[2012] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 61 AND 62/2012

APPLICATION NOS 6 AND 7/2012

SEIAN FORBES
TAMOY MEGGIE v R

Mrs Jacqueline Samuels-Brown QC instructed by Mrs Velma Hylton QC for the applicants

Jeremy Taylor for the Crown

17, 26 July and 20 August 2012

IN CHAMBERS

PHILLIPS JA

[1] The applicants were both tried on indictment in the High Court Division of the Gun Court in the Parish of Manchester and convicted after the trial by Simmons J on 18 June 2012. They were, as indicated by the Crown, charged and tried with one Kemoy Gayle for the following offences:

(1) Illegal possession of firearm - contrary to section 20(1)(b) of the Firearms Act

(2) Burglary – contrary to section 39(1)(a) of the Larceny Act

(3) Robbery with aggravation – contrary to section 37(1)(a) of the Larceny Act

(4) Buggery – contrary to common law

(5) Shop breaking – contrary to section 40 of the Larceny Act

(6) Larceny – contrary to section 5 of the Larceny Act

[2] The applicant Seian Forbes was convicted on counts 1, 2, 3, 5 and 6, and sentenced on 22 June 2012 to six years imprisonment on counts 1, 2, and 3, five years imprisonment on count 5 and three years imprisonment on count 6. The applicant Tamoy Meggie was convicted on all counts, and sentenced on 22 June 2012 to 10 years imprisonment on counts 1, 2, and 3, seven years imprisonment on counts 4 and 5 and five years imprisonment on count 6. All the sentences were ordered to run concurrently.

[3] During the trial Kemar Gayle changed his plea to one of guilty in respect of counts 1, 2, 5 and 6. He was sentenced on 21 June 2012 to four years imprisonment on count 1, five years imprisonment on counts 2 and 5, and three years imprisonment on count 6. The Crown offered no evidence on counts 3 and 4. He has not sought to appeal.

[4] Both applicants have applied for permission to appeal against conviction and sentence pursuant to section 14(2)(a) of the Gun Court Act and have therefore filed form B1 in accordance with rule 3.3(1)(a) of the Court of Appeal Rules (CAR). The grounds of the application are set out as follows:

> "(a) Her Ladyship the Trial Judge misdirected herself in relation to:

(1) the good character of the Accused

(2) the Alibi evidence

(3) the implications of the 3rd Co-Accused pleading Guilty to 4 Counts of the Indictment after the fingerprint evidence was completed."

Pursuant to rule 3.24(2) of the CAR, both applicants also filed form B22 simultaneously with form B1, referred to above, indicating their desire to apply for leave to call witnesses on their appeals. The two witnesses were named: (1) Velma L Hylton QC and (2) Kemar Gayle. The reasons given why these witnesses were not examined at trial were that Queen's counsel was counsel for the applicants at the trial, and that Mr Gayle was their co-accused. The evidence that the applicants were of the view that these witnesses could give was set out very succinctly. With regard to Queen's counsel it was said to be contained in her affidavit, and with regard to Mr Gayle, it was that he and his friends had committed the offences for which the applicants had been convicted.

[5] The applicants also filed simultaneously, applications Nos 6 and 7, respectively requesting that they be released on bail pending the hearing of the applications for leave to appeal on such terms and conditions as this court may deem to be just in all the circumstances. It was stated on the applications that the applicants intended to rely on the affidavit of Velma L. Hylton QC sworn to on 21 June 2012, and also on the statement of Kemar Gayle [dictated to Velma L Hylton QC in the office of the acting overseer at the Saint Catherine Adult Correctional Centre, Spanish Town, and witnessed

by acting overseer Mr Scott on 22 June 2012]. The grounds of this application were set out as follows:

> "[1] The Applicants/Appellants have an extremely strong likelihood of succeeding at the Hearing of the Application for leave to appeal as is evidenced in the affidavit and statement mentioned above AND [2] in addition the Investigating Officer in the instant case passed TO counsel then representing the Applicants/Appellants a Note during the sentencing of the Applicants/Appellants which is copied and attached hereto and which supports both the Affidavit and Statement."

[6] The applications before me were therefore for permission to appeal the convictions and sentences and for bail, pending appeal. The latter was claimed pursuant to the common law, the Judicature (Appellate) Jurisdiction Act and the Bail Act.

