CASE NOTES

SULAIMAN BIN KADIR AND BAIL IN OFFENCES PUNISHABLE WITH DEATH OR IMPRISONMENT FOR LIFE

SULAIMAN B. KADIR v P.P.[1]

The decision of Mr. Justice Harun in the 1976 case of *Sulaiman Bin Kadir* has further helped to entrench what is often considered to be one of the most controversial and illogical rules in Malaysian Criminal Procedure, namely, that a subordinate court has no power to grant bail if the accused is *charged* with an offence punishable with death or imprisonment for life. That rule was formulated some twenty-five years ago by Spenser Wilkinson J. in the Penang case of *R.* v. *Ooi Ah Kow*.[2]

Sulaiman Bin Kadir was arrested in August 1975 and charged with the offence of rape under section 376 of the Penal Code. His trial was fixed on a date in February 1976. In November 1975, after having been in custody for almost two and a half months, the accused applied to the Special Sessions Court in Kuala Lumpur for bail. This application was refused by the learned President under section 388(i) of the Malaysian Criminal Procedure Code[3] which reads as follows:—

> When any person accused of any non-bailable offence is arrested or detained without a warrant by a police officer or appears or is brought before a court, he may be released on bail by the officer in charge of the police district or by such court, but he shall not be so released if there appear *reasonable grounds for believing that he has been guilty* of an offence punishable with death or imprisonment for life[4]: Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

[1] [1976] 2 M.L.J. 37.

[2] [1952] M.L.J. 95

[3] F.M.S. Cap. 6 as amended and extended to the States of Malacca, Penang, Sabah and Sarawak by the Criminal Procedure Code (Amendment & Extension) Act, No. A 324 of 1976.

[4] The phrase "punishable with death or imprisonment for life" should be read disjunctively as if it reads "punishable with death or punishable with imprisonment for life": *R.* v. *Ooi Ah Kow*, [1952] M.L.J. 95; *Chinnakarappan* v. *P.P.*, [1962] M.L.J. 234; *Shanmugam* v. *P.P.*, [1971] 1 M.L.J. 283.

The learned President had obviously refused bail following the line of Malaysian authorities[5] which have held that subordinate courts have no power to grant bail in respect of offences punishable with death or punishable with life imprisonment. The offence of rape under the Penal Code carries a maximum term of life imprisonment, but the case was scheduled to be tried by the Special Sessions Court which has special jurisdiction to try rape cases.[5a] In holding that the President of the Sessions Court was correct in denying bail, Harun J. observed[6]:—

> "There is abundant authority, the most recent being *Shanmugam* v. *Public Prosecutor*[7] that a Subordinate Court has no power to grant bail if there are reasonable grounds for believing that an accused person has been guilty of an offence punishable with death or life imprisonment."

There was, in fact, no finding by the President of the existence of reasonable grounds for believing guilt of the accused when he denied him bail and neither does this material factor appear to have been considered by Harun J. in the High Court.

It is important to remember that section 388 does not totally prohibit a subordinate court from granting bail in offences punishable with death or punishable with imprisonment for life. The lower court is only precluded from granting bail if there are "reasonable grounds" for believing that the accused has been guilty of such an offence. It is, in fact, clear from subsection (ii) of section 388 that if it appears to a police officer or court at "any stage of an investigation, inquiry or trial" that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, he must be released on bail or on his own bond.[8]

[5] See for e.g. *R.* v. *Chan Choon Weng & Ors.*, [1956] M.L.J. 81; *Chinnakarappan* v. *P.P.*, *ibid.*; *P.P.* v. *Latchemy*, [1967] 2 M.L.J. 79; *P.P.* v. *Lee Hor Sai*, [1969] 1 M.L.J. 168; *Shanmugam* v. *P.P.*, [1971] 1 M.L.J. 283.

[5a] The special jurisdiction given to Sessions Courts to try rape cases was conferred by the Courts (Amendment) Act, 1971, which came into force on 30th April, 1971.

[6] [1976] 2 M.L.J. 37.

[7] *op. cit.*

[8] Section 388 (ii) reads:

> If it appears to such officer of court at any stage of an investigation, inquiry or trial, as the case maybe, that there are no reasonable grounds for believing that the accused has committed a nonbailable offence, but there are grounds for further inquiry as to whether the accused has or has not committed some other offence the accused *shall*, pending such inquiry be released on bail, or at the discretion of such officer of court on his own bond or his appearance as hereinafter provided.

