

Ewe Pang Kooi v Public Prosecutor
[2015] SGHC 24

Case Number : Criminal Motion No 2 of 2015
Decision Date : 02 February 2015
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Ramachandran Doraisamy Raghunath and Andrew Lee Weiming (Selvam LLC) for the applicant; Nicholas Khoo and Leong Weng Tat (Attorney-General's Chambers) for the respondent.
Parties : Ewe Pang Kooi — Public Prosecutor

Criminal Procedure and Sentencing – Bail

2 February 2015

Judgment reserved.

Choo Han Teck J:

1 This was an application by the applicant for bail to be granted. The applicant has been in remand since 12 January 2015. He was charged with 693 charges which included the following:

- (a) 22 counts under s 409 of the Penal Code (Cap 224, 1985 Rev Ed) (“1985 Penal Code”) and 28 counts under s 409 of the Penal Code (Cap 224, 2008 Rev Ed) (“2008 Penal Code”) for criminal breach of trust as an agent;
- (b) 1 count under s 465 of the 1985 Penal Code and 182 counts under s 465 of the 2008 Penal Code for forgery;
- (c) 2 counts under s 417 of the 2008 Penal Code for cheating;
- (d) 236 counts under s 14(1)(a) of the Oaths and Declarations Act 2000 (Cap 38) for making false declarations;
- (e) 178 counts under s 47(1)(b) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) (“CDSA”) for transferring benefits of criminal conduct out of the jurisdiction; and
- (f) 44 counts under s 47(1)(c) of the CDSA for using benefits of his criminal conduct at casinos.

2 It is not disputed that the applicant was charged for misappropriating S\$40,622,169.79 and US\$147,000. The District Court granted bail on 14 January 2015 in the sum of \$4m. The prosecution has applied for the case to be transferred for trial in the High Court. Accordingly, the District Court set aside the bail on 15 January 2015. This application was filed on the same day to the High Court for bail to be granted under s 97 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

3 Mr Doraisamy, counsel for the applicant, submits that the terms of the original bail were excessive. He submits that the proposed surety, Ms Lee Siew Hua, is a person of good standing but is

only able to raise \$1m. He was instructed only on 12 January 2015 when the applicant was charged and only managed to obtain the relevant documents on 14 January 2015. Counsel says that it is difficult for him to take instructions when the accused client is in remand, noting also, that the remand will be "for an unreasonable period of time before the case even proceeds to trial".

4 Next, Mr Doraisamy argues that the applicant is not a flight risk. He says that the applicant, a 61-year old Malaysian, is now a permanent resident and "has deep roots in Singapore, having lived here for more than 30 years". He has been adjudged a bankrupt and has no means to live abroad should he abscond. He has no family support because he is estranged from his wife and children who are living in Australia. They have been estranged for the past eight years. Most importantly, the applicant has been fully co-operative in investigations throughout the past two years and has continued to work in Singapore whilst investigations were ongoing. Furthermore, the applicant's passport has been impounded.

5 DPP Nicholas Khoo, the prosecuting counsel, argues that the applicant faces "numerous non-bailable" offences and that being a person who "has no family roots in Singapore" and no unencumbered assets here, is a "real flight risk". Counsel cites several cases of fraud involving large sums of money. First, in *PP v Teo Cheng Kiat* [2000] SGHC 129, the amount involved was \$35m (with \$24m recovered). Bail was fixed at \$20m. The second, in *PP v Lam Chen Fong* [2002] 2 SLR(R) 599, the amount involved was \$8.8m (with \$905,000 recovered) in which bail was fixed at \$9m, and third, in *PP v Koh Seah Wee* [2012] 1 SLR 292, the amount involved was \$13m (with \$9m recovered) and bail was fixed at \$1.5m.

6 DPP Khoo submits that the amount involved in this case was S\$40,622,169.79 and a further US\$147,000. Only \$17m was recovered. Counsel submits that \$23m is unaccounted for and that the applicant is "an accountant by training and knows how to move money around". He submits that the applicant has already admitted guilt in all his statements to the police. In reply, Mr Doraisamy says that the applicant "has no funds to move".

7 This is not a complicated or difficult application but I have stood down the case to have written grounds delivered because I wish to address some of the matters raised.

8 First, it is common for counsel (as in this case) to argue whether the applicant is a "flight risk", and then proceed to suggest the amount of bail that should be granted. I think that we should be clear on one basic point. Every person on bail is a "flight risk" to some extent but "flight risk" is now commonly used as a reference to a high degree of risk of absconding. This is not an accurate use. I think that if we determine that an applicant is a "flight risk", then no bail should be granted at all.

9 Second, it seems like a good idea, in cases where the likelihood of flight is high, to fix bail at a sum so prohibitive that it is as good as denying bail. But that would be wrong. It is important to understand the fundamental basis for bail. Presumption of innocence is a foundational justice. When a person is charged, bail is the comfort and safeguard not only to those presumed innocent but to the entire system. We cannot acknowledge the presumption of innocence and then impose bail on such onerous terms that the accused cannot satisfy.

10 The application and grant of bail is an important aspect of the criminal law. Thus, if the law presumes a man innocent until proven guilty, he should not be in remand, but this is not an absolute provision because in certain cases, the risk of flight is so likely that bail will not be granted. These are usually cases involving the death penalty or life imprisonment or some other lengthy term of imprisonment.