[7] Mrs Hylton QC deposed in her affidavit that, as experienced Queen's Counsel, with a private practice established in the parish of Manchester, she had been retained to represent the applicants. The applicant Forbes was a taxi operator, and the applicant Meggie was a corporal in the Island Special Constabulary Force, and they were both of the Scotts Pass area in the parish of Clarendon, within a mile of the border of the parish of Manchester. Both men were charged she averred for terrorizing a bar operator who lived in close proximity to the bar. The men were apprehended on 17 February 2010 and transferred to the Manchester Circuit Court on 27 May 2012. After many mention dates the case was eventually set for trial on 15 February 2012, and it was then, Mrs Hylton stated, that one Kemoy Gayle was charged jointly with the applicants.

Mrs Hylton averred however, that the virtual complainant had testified that two men had broken into her house and committed several serious offences on her person.

[8] Mrs Hylton QC further deposed that she had represented Mr Gayle previously in circumstances where he had been apprehended on 13 February 2010 when in a motor car with three other persons, and a firearm was found in the car. He pleaded guilty, then changed his plea, then when the matter came up for trial he pleaded guilty again, and was sentenced to imprisonment. He was thereafter, counsel deposed, tried together with two of the other persons who had been apprehended in the car with him, and he and one of those persons had been found guilty.

[9] Mrs Hylton QC further averred that when she approached the dock to speak with her clients Mr Gayle told her that he did not know the applicants and did not know how he had been charged with them. The applicants, she said, had also told her that whilst in the dock and before and during the complainant's evidence, Mr Gayle had told them that he knew they were innocent. Additionally the applicant Forbes had also told her that while in the cell with several inmates, one of the men there told him that he and his friends had indeed committed the offences with which he, and the applicant Meggie had been charged. Indeed, counsel deposed, that at the trial, Mr Gayle was represented by Mr Norman Manley of counsel, and although the virtual complainant had indicated that two men had broken into her home, Mr Gayle had asked him, Mr Manley initially, if he should plead guilty, but Mr Manley had at first thought, that the scientific fingerprint evidence had not been appropriately documented. He later however, had received instructions from his client, firstly that the applicants were not a party to the offences

for which they were being tried with him for, and secondly, that he wished to plead guilty to four of the six offences. Mrs Hylton indicated that this occurred. She further stated that despite her request to have Mr Gayle remain at court, this did not occur, and he was thereafter released from the case, and the applicants were convicted. She also stated that the fingerprint evidence was to the effect that Mr Gayle's fingerprints were found on a plastic container underneath clothes in the ransacked house of the virtual complainant. It was of some importance that Mr Gayle was sentenced the day before the applicants.

[10] As indicated in the notice of application for bail, a statement was taken by Mrs Hylton from Kemar Gayle at the Saint Catherine Correctional Centre. It was his position that he did not know the applicants, but he had been at the house of the complainant with one Robert and one Scott Morris. He said that Scott Morris looked like the policeman Meggie, and when he had heard the "woman" saying that Meggie had done certain things he knew that it had been Scott Morris who had done them. He said that the gun was his, and that he had given it to Morris. He said that he had been to the Inspector and told him that the applicants were not guilty of the crime and told him who had been with him, and the Inspector had indicated that he was familiar with Robert, a previous offender, and he would "see what he could do". He also said that he had told his lawyer that the applicants were not guilty. He said that the woman did not have a chance to see the persons who had entered her house as they had covered their faces. He had also done so. He gave information on the incident, that is taking the complainant into her room and making her lie down on her belly. He denied that he had

had sexual intercourse with her, as he said that he had never raped a woman yet and never would. He said that he had told this to the applicant Forbes, as well as the fact that he knew who had committed the offences that he, the applicant Forbes, had been charged with. He stated that Scott Morris had demanded money from the woman, and that he, Gayle, had removed several items from her shop after obtaining the keys in respect of the same from her. He further stated that he had been apprehended by the police when sleeping in an old abandoned house on the Villa road near to Belair, had later been released and then had subsequently been arrested by the police two days after the incident at Scotts Pass when in a car with three other men who were not the men who had gone to the house with him.

[11] Mrs Hylton QC deposed to a further supplementary affidavit in which she referred to her earlier affidavit and indicated that she wished to add the following:

> "At the end of the trial and during the sentencing I was handed a note by the Investigating Officer Detective Sergeant Owen Hyatt in which he stated that, "A yesterday mi talk to Kemar Gayle and him now a admit to me that them innocent and a him and three others did it. Mi ask him why him never tell me the truth when me arrest him but him say him think them would a get away."

