

Criminal Case No.40 of 2011

Tasmen Atto

Applicant

V

Director of Public Prosecutions

Respondent

JUDGE: Eames, C.J.
WHERE HELD: Nauru
DATE OF HEARING: 8, 19 July 2011
DATE OF JUDGMENT: 19 July 2011 [Ex tempore]
CASE MAY BE CITED AS: DPP v Atto
MEDIUM NEUTRAL CITATION: [2011] NRSC 16

Murder - Bail - Whether exceptional circumstances - member so family of deceased support bail application - Strength of prosecution case - Bail refused

APPEARANCES:

Practitioners

For the Applicant

Mr Knox Tolenoa

For the Defendant

Mr D Lambourne (8 July)
Mr W Kurisaqila DPP (19 July).

CHIEF JUSTICE:

- 1 The applicant Tasman Atto was arrested on the 14 June 2011 on a charge of murder, contrary to section 302 of the Criminal Code. The deceased was the uncle of the applicant.
- 2 The prosecution case is that on 11 June 2011 the applicant fought with the deceased using his fists, knees and feet, then a short time later, while the victim was on the ground unconscious, he attacked him again, kicking him three times to the face.
- 3 The deceased man was taken to hospital in a semiconscious state, with injuries to the face and head. He died on 14 June 2011 from severe head injury, caused by trauma to the head
- 4 The applicant applies for bail. Section 80 of the *Criminal Procedure Act* 1972 provides that a person may apply for and be granted bail "other than a person accused of murder and treason". This constitutes a presumption against bail in a case of a murder charge, which was the common law position: see *Re Anderson* [1978] VR 322 at 324 per O'Bryan J; *R v Martin* (1980) 23 SASR 233 at 235-6 per Legoe J. By section 83(3) a judge may grant bail, even on a charge of murder, but with a presumption against bail, the applicant must show exceptional circumstances justifying bail..
- 5 The principles governing an application for bail on a murder charge are set out in *The Queen v Henry Gwao*, a decision of Chetwynd J in the High Court of the Solomon Islands on 15 February 2011. The legislation in Solomon Islands regarding bail is in identical terms to that in Nauru.
- 6 Mr Tolenoa, in his helpful and thorough submissions for the applicant, conceded that the onus is on the applicant to satisfy the Court that there are exceptional circumstances that would justify a grant of bail. Murder is the most serious charge in the Criminal Code and bail would rarely be granted, and certainly never without there being exceptional circumstances.

7 Mr Tolenoa submitted that the applicant is a married man with three children who has no prior convictions. He submits that the grant of bail would allow the applicant more time to prepare his defence case for the preliminary enquiry.

8 He further submitted that the applicant would not be a security risk, were he released. He is neither a risk to the general public nor is he at risk from family members of the deceased, counsel submitted. In support of the submission that family of the deceased would not oppose bail, he filed an affidavit by Suzie Scotty sworn before a Commissioner for Oaths. On the affidavit were 40 other apparent signatures and named people. Ms Scotty asserted that these were the closest and legitimate families of the deceased and were also close relatives of the applicant.. She asserted that these people did not oppose bail and that no person would retaliate against him.

9 As Mr Lambourne, who appeared on the first hearing of this application, submitted, the affidavit had some unusual features. It seems unlikely that 40 people have attended before the Commissioner to make a joint oath. Secondly, many signatures and names on the list appear to have been written in the same hand. In an affidavit from Sgt Raynor Tom, it emerges that the list already signed was taken by Mrs Scotty to the Commissioner. The other signatories were not present, but had signed or had their agreement recorded, to the contents of the affidavit.

10 Mr Tolenoa has today provided more details about the names on the list. He referred to 27 of the 40 named people. Those 13 whom he did not discuss had not been included because they had not themselves signed the list produced by Mrs Scotty, which had the appearance of a petition.

11 Of the 27 named people who supported bail they included the sister of the deceased, five first cousins and others who were related to both families. Other names on the list were those of four sisters of the accused and his wife. The Director of Public Prosecutions submitted that the list was not exhaustive of all those who might be affected by a grant of bail; he submitted that the applicant's immediate family would

be expected to support his bail application.

12 Mr Tolenoa submitted that this was an appropriate case for bail, one exceptional circumstance being the support of family of the deceased as to his bail application. Secondly, he submitted, the case for murder was not strong. The applicant made no admissions as to having an intention to kill or cause serious bodily harm to the deceased man.

13 As to the assertion that the applicant could be released on bail without any risk of retaliation from members of family, Mr Tolenoa did his best to persuade me that the risk had been reduced but I am not persuaded that that risk can be eliminated. A death so recently occurring is likely to produce animosity among some family members, and the applicant if released on bail would be living within about 800 metres of the residence of the deceased man's family. Notwithstanding the assertion that there would be no risk, that cannot be assured. Indeed, when Sgt Tom asked a younger brother of the deceased what his attitude was to bail he angrily said he opposed bail being granted. Although that is only one voice in opposition, it suggests that emotions are still raw within some sections of the family, and I would not exclude the likelihood that others may share the brother's opinion.

14 As to the strength of the prosecution case, I agree that the case of murder is not overwhelming, given that no admissions have been made as to intention. In addition, there may be a causation issue, concerning the adequacy of the treatment the deceased received in hospital.

15 The strength of the case will be able to be better assessed after the preliminary hearing. Although the case is not exceptionally strong for murder, a conviction could be obtained, and a conviction for manslaughter, at least, is a strong likelihood. That too is a serious charge.

16 The applicant has not discharged the onus on him to persuade me that a grant of bail is appropriate at this stage. Accordingly, I refuse bail. The applicant is remanded in custody.

Dated the 19th day of July 2011

Geoffrey M. Eames AM QC

Chief Justice

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