The District Magistrate of Grand Port [2000] SCJ 223** that

"A person should normally be released on bail if the imposition of the conditions reduces the risks ....– to such an extent that they become negligible having regard to the weight which the presumption of innocence should carry in the balance".

The exception, that is, bail may be refused if "*the imposition of the above conditions is considered to be unlikely to make any of the above risks negligible*".

In **Deelchand v Director of Public Prosecutions [2005] SCJ 215** it was held citing the terms of section 4(1)(a) of the 1999 Act that :

"The word 'may' in the above section indicates that there is still a discretion to grant bail even where the judge is satisfied that one of the risks in (i), (ii) or (iii) above is likely to materialise, *but common sense indicates that except where the imposition of conditions is likely to reduce those risks to an acceptable level, the circumstances at (i) and (iii) above will certainly provide adequate grounds for refusing bail; and that a similar analysis will apply in relation to (ii) above where an offence involving serious harm to one or more persons or to society in general, is concerned."* [emphasis is mine]

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The nature of the evidence

Referring to the relevant consideration of the 'nature of the evidence' under section 4(2)(c) of the Bail Act, **Maloupe v The District Magistrate of Grand Port** explains how same should be assessed by the court:

"What may be examined at the stage of an application for bail is the "nature" of the evidence, but this should not be a doorway for looking in detail at the evidence itself as opposed to the ***surrounding circumstances which have a bearing upon its quality.***

Witnesses in the course of the hearing of an application for bail should only be allowed to depone as to the "nature" i.e. the kind of evidence available (including external circumstances which have a bearing on its quality) and not as to the actual precise evidence of the police. Thus, in one case, for example, the police officer or counsel representing the interests of the police may wish to elicit from a police enquiring officer testimony to the effect that a confession has been recorded from the accused whilst corroborative evidence is available, whilst in another case, counsel for the applicant may, ***by cross-examination, elicit testimony as to the***

existence of evidence showing that there is only one witness and that he would fall within the category of "accomplices", whose evidence normally has to be viewed with caution. *But, whilst surrounding facts relevant to the assessment of the "nature" of the evidence may be properly canvassed, it would be improper, for a court, on the occasion of a bail application, to receive testimony as to the details of the evidence available to the prosecution and to make an assessment of its sufficiency or weight."*

Without seeking to encroach on the merits of the case, the nature of the evidence against the Applicant in the present case appears to be strong. The evidence obtained so far against the Applicant consist of documents and statements made by witnesses.

Risk of Absconding

It is the case of the ICAC that the applicant will abscond because all his assets have been subjected to attachment orders. He has contacts with skippers, has shares in a boat and has assets which he has concealed under the names of other people. He may sell those assets and raise sufficient money to illegally leave the Mauritian territory for fear of facing a heavy sentence if ever if he found guilty for the probable offence of money laundering.

On the other hand, the applicant has denied that he intends to abscond. He has stated that he has a fiancée with whom he is in a live-in relationship and that he is close to his brother. It is the applicant's case that usually for money laundering cases a heavy fine is imposed as opposed to penal servitude.

In respect of the weighing of the risk of absconding, the following extract from the case of **Deelchand (supra)** is of utmost relevance:

"The severity of the sentence which may be inflicted upon the petitioner in the event of a conviction does not in itself justify the inference that he or she would attempt to evade trial following release on bail (see supra para 5.3).

In the present case, the essential factor creating a risk of absconding is the prospect of heavy penalties (including mandatory penal servitude for a term of 45 years) which the petitioner would incur should he be found guilty of the relevant offences.

On the other hand, the facts before this Court which can reasonably be considered as capable of minimising that risk are: the petitioner's occupation and professional ties,the fact that he has a family to support (although that factor is not of great weight as no details have been given of his family and of circumstances explaining the extent of their

dependence) his previously clean record, the fact that he did return to Mauritius when allegations of drug-trafficking involving a huge amount of heroin had been levelled against him by his driver, his property ties in Mauritius and the nature of the evidence against him as analysed earlier.