A copy of the hand written note from the Detective Sergeant was attached to the affidavit marked as "VH 1".

[12] She also indicated that with regard to the grounds of appeal, the learned trial judge had not adequately dealt with the directions on character evidence in that character evidence had been given in cross examination by a Crown witness, Special

Sergeant Erwin Barret, in respect of the applicant Meggie, who was his supervisor and senior, and the judge omitted to consider whether a person of admitted good character would have committed such grave offences. She also failed to deal adequately with the alibi evidence, as she had indicated that the applicant Meggie had not given evidence about the driver who had picked him up on his way to his house, which was in error, and which had been corroborated by other evidence, and also, the learned trial judge did not deal adequately with the evidence given by the applicant Meggie's brother who gave detailed evidence about their activities at their mother's house, at the time when the incident at Scotts Pass had been committed. A further complaint, deposed to by Mrs Hylton, was that the learned judge did not deal adequately or at all with the fact that the fingerprints of the applicants had been taken, but the only fingerprints identified at the house were those of Kemar Gayle. Additionally, he had only been charged when the fingerprint evidence had disclosed this, some two years after the event, while he was serving two terms of imprisonment for illegal possession of firearm, and when he had been apprehended with others on 13 February 2012, two to three days after the incident, and four days after the applicants had been apprehended.

The submissions

[13] Queen's counsel Samuels-Brown submitted that I ought to grant the applications as the documents submitted with the notices of appeal and the application for bail showed that the applicants had substantial grounds of appeal. She set out a theory for the prosecution, which was that the two applicants with Kemar Gayle had attended on the complainant's premises and committed various crimes. As a result the

fingerprint exercise was carried out in an effort to identify and confirm the perpetrators. That exercise however, resulted in verification of the presence of Kemar Gayle only. It was her submission that as the complainant had said that Kemar Gayle had not come inside the house and the fingerprint evidence was indicating to the contrary, the viva voce evidence and the scientific evidence were contradictory. This she further submitted was compounded by the fact that the judge had accepted the guilty plea of Kemar Gayle with the concurrence of the prosecutor, indicating that they had accepted the veracity of the fingerprint evidence in which case the prosecution's case would have been severely impugned.

[14] Counsel also referred to the judgment of Cooke JA who delivered the judgment of the court in **R v Newton Clacher** SCCA No 50/2002, delivered 29 September 2003, a case in which she submitted identification and credibility were live issues. Applying the principles articulated in that case, she submitted that as both applicants had given sworn evidence, they were entitled to the full character direction, which in the instant case, she said was flawed, as the propensity limb of the direction had been ignored by the trial judge. Additionally, she submitted, that as the character evidence had been elicited from a Crown witness and therefore formed part of the case for the Crown, it assumed "additional legal significance and a judge was entitled to act on it".

[15] Counsel submitted to me, without any opposition from counsel for the Crown, copies of the Social Inquiry Reports tendered in the sentencing process in the case, in respect of both applicants. With regard to the applicant Meggie counsel contended that the information contained under the heading "Community Report" was consistent with

the evidence given by Special Sergeant Erwin Barret in the trial, in that he was well known in the community and that a majority of persons spoke well of him, to buttress her argument that he was entitled to the full character direction from the judge. He was said to be a very sociable, disciplined, and generally good person. Members of the community had expressed shock and surprise when hearing of the matter, as it was said that he was not the type to commit those acts. In fact he was described as a "model citizen and a valuable contributor to their community. They said he has had a good upbringing, is decent and brilliant and they have never so much as heard him use foul language". No submission was made to me with regard to evidence given at the trial in respect of the applicant Forbes, to warrant a challenge to the directions of the learned trial judge. However the Social Inquiry Report was nonetheless submitted and referred to. It was said that he was humble, hardworking, sociable, kind and gave no trouble. He was said to be a community person who offered counseling and volunteered his time in assisting with other residents.

[16] Counsel submitted that in respect of the applications for bail, both applicants had been on bail before and throughout the trial, and had complied with all the conditions thereof. She referred to the fact that the transcripts were likely to be produced two years hence and by that time the applicants would have served substantial portions of their sentences which would be unjust. She referred to the statutory powers of the judge to grant bail (the Bail Act and the Judicature (Apellate jurisdiction) Act), and the inherent power of the court to do so (**R v Spilsbury** [1898] 2 QB 615). She also drew

my attention to **R v Mckenzie and Mckenzie** (1974) 12 JLR 1563 for the principle that "where there is a real likelihood of success on appeal bail is indicated".