REASONABLE GROUNDS FOR BELIEVING GUILT

In the celebrated Indian case of *Jamini Mullick* v. *Emperor*[9] the following observations, which are useful in the interpretation of the section under inquiry, were made;—

> "The question of a fact, therefore is — are there reasonable grounds for believing that the petitioners are guilty of the offences of which they have been accused? Whether there are reasonable grounds or not is a question which must be decided judicially, i.e. there should be some *tangible* evidence on which the court might come to the conclusion that, if unrebutted, the accused might be convicted. The statement by a witness in the witness box that he has seen a certain act done, an act of an incriminating character, might be sufficient."[10]

Two problems arise in this area, one conceptual and the other evidentiary:—

(a) What is the meaning of the term "reasonable grounds for believing guilt"?

(b) How is a court of first instance to determine whether or not there are reasonable grounds for believing guilt of the accused under section 388 of the Criminal Procedure Code, at the time of his bail application?

The Indian authorities[11] suggest that the magistrate must be satisfied that there is a genuine case against the accused supported by at least *prima facie* evidence, but not necessarily evidence establishing the guilt of the accused beyond reasonable doubt, before bail can be denied under section 388(i).

In *Muhammed Panah's* case[12] Chief Justice Ferrers held that charge sheets and statements made by witnesses and which were tendered by the prosecution were sufficient to establish reasonable grounds of guilt on the reasoning that section 497 of the Indian Code (which corresponds to section 388 of the Malaysian Code), does not speak of evidence but only requires reasonable *grounds*. The significant point established in *Muhammed Panah* is that such reasonable grounds as required by section 388(i) may be established by producing for the inspection of the court materials which indicate the evidence that the prosecution has gathered or will adduce without the details of such evidence being disclosed.[13]

[9] 9 Cr. L.J. 409.

[10] *Ibid.*, at p. 411.

[11] See for eg. *Emperor* v. *Muhammed Panah*, 36 Cr. L.J. 711; *Keshar Vasudeo* v. *Emperor*, A.I.R. [1933] Bom. 492.

[12] *ibid.* See also *State* v. *Vellappan Kochunny*, [1952] Cr. L.J. 1087.

[13] See *State* v. *Maheboob Ali*, [1956] Cr. L.J. 983, where the court was critical of

In some jurisdictions however, some kind of a preliminary hearing to determine such questions has been demanded. For example, in the Philli-pines, where bail in capital offences may only be denied where "proof of guilt was evident or presumption of guilt is strong," the Phillipines Supreme Court has held that in as much as the granting of bail is a judicial discretion, a hearing is necessary to enable the judge to determine whether proof of guilt is evident or presumption of guilt is indeed strong.[14]

The matter has in fact been considered in earlier decisions both in Malaysia and Singapore but these cases now appear to be largely ignored. In ***Re** K.S. Menon*[15] the court accepted the necessity of having some facts upon which to base an opinion whether there were reasonable grounds for believing that the accused was guilty of an offence punishable with life imprisonment, and looked at the statements of witnesses for the prosecu-tion to satisfy itself that there was a *prima facie* case against the accused to warrant a denial of bail. In the 1887 Singapore decision of *Re Koh Ah Pow & Others,*[16] Chief Justice Ford also considered it sufficient reason to refuse bail in that case because officers responsible for the prosecution had stated by *affidavit* that they had evidence to produce from China, which was expected to confirm the evidence in hand, which implicated the accused.

However, after the decision of Spenser Wilkinson J. in *R. v. Ooi Ah Kow*[17] the question of the proper manner in which reasonable grounds ought to be established for purposes of section 388(i) has become an academic one both in Malaysia and in Singapore, although in Singapore the High Court has had no occasion to make any ruling on the matter.

In *Ooi Ah Kow's* case some facts in respect of the offence had in fact been established during the bail application and it was not suggested on behalf of the accused either before the magistrate or in the High Court that there were no reasonable grounds for believing his guilt. All that was argued in the High Court was that the learned magistrate had erred in ruling that he was precluded from granting bail in capital cases. Mr. Justice Spenser Wilkinson however went further and propounded the following

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the procedure adopted by the magistrate in dealing with the bail application without considering any evidence against the accused.

[14] *Montalbo v. Santamania,* 54 Phil. 955. See Alejandra Siazon, "The Bailability of the Accused in Capital Offences" Vol. XLII, Phil. L.J. 347. For the U.S. position see for e.g. *Ex Parte Davis,* 294 S.W. 2d.106.

[15] [1946] M.L.J. 49.

[16] 4 Ky. 287.

[17] [1952] M.L.J. 95.

startling proposition[18]:–

> "Under section 416(i) (now section 388(i) of the Malaysian Code) a magistrate has no power to release an accused on bail, because unless there had been at least reasonable grounds of suspicion (*sic*) that the accused had been guilty of such offences he presumably would not have been remanded in custody on the previous occasions."