Moreover, it is imperative to consider, as in all bail cases, the possibility of reducing the risk of absconding to an acceptable level by the imposition of conditions, notably those mentioned at para. 12.13 above."

In the recent case of **Aubert v The State 2022 SCJ 405**, it was held that

*"In **Morganti v France (1995) 21 EHRR 34**, the Strasbourg Court held that the severity of the sentence which the defendant faces, if convicted, does not, in itself justify the inference that he or she would attempt to evade trial if released from detention, yet this is one of the factors to be taken into account. Similarly in the case of **Police v A.R. Khoyratty [2004SCJ 138]**, the Supreme Court, after having carried out a review of the law relating to bail, came to the conclusion that in fact the main test remains whether the applicant will attend for his trial as and when so required."*

Applying the above to the present case, I am of the view that the risk that the applicant may abscond is real and plausible in the present case. The applicant appears to have the necessary connections and means to evade. However, I am of the view that conditions may be imposed to reduce this risk to a negligible level.

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Risk of Tampering with evidence

The phone and tablet of the applicant has not been examined by the ICAC yet. Based on the information retrieved on these devices, the ICAC may need to secure more documentary evidence. Some of these documents have been identified by the ICAC but they have not been secured yet. The ICAC strongly apprehends that if he is released on bail the applicant will be able to dispose of these documentary evidence.

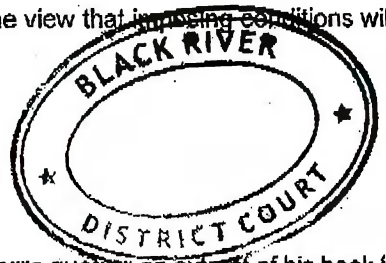
The applicant's case is that there is nothing on record to say that he has reliable information which would indicate that he will tamper with the items used in the commission of the offence which has not yet been recovered. If he is released, he will provide all documents to the ICAC.

In the present case, there is nothing on record to suggest that applicant has (i) tampered with evidence in the past; (ii) attempted to tamper with evidence in the present matter; and (iii) shown any intention of tampering with evidence. The enquiring officer has also conceded that the applicant voluntarily remitted some documents to the ICAC.

In **Hossen v District Magistrate of Port Louis 1993 MR 9**, their Lordships stressed that *".. the mere fact that, as we are often told, an enquiry has not been completed is no ground per se for the continued detention of a suspect. An objection to release can only be justified on this score if the Court can be satisfied that the release of the suspect will impede the completion of the enquiry, for example, by reason of the likelihood that the suspect will abscond or will interfere with witnesses or destroy evidence."*

In the present case, the applicant has only been arrested 3 weeks ago. The enquiry is being carried out in respect of the offence of money laundering which is a serious offence and appears to be complex not only by virtue of being linked with the case of Franklin but also because of the large amount of money involved in the present matter. In these 3 weeks, the ICAC has interviewed over 31 witnesses and ten more witnesses remain to be interviewed. As and when these witnesses will be interviewed more witnesses will be identified and the ICAC will also be able to identity the documentary evidence they need to secure. The same applies to the tablet and phone of the applicant which, once examined, may enlighten the ICAC about other documentary evidence which they need to secure as well as witnesses they need to interview. I deem it fit to open a parenthesis to deplore the fact that no effort has been made by the ICAC to examine these devices nor was there any explanation provided for the failure to do same. Having said that, I am of the view that the Respondent has adduced sufficient evidence to demonstrate that there is a strong likelihood that, if released, the applicant may tamper with evidence.

Now, considering the fact that the evidence in question is documentary in nature and as such, to the exclusive knowledge of the applicant, I am of the view that ~~imposing conditions~~ will not be able to reduce this risk to a negligible level.