[17] Counsel for the crown submitted that the Court of Appeal had no inherent jurisdiction to grant bail. It was further submitted that the jurisdiction to grant bail to convicted persons exists only if there are statutory provisions enabling the court to do so. He argued that the power of the Court of Appeal in Jamaica to grant bail pending appeal is governed by the Bail Act and the Judicature (Apellate Jurisdiction) Act. Counsel contended that the question of bail after a person has been convicted is one of serious importance and only a stringent approach to the same would be acceptable, failing that the system of trial by jury would be undermined which would not be in the public interest. Once convicted, counsel argued, a person is no longer clothed with the constitutional protection of the presumption of innocence, has no entitlement to bail and the court ought only to exercise its discretion to grant bail in certain circumstances. Indeed, counsel submitted, the discretion should be sparingly exercised, in fact only in exceptional circumstances. Counsel very helpfully referred to several authorities in support of this position some of which I will allude to later in this judgment.

[18] Counsel posited that the applicants were relying on two grounds in support of their applications viz that the applicants had a strong likelihood of succeeding on appeal, coupled with the note of the investigating officer passed to Queen's counsel during the sentencing of the applicants. He submitted that the applicants would have to be saying that the exceptional circumstances which existed in their case, must be that

the convictions are wrong, but, he argued, for the applicants to submit that, on the basis of the grounds stated in their applications, they would have to be relying on the introduction of fresh evidence on appeal. Counsel argued also that the mere possibility of success on appeal was not sufficient for the grant of bail after conviction, the court must be "convinced on the merits that the appeal will probably succeed". He relied forcefully throughout his submissions on the judgment of Chief Justice Bernard in **Krishendath Sinanan et al v The State** (1992) 2 TTLR 480. He also submitted that with regard to the note from the Inspector, no affidavit had been submitted by him and his state of mind was not relevant.

[19] Counsel referred to section 28 of the Judicature (Appellate Jurisdiction) Act and several cases with regard to the law relative to adducing fresh evidence on appeal and submitted that the burden was on the applicants to satisfy the court as to the cogency of the fresh evidence sought to be adduced. Additionally, they must comply with the relevant section in the enabling statute. He submitted that the applicants had failed in relation to the first limb, as they could not demonstrate that the evidence from Kemar Gayle was not available at trial. In fact, he argued, the affidavits submitted seem to suggest that the evidence was available. Mr Gayle was supposed to have spoken to the applicants in the dock, to Queen's counsel as she approached the applicants in the dock, and to his own counsel. There was, he argued, no explanation given as to why his evidence had not been taken. It was therefore his submission, that both grounds of the application ought not to succeed. He referred to the dictum of Bernard CJ in **Krishendath Sinanan et al v The State** for guidelines with regard to circumstances

which could be considered exceptional so as to persuade a court to exercise its discretion and grant bail pending appeal. Although counsel submitted, that as is set out in the case, the guidelines were not exhaustive, he was adamantine that none of the matters set out in the guidelines existed in the matter before me.

[20] Counsel in his further submissions referred to the fingerprint evidence and where the fingerprints had been taken from. It seems that all the impressions taken had not been of good quality and so photographic enlargements were made of the impressions which were of good quality, and these identified Kemar Gayle. Counsel submitted that the virtual complainant had testified that both applicants had been inside her house. He argued that, having been tied up, and put to lie face down in another room, she could not say if others had not joined the applicants in the house, and so her evidence did not invalidate the scientific evidence, nor did it negatively affect her credibility. He then referred to the evidence given by the virtual complainant with regard to her description of the applicants and her ability to identify them. He submitted that she had identified them by description and name in her first statements to the police, and had later identified them positively in the identification parades.

[21] In referring to the ground raised by Queen's counsel for the applicants that the learned judge had given inadequate directions in respect of character evidence, counsel reminded me of the duty of this court on appeal with regard to the summation of a judge sitting in the High Court Division of the Gun Court, which was to determine whether the trial judge had fallen into error, either by applying some rule incorrectly or not applying the correct principle. He submitted that the applicant Meggie was entitled

to the full character direction embracing both the direction as to credibility and propensity. He referred to several cases dealing with the law on character evidence. However, he argued that without the transcript of the trial, there would be no basis for me to find that the directions were inadequate. In any event, having agreed with counsel for the applicants on the law, he submitted that evidence of good character was an issue of fact, and the learned judge could have accepted the evidence wholly or rejected it wholly or in part. Counsel submitted that there was no fundamental reason put forward by the applicants, why they should be placed on bail pending appeal, and accordingly asked that the applications be dismissed.