Section 388 demands the existence of reasonable grounds for believing guilt before denial of pre-trial liberty by a subordinate court. It does not speak of, nor even remotely suggest, reasonable grounds for *suspecting* guilt, whatever the expression may mean. Even more repugnant to the bail provisions of the law was the presumption by the learned judge of the existence of reasonable grounds merely because the accused had been remanded in custody on previous occasions.

Four years after his decision in *Ooi Ah Kow*, Mr. Justice Spenser Wilkinson wrote the obituary for the reasonable grounds rule in the following terms[19]:–

> "There is no doubt that where an accused is *charged* with an offence punishable with life imprisonment a magistrate has no power under section 416(1) (now section 388(i)) to grant bail whether that offence is or is not also punishable with death."

After considering this statement of the law, which was not supported by any authority, Neal J., in *Ad'at bin Taib v. Public Prosecutor*,[20] noted the obviously "wide distinction" between the charging of an offender and of there being reasonable grounds for believing his guilt, but observed that "in the initial stages of a criminal prosecution the fact that the Public Prosecutor had elected to charge a man of an offence coming within the proviso to section 388(i) may provide *prima facie* evidence of such reasonable grounds."[21] The learned judge however emphasized that "the liability still remains that there must be reasonable grounds for believing the guilt."[22]

The rule in *Ooi Ah Kow* has been affirmed in a number of subsequent decisions[23] by the Malaysian High Courts and has come to stay in Malaysia. Following Malaysian authorities the subordinate courts in Singapore have often maintained that the mere fact that an accused person

[18] *Ibid.*, at p. 96.

[19] *R. v. Chan Choon Weng & Ors.*, [1956] M.L.J. 81 at p. 82, approved in *Chinnakarappan, op. cit.* in 1962.

[20] [1959] M.L.J. 245.

[21] *Ibid.*, at p. 246.

[22] *Ibid.*

[23] See authorities cited in footnote 5 *supra*.

is charged with an offence punishable with death or life imprisonment prohibits the court from entertaining a bail application from him.[24] This view has not been seriously challenged in a Singapore Subordinate Court since the 1964 case of *Sunny Ang* v. *Public Prosecutor*.[25]

To hold that the mere preference of a charge against an accused person is sufficient to indicate the existence of reasonable grounds for believing his guilt on that charge is objectionable for at least two reasons:—

(1) It means that the determination as to the question of reasonable grounds for believing the guilt of the accused is left entirely to the police who have brought the charge and not to the court before which the accused is produced. Such a course of action (or inaction) has obvious dangers and negates the judicial checks against unnecessary pretrial detention envisaged by section 388(i) of the Criminal Procedure Code. Pre-trial detention can be affected *sub rosa* by merely preferring against the accused a "holding" charge, that is, a charge punishable with death or life imprisonment, as long as the courts insist on refusing bail or from even considering a bail application in such cases.

(2) It demolishes or at least belittles the cherished principle of the presumption of innocence in criminal law, for a charge is merely an allegation by the State that the accused had committed the offence. The provisions of both the Malaysian and Singapore Criminal Procedure Codes are so framed that a criminal trial should begin with and be throughout governed by this essential presumption.[26] This is even more so where an accused is produced in a magistrate's court for the purpose of a preliminary inquiry into a charge triable only by the High Court in order for the magistrate to inquire whether a *prima facie* case has been made out against the accused on credible evidence.[27]

APPLICATION FOR BAIL IN THE HIGH COURT

A person accused of an offence punishable with death or life imprisonment who has been refused bail in the lower court may apply by criminal

[24] But see *Re Lim Peng Koi*, [1952] M.L.J. 26, where the granting of bail by a Singapore magistrate in a case of gang robbery, an offence punishable with imprisonment for life, was approved by the High Court. See also *R.* v. *Koh Hock Kian & Ors.*, [1960] M.L.J. XXVI, where a District Judge granted bail in an offence punishable with life imprisonment.

[25] Magistrates' Appeal No. 4 of 1965. The appeal was subsequently discontinued.

[26] See also *Talab Haji Hussein* v. *Mondkar*, A.I.R. [1958] S.C. 376.

[27] Section 140, Criminal Procedure Code, Cap. 113; *Re Osman*, [1954] M.L.J. 237.

motion to the High Court for bail.[28] It is significant that in such applications the test adopted by the High Court is more stringent than that which it adopts for bail applications pending appeal[29] against conviction: are there "special and exceptional reasons" for the granting of bail. From such Malaysian decisions as *Shanmugum* v. *Public Prosecutor*[30] and *Public Prosecutor* v. *Latchemy*,[31] the exceptional and very special reasons rule appears to be problematic and is not as flexible as the phrase itself suggests or was intended to be. Must there be "exceptional and special" reasons in the circumstances of the applicant himself or in the case against him?