11 What then is the nature and purpose of bail? The answer goes back to the point that there is a risk that an accused person may abscond. In cases where flight is not likely, the court may grant bail so that a surety may be appointed to help ensure that the person bailed attends court as required. That is why the bailor is an important person in a bail application. It is his money that is at stake should the accused person abscond. That is why bail money cannot come from the accused himself.

12 The amount of bail will be determined by a number of factors. If the surety is someone who is able to ensure the attendance of the accused in court, the amount of bail might be lower than other like cases. As an illustration, a father who turns his son in to the authorities for having committed an offence, then agrees to stand bail, may not be required to post a high bail. Conversely, to a billionaire bailor, a \$1,000 bail may be utterly ineffective in ensuring that the bailor is diligent in his duties as bailor. If, on the other hand, the court is of the view that the accused who has the means to call upon a bailor who has sufficient assets to ensure performance of his duties, but procures a bailor with low income (or assets) who is not in a position to ensure the attendance of the accused in court, the court may impose a higher bail so as to compel the appropriate bailor to post bail.

13 Third, it is a mistake to link the amount of bail to an assumption that it must be high enough so that it deters the accused from flight. Bail money cannot be the accused person's but the bailor's. It is primarily to be sufficient to ensure that the bailor will not shirk from his or her duties as bailor, and that the accused will not wish to see his bailor impoverished by a forfeiture of the bail money. Section 96 of the Criminal Procedure Code provides the legislative direction as to the amount as follows:

The amount of every bond executed under this Division must be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested or charged.

Thus, the court needs to know some detail about the bailor so that an assessment can be made as to whether the bailor is able to ensure the accused person's attendance in court. Yet, in many bail applications, nothing much is known about the bailor.

14 The error in using the term "flight risk" loosely probably arose because some offences are "bailable" and others are "non-bailable". Non-bailable offences, contrary to the description, means offences in which bail can be denied. Being a flight risk would be grounds for the court to deny bail to persons charged with non-bailable offences. In contrast, persons who are charged with bailable offences are entitled to bail and the court cannot deny him bail if he is so prepared to furnish it (and adhere to all of the bail conditions). In such cases, since every accused person is a potential flight risk, an assessment is required to be made as to the seriousness of that risk. Some may be less likely to flee, others may be more likely to flee.

15 Consequently, where a person who has been charged with a bailable offence but is likely to be a flight risk applies for bail, the prosecution tends to ask, and courts sometimes grant, that bail be fixed at an amount that is impossible for the accused to raise; effectively denying him bail.

16 The idea and effect may be correct but the principle is not. Bail money should not come from the accused, and bailable offences are not meant to deny bail by fixing an amount of bail bond that cannot be raised by the bailor. It may be necessary for legislative changes to be made, but until they are, the basic principles of bail apply. In flight risk cases for bailable offences, it is extremely important that the court is satisfied that the bailor can and will do his job.

17 In the present case, DPP Khoo argues that the applicant is a flight risk, yet suggests that bail be granted in the sum of \$4m. It is reasonable to think that a man like the applicant who faces a

lengthy sentence of imprisonment if convicted may abscond. In this case, the other factor inclining him to flee is that he is already 61 years old. To many, the thought of spending the remaining decades of one's life in jail is meaningless and therefore flight is the answer; others may, on account of that fact, be resigned to it. In the present case, some of the charges that the applicant is facing are non-bailable offences because they carry a maximum term of life imprisonment. But DPP Khoo is not arguing that bail should be denied. Although I am of the view that an application to the High Court for bail under s 97 is not governed by the same restrictions as an application for bail in the State Courts under s 95, in cases involving serious offences or offences that carry life imprisonment, or where there is a likelihood of re-offending if the accused is released on bail (eg serial offenders), the High Court will not be likely to grant bail.

18 The applicant may be a Malaysian without family or unencumbered assets in Singapore. Although a bankrupt, there is still a sum of \$23m unaccounted for. No details were given as to what that means – whether the police cannot trace them or the applicant does not have them or had spent them in ways which cannot be verified.

19 The incontrovertible fact is that he was under police investigation for almost two years for the offences charged. He has been co-operative throughout this period and has not left the country. This is not disputed by the prosecution. At present, his passport is held by the police. I am thus of the view that the applicant cannot be considered a flight risk (otherwise I would not grant bail).

20 The question is, on what terms ought bail be granted to him? There is no indication that the applicant is in a position to transfer funds, assuming that he has them, to the proposed bailor. The money posted for bail will be the bailor's money. She is a former colleague and a close friend of the applicant. She seems to be in close contact with the applicant and appears to be well-placed to discharge the duties of a bailor, which includes notifying the police should she think that the applicant is preparing to flee.

21 I accept the submission that \$1m is all that she can afford. Given her occupation as a director of a corporate secretarial services firm and in the absence of evidence to the contrary, I think that \$1m is a large enough sum for her to comply with her duties as a bailor in ensuring the attendance of the accused in court.

22 I therefore grant bail of \$1m in one surety with the following additional terms:

- (a) The applicant's passport be retained by the police;
- (b) The applicant reports twice a day to the investigating officer or his designate.