The statements

[22] As the transcript of the proceedings was not yet available, but based on some of the submissions that were being made to me, I requested copies of the statements which had been taken in respect of this matter and which were on the file at the offices of the Director of Public Prosecutions. Both counsel were informed of my decision to familiarize myself with the same. There were 12 statements, three from the virtual complainant, two from the forensic crime scene investigator, one from the fingerprint expert, and three from police officers. I will only refer to some points which appeared relevant to the applications before me.

[23] The virtual complainant in her first written recorded statement signed by her, said that she heard a loud sound and the door of her home flew open, and two men entered, one with a gun and one with a knife. She said that she could see clearly. The

men were touching distance from her, she could see their faces and she immediately recognized them. She said that they covered their mouths with their t-shirts and asked her if she knew them which she denied as she was afraid. She described her ordeal and indicated that one of the men had told her that there were two more men there and they would kill her if she attempted to move. She also said he told her that there were four of them there, and they would kill her if she made any noise. She spoke of hearing sounds of persons moving bottles around her house but the only voices she heard were those of the same two persons, whom she had seen break into her house, and no-one else. She however gave detailed descriptions of the two men. This is what she said:

> "I will now describe the men who broke into my home and robbed me and raped me. The man I called Jay who was armed with the long black handle knife is of dark brown complexion, medium built, he is about my height, low cut hair style and appears to be in about his twenty's (20's), I have known him for about (6) six months now and I know he lives in the Scotts Pass area but I don't know the exact house. I do know that he drives a red plate taxi brown Nissan Motor car which runs from Mandeville to May Pen in Clarendon. I see him almost every day driving pass when I am at my business place and sometimes he stops and buy food at the restaurant. I have spoken to him on more than one time when he would come into buy food. I had seen Jay about 8:20pm at the restaurant, he came into buy food but none was there so he left on the same day of the incident, he was dress in his work uniform at that time. During the incident when he came to my house he was wearing a dark colour pants and black shirt. He was wearing nothing on his head at the time he came to the house. If I should see him again I would be able to identify him by his face. I saw his face for about 30 seconds during the incident by the aid of the lights in the living room. There was nothing blocking my view.
>
> The man I [sic] Tommy who was armed with the gun is of dark brown complexion, but Jay is darker than him. He is of

> medium built, Indian looking a bit taller than I am, low cut hair style with side burns and moustache [sic] and appears to be in his med [sic] twenties. I know him to be Police Officer who works in Mandeville. I have known him for about (17) seventeen years now and I know he lives at St. Toolist Dist, Clarendon. He attended Bellfield High School in Manchester. I know his mother is called Chum and she and him lives in some place at St Toolist District, Clarendon and his baby mother Tameka lives in Scotts Pass Primary School lane at the same house where Jay lives. I have seen Tommy in a blue uniform driving a Police vehicle a bus passing the shop, I have only spoken to him one time in September 2009. I know [he] rides a big bike sometimes or sometimes drives the taxi car Jay drives or a Nissan white in colour that his mother has. I don't remember exactly when I saw him last passing he has never been to the shop when I am their [sic], but when he is driving pass he would blow and hail mi. When Tommy come to the house, he was wearing black jeans pants and black shirt and I saw his face for about 30 seconds by the aid of the living room lights and there were [sic] nothing blocking my view. The entire incident lasted for about (3½) three and a half hours."

[24] The complainant then said that she showed the police where "Tommy's mother lived and also where the girlfriends' of Tommy and "Jay" lived. Her other statements related to the identification parades, where she identified the applicants, and the description of the gun that she said that "Tommy" had on that fateful night. One of the police officers in the statement that she gave, said that she went to the home of the complainant pursuant to a report received, and she overheard the complainant telling the officer whom she had accompanied, that she knew the men who had broken into her home and committed the crimes and she named them as "Jay" and "Tommy".

Further affidavit from counsel for the applicants

[25] Subsequent to the hearing of the applications, I received on 3 August 2012, yet a further second supplementary affidavit of Velma L Hylton QC, sworn to on 31st July, and filed on 3rd August wherein she deposed that having become aware that counsel for the respondent had provided statements from the prosecution witnesses to me, she redoubled her efforts to obtain an extract from the Station Diary of the Porus Police Station in the parish of Manchester, setting out the first report made relative to the offences for which the applicants were charged. She attached the extract made on 11 February at 12:30 pm by Constable Ricketts, who testified at the trial. She indicated that she had read the said extract and that there was no mention made of the applicants by name. This affidavit had been sent to counsel representing the Crown in the applications before me. I received no comment with regard to the same.