Risk of Interfering with witnesses

In **Deelchand (Supra)**, reference was made to **Neil Corre** quoting an extract of his book **"Bail in Criminal Proceedings" (1990)**, to express the most common manifestations where there is a risk of interference with witnesses, namely:

(a) the defendant has allegedly threatened witnesses;

(b) the defendant has allegedly made admissions that he intends to do so;

(c) the witnesses have a close relationship with the defendant, for example in cases of domestic violence or incest;

(d) the witnesses are especially vulnerable, for example where they live near the defendant or are children or elderly people;

(e) it is believed that the defendant knows the location of inculpatory documentary evidence which he may destroy, or has hidden stolen property or the proceeds of crime;

(f) it is believed the defendant will intimidate or bribe jurors;

(g) other suspects are still at large and may be warned by the defendant.

The exception does not apply simply because there are further police enquiries or merely because there are suspects who have yet to be apprehended".

It was further stated that:

"It would be preposterous to hold the view that in each and every application for bail, it would suffice that an enquiring officer should express his fear that the applicant would interfere with one or more witnesses for the accused to be denied bail on that ground. To satisfy the court that there is a serious risk of interference with a witness, satisfactory reasons, and appropriate evidence in connection thereof where appropriate, should be given to establish the probability of interference with that witness by the applicant."

It, therefore, follows that the risk or probability of interference with witnesses is not a generalised risk. It is a risk which has to be serious, specified, identifiable and supported with appropriate evidence.

In the case of **DPP v Lam Po Tang G [2011] SCJ 56**, their Lordships stressed on the following:

"... indeed, the police should not be compelled to reveal sensitive details which might cause prejudice to their enquiry. However, the fear of the police that the respondent might interfere with a suspect whose identity is still unknown is based on mere speculation and can under no circumstances be a ground for the continued detention of the respondent".

After having duly considered all the above, I am of the view that the fact that the Respondent has not provided the names of the witnesses they intend to interview does not preclude them from raising the risk of applicant interfering with witnesses as a ground of objection. Bearing in mind the complexity of the present case, the fact that the applicant has been [illegible]

3 weeks ago and considering the limited resources of the ICAC, I am of the view that the ICAC is justified in raising the risk of interfering with witnesses as a ground of objection to bail in the present case.

Considering the above, I find that any conditions that the Court could impose on the applicant, however stringent they might be, would not, to my mind, reduce the risk of interfering with witnesses to an acceptable level.

For the Applicant's own security

In **Deelchand (Supra)**, citing **IA v France [1998] ECHR 89 (23 Sept. 1998)**, it was held that the own protection of an applicant can be a relevant and sufficient reason for his pre-trial detention subject to the following caveat:

"However, this can only be so in exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place."

In the present case, the ICAC has no evidence that the applicant's life is at risk is any manner. There is no evidence that the applicant has been threatened and the applicant himself does not consider that his life is in any sort of danger. The ICAC is basing their apprehension on the fact that the applicant may eventually be called as a witness against Franklin, who is presently in the custody of the ICAC, may decide to harm the applicant because of this possibility. I am of the view that this is too far-fetched and I am not prepared to deny the applicant his freedom based on such assumptions.

Conclusion

After carrying out the required balancing exercise in line with section 4(2) of the Bail Act, I hold that the need for Applicant to be in continued detention in the present circumstances outweighs his right to remain at large in light of the fact that no conditions could be imposed which would minimise the risk of tampering with evidence and interfering with witnesses to a negligible level. The motion is therefore set aside.

However, the applicant has the right to be tried within a reasonable time as stipulated under Section 5(3) of the Constitution. The dicta in **Hossen v District Magistrate of Port Louis (supra)** bears repeating: the Applicant "*must, whatever the Bail Act says on the matter, be released unless he is brought to trial within a reasonable time*"

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I therefore strongly urge the ICAC to complete the enquiry as expeditiously as possible and to lodge the formal charge against the applicant within a reasonable time in order to safeguard his constitutional rights.

Vidya Mungroo Jugurnath

Senior District Magistrate

7 March 2023

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