In *Shanmugum's* case the plea by the accused to be released on bail principally on the ground that he and the complainant intended to get married and hence there was a probability that the rape charge against him would be withdrawn, failed. In *Latchemy*, Pawan Ahmad J. held that the reasons that the applicant was a mother of ten children, the youngest of whom was still under breast-feed, and that there was no one else to look after them if the applicant was remanded in prison, fell far short of being "exceptional and very special". The accused in that case had in fact relied upon the proviso to section 388(i) which grants even a lower court a discretion to grant bail in offences punishable with death or imprisonment for life if the accused is a person under sixteen years of age or a woman ir sick or infirm.

Despite the language of section 388(i) that a person accused of an offence punishable with death or life imprisonment shall not be released on bail *only* if there appear to be reasonable grounds for believing his guilt, the decision in *Sulaiman bin Kadir*[32] has again emphasized the rule that a charge *per se* is sufficient to remove the discretion of a lower court to entertain a bail application. The need to adduce evidence of a *prima facie* case at a preliminary hearing or to at least indicate to the court the nature and quantum of evidence sufficient to establish "reasonable grounds for believing guilt" has thus become totally irrelevant.

However, the case of *Sulaiman bin Kadir* has an happy ending. The accused was released on bail. Harun J., who was clearly troubled by the

[28]See section 389 of the Criminal Procedure Code, F.M.S. Cap. 6. The Malaysian Code (but not the Singapore Code) also gives the right of appeal against any order of refusal of bail. The speedy procedure under section 389 should of course be preferred: *Sulaiman bin Kadir*, *op. cit.*

[29]There need only be "special reasons" before bail is granted pending appeal: *Re Kwan Wah Yip & Anor.* [1954] M.L.J. 146; *Ralph* v. *P.P.*, *[1972] 1 M.L.J. 242.*

[30]*op. cit.*

[31]*op. cit.*

[32]*op. cit.*

fact that although the Special Sessions Court had jurisdiction to try a case of rape it has no discretion to grant bail, held that there were exceptional and special reasons to grant bail which "arise from the fact that the applicant is to be tried by the Sessions Court".[33]

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[33] [1976] 2 M.L.J. 37 at p. 38. It is doubtful whether the need for the trial court to have discretion to grant bail, which in fact it did not possess, could be an "exceptional and special reason". If the court had the discretion it would still have to decide the further question whether on the merits of the application that discretion ought to be exercised in the accused's favour. Again, is the "exceptional and special reasons" test relevant when a subordinate court entertains a bail application under Section 388 of the Code?

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LEGISLATION NOTES

THE SMALL ESTATES (DISTRIBUTION) (AMENDMENT) ACT 1977 AND THE PROBATE AND ADMINISTRATION (AMENDMENT) ACT 1977

The Small Estates (Distribution) (Amendment) Act 1977 which came into force on 10th June 1977 substitutes the amount of fifty thousand dollars for the amount twenty-five thousand dollars in the definition of a 'small estate" in the Small Estates (Distribution) Act 1955 (Revised 1972). The passing of this Act marks the fourth time the definition of a small estate has been amended in the last eighteen years.

The concept of small estates distribution originated in s. 37A of the F.M.S. Land Enactment of 1911.[1] This section gave Collectors of Land Revenue powers of summary distribution over land owned by deceased persons if the land did not exceed one thousand dollars in value. In 1926 more elaborate legislation was enacted on the subject by the Probate and Administration (Amendment) Enactment 1926. This amending Enactment repealed s. 37A of the Land Enactment 1911 and moved small estates distribution to the Probate and Administration Enactment 1920. It added sixteen new sections, all dealing with small estates, to the principal Enactment. One of these new sections increased the value of small estates to three thousand dollars. This value was retained until 1949 when s. 2 of the Administration of Small Estates Ordinance amended the value to five thousand dollars. The legislation on the subject was overhauled and re-enacted in a comprehensive manner in the Small Estates (Distribution) Ordinance 1955. The new legislation retained the value of a small estate within the Ordinance at five thousand dollars, but not for long. The Small Estates (Distribution) Amendment Ordinance 1959 increased it to ten thousand dollars. When the Ordinance was revised and re-enacted as the Small Estates (Distribution) Act 1955 (Revised 1972) a new value, namely twenty-five thousand dollars, was substituted by s. 3(2) of the revised Act. Although the new Act operated from 1st November 1972, the coming into force of s. 3(2) was delayed until 1st July 1974. The latest amendment, the subject of this note, raises the value of a small estate to fifty thousand dollars, a hundred percent increase in just three years. Can there be a better illustration of the fall in the value of money in the past ten years

[1] This section was added to the Land Enactment 1911 by an amendment Enactment in 1918.