Discussion and Analysis

The applicable principles

[26] There are two statutory instruments which empower the Court of Appeal to grant bail to a convicted person pending appeal. They are:

Section 13 (1) of the Bail Act which states as follows:

> "s. 13--(1) A person who was granted bail prior to conviction and who appeals against that conviction may apply to the Judge or the Resident Magistrate before whom he was convicted or a Judge of the Court of Appeal, as the case may be, for bail pending the determination of his appeal." And

Section 31 (2) of the Judicature (Apellate Jurisdiction) Act, which reads:

> "s 31--(2) The Court of Appeal may, if it seems fit, on the application of an appellant, grant bail to the applicant in accordance with the Bail Act pending the determination of his appeal."

[27] In my view the Court of Appeal has no inherent jurisdiction to grant bail to a convicted person. The jurisdiction to grant bail in those circumstances only exists if there is in support of it some statutory provision which defines not only the persons empowered to exercise it but also the manner in which it is to be exercised **Lyttleton, Re** (1944) 172 LT 173, 61 TLR 180; **Ex parte BLYTH** [1944] KB 532). In **Regina v Spilsbury** referred to by Queen's counsel for the applicants the application for bail was made as an alternative to other applications and was not made after conviction, and is therefore not helpful for these purposes.

[28] The court is clearly exercising a discretion when considering the grant of bail, as the statute refers to the Court acting "if it deems fit". However there are several authorities going back over 100 years, indicating that that discretion ought to be sparingly exercised. In **Edgar Gordon** [1912] C Cr A 183, the court referred to the course as an unusual one and refused bail to a prisoner on the basis that no sufficient reason had been shown. In **John Henry Charles Ernest Howeson, Louis Hardy** [1936] 25 C CR A, 167, Talbot J made this succinct statement referring to a similar application:

> "The Court sees in this case none of those exceptional circumstances which alone justify the granting of bail by this court, and the applications must be refused."

[29] In Jamaica and the Caribbean the law has been stated somewhat similarly over the years. In **R v Marsh** (1965) 9 JLR 217, in circumstances where the applicant had been convicted on several counts of an indictment charging falsification of accounts, fraudulent conversion, larceny, uttering and embezzlement and was sentenced to 18 months imprisonment, and applied for bail pending appeal, and attached a certificate from the prison medical officer to the effect that the applicant was a person of a nervous disposition and when subjected to undue stress and strain and nervous tension was liable to develop a nervous breakdown, and that continuous imprisonment was detrimental to his health, this court (Dufffus P, Lewis J.A and Swaby JA (Ag)) held that:

> "After conviction and sentence, the court will exercise the power to admit an appellant to bail only in exceptional circumstances, and no exceptional circumstances had been shown by the applicant."

Duffus P in delivering the judgment of the court stated that the practice in the Criminal Court of Appeal in England, at that time, was exactly the same as the practice which had been followed by this court in Jamaica.

[30] In **R v Tomlinson v Riley** (1970) 12 JLR 220, Fox J in dealing with applications for bail pending appeals from the Resident Magistrate Courts and submissions that the consideration by the judge of appeal should be different when dealing with appeals from the Resident Magistrate Court as against appeals from the Circuit Court indicated that on the basis of the specific provisions of the Judicature (Resident Magistrate

Court's) Act, the approach need not necessarily be the same. Additionally Fox J mentioned **R v Marsh** and **R v Gordon** and stated that the basis of the "exceptional case" rule appeared to have developed without any real reason and explanation. He made this comment criticizing the same:

> "It may still be an entirely just rule in England where the provisions of s. 6 of the Criminal Appeal Act 1966 ensure that the period during which an appellant is in custody pending the hearing of his appeal shall count towards his sentence unless the court otherwise directs, and states its reasons for so directing; and where the time between conviction and the hearing of the appeal is likely to be very short. In Jamaica where the circumstances of an appellant are different, there may be good reason for eliminating the rule - and replacing it by considerations which are more in accord with existing realities here."

Fox J made mention, inter alia, that the sentences which had been imposed were short, that the appeals would turn against a point of law the possibility of success of which was not insignificant, and he granted the applications for bail pending appeal.

[31] Graham-Perkins J A in **R v Rudolph Henry** (1975) 13 JLR 55, in dealing with a case in which the appeal was more than likely to be resolved in the appellant's favour as he was convicted under section 20 of the Firearms Act of being in possession of a firearm without a licence and there appeared to be no evidence that the "thing" which was in the possession of the appellant was a firearm within the definition of the Act, made this pellucid statement as eloquently as only he could put it:

> "By virtue of the provisions of ss 28 and 29 of the Judicature (Appellate Jurisdiction) Law 1962 the Court of Appeal, or a judge thereof, 'may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the

> determination of his appeal'. The words 'if it seems fit' are unmistakably clear. Their intendment is to vest in the court, and the judges thereof, a discretion to admit an appellant to bail in circumstances in which, in the opinion of the court, or a judge, such a course is desirable or just. This court has never, as far as I am aware, sought to formulate a catalogue of principles by reference to which an application by an appellant to be admitted to bail is to be determined. It is to be hoped that no such attempt will ever be made. Parliament has, by the terms of ss. 28 and 29, *supra*, and without equivocation, entrusted this court, and its judges, with a discretion in the widest possible terms in the knowledge, it must be supposed, that that discretion will be responsibly exercised. For these and other reasons I am constrained to the conclusion that in the exercise of the discretion with which I am here concerned it is eminently desirable to avoid reference to such vague and indeterminate phrases as 'in the exceptional circumstances of the case' from which, by their very nature, no common statement of principle can be extracted."

[32] Chancellor Haynes in chambers in the Court of Appeal in Guyana, in **The State v Lynette Scantlebury** (1976) 27 WIR 103, commented on the above dictum and had this to say:

> "But I would venture to suggest with respect that the English judges meant nothing really different in their use of the words 'exceptional' or the phrase 'very exceptional.' What was being emphasised was that normally bail would not be granted to an appellant or a prospective one after his conviction by a jury; that it was not to be lightly allowed; and so an applicant had to show that, in his case, there were special circumstances which made it the just thing to do to put him on bail pending the hearing of his appeal. For example, if on the face of the papers before the court, the conviction appears plainly wrong so that his appeal has every prospect of success (as in *R v Rudolph Henry*), this would be a factor which could make the case exceptional. But an instance of more frequent occurrence is where the sentence is a short one and it is administratively impossible

> to hear the appeal or there is not much hope of doing so before his sentence terminates. For, if the appeal succeeds after this, justice might not appear to have been done. And this might even be so where, although the appeal may or will be heard before the sentence ends, he will by then have served most or a very substantial part of it."

[33] The matter before Chancellor Haynes, was an application for admission to bail pending the hearing of an appeal against conviction for causing death by dangerous driving and a sentence of six months imprisonment. The application was based on the applicant's own ill-health, that of her husband, great hardship on her family and on the real likelihood that her appeal would come on for hearing after she would have finished serving her sentence. Haynes C found as set out above, and the applicant was granted bail on the basis that it was likely that she would have served her sentence before the appeal came up for hearing, and that if her appeal was successful and her conviction was set aside, or her sentence varied to a monetary one, she would have suffered imprisonment or detention pending her appeal unjustifiably. Justice would not have appeared to have been done in that event, and there was therefore a real possibility of injustice being done to her.

[34] The Court of Appeal in Trinidad and Tobago dealt with these issues in **Krishendath Sinanan et al v The State**, and Chief Justice Bernard made this powerful statement:

> "Application for bail by a person after he has been convicted by a jury is a serious matter. It is not to be treated lightly. Anything but a stringent approach to the matter undermines the system of trial by jury and as such is inimical to the

> public interest. The granting of bail to such persons is a facility that is sparingly resorted to and the discretion of the Court is exercised only in very exceptional circumstances. That has been the approach in most if not all Commonwealth countries and was certainly so in England under the Act of 1907."

Bernard CJ commented that a person who has already been convicted of a criminal offence has no right to bail, but in certain circumstances in the discretion of the court he may be granted bail. Having referred to several authorities which dealt with this area of the law, he concluded, "The principle to be extracted from all the cases is that the circumstances must be exceptional". In his opinion, the mere fact that there might be a delay in securing a hearing of the appeal was, he said, by itself not such an exceptional circumstance as to warrant the grant being made, as this, he said, could be due to a "host of unavoidable or exceptionable circumstances".

[35] In later cases in the High Court of Australia, the courts have held that the ruling of the jury should be given its true significance and one ought not to assume that the real effect of their decision awaits confirmation from the Court of Appeal and therefore the appellant should be on bail until that confirmation. The courts maintain that one should show exceptional circumstances to obtain what is in effect a suspension of the jury's verdict (**Chamberlain v The Queen**, [1983] HCA 13). Thus one must accept, as a practical and legal matter that the conviction and punishment have been regularly entered and imposed. However there are cases where the convictions are wrong and the sentences are far harsher than the crime warranted. It is not until after careful evaluation by the Court of Appeal with the benefit of argument, and the time to

undertake it, that the miscarriage of justice may be discerned. But exceptional cases do occur, and it is in those cases, when shown to exist, that the "courts may react by allowing bail to a convicted person pending the hearing of his or her appeal (**Ettridge & Hanson v The Queen** [2003] HCA 68).

[36] At the end of the day even if the threshold is not that exceptional, or very exceptional or even unusual circumstances must exist before the court can grant bail to a convicted person, in my view, there must be special circumstances which warrant a convicted person being admitted to bail. It is a discretion which the court exercises and which must of course be exercised judicially and responsibly, and must be dependent on the facts of each and every case. The approach to the grant of bail is significantly different after conviction than it is before conviction, as there is no entitlement to bail at that time, as the presumption of innocence no longer exists. A very stringent approach therefore must be adopted.

[37] Within the context of special circumstances, the court must look at the likelihood of success on appeal. Queen's counsel for the applicants referred to **R v Arthur Mckenzie and Anthony Mckenzie** and the dictum of Edun JA in chambers, wherein he said that there was a real likelihood of Arthur Mckenzie being acquitted on appeal, and in those exceptional circumstances he was prepared to grant bail pending appeal. Graham-Perkins JA in **R v Henry**, was pellucid in his opinion in respect of the approach which should be undertaken in certain circumstances. He said this:

> "I entertain not the least doubt, however, that where it is manifest that a verdict adverse to an appellant is unlikely to

be sustained by reason of the total absence of proof of those matters which it is essential to establish in order to constitute the offence charged, an applicant ought, without the least delay, to be admitted to bail. It is my firm view that in this case the prosecution did not lead any evidence to cast even the shadow of a *prima facie* case of possession of a firearm by the applicant."

[38] Chief Justice Bernard in **Krishendath Sinanan** stated

> "… the mere possibility of success on the appeal is not sufficient in itself to constitute an exceptional or special circumstance to justify the granting of bail. In the absence of any other special circumstance, bail should not be granted unless the court is convinced on the merits that the appeal will probably succeed."

[39] In this matter before me the whole question of success on appeal will depend on the fresh evidence, which Queen's counsel expects to adduce on appeal on behalf of the applicants. The power of this Court to permit fresh evidence is captured in section 28 (b) and (c) of the Judicature (Appellate Jurisdiction) Act, which reads as follows:

> "For the purposes of Part IV and part V, the Court may, if they think it necessary or expedient in the interest of justice-
>
> (a) …
>
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and

> (c) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application;"

[40] Carey P (Ag) in delivering the judgment of this court in **R v Leaford Smith,** (1988) 25 JLR 535 identified and said that certain evidence was "fresh evidence", " in the sense that it is a state of affairs devised or imagined and put forward after a conviction". He also confirmed that the burden was cast upon the applicant to show that:

> "i) the evidence was not available at the trial;
>
> ii) that it must be relevant to the issue;
>
> iii) that it must be credible evidence;
>
> iv) that the court will, after considering whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at trial."

In that case the court indicated that it had no hesitation in rejecting the witness and the evidence to be adduced as by his own admission, he was a liar.

[41] With regard to Queen's counsel's claim that the character directions of the trial judge were inadequate, there is no doubt that on authority from this court the law is clear (**R v Newton Clacher** and **Michael Reid v R** SCCA No 113/2007, delivered 3 April 2009), that if the defendant gives sworn evidence he is entitled to the credibility limb of the standard good character direction and to the benefit of the standard

direction as to the propensity of whether someone of his good character would commit the offence with which he is charged. However, with his usual cogency and clarity, Morrison JA in **Michael Reid v R,** in delivering the judgment of this court, indicated that that was not an end of the matter. He stated:

> "The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and /or the judge have had on the trial and the verdict. Regard must be had to the issues and the other evidence in the case and the test ultimately must always be whether the jury, properly directed would inevitably or without doubt have convicted **(Whilby v R**, per Cooke JA (Ag) at page 12, **Jagdeo Singh v The State** (2005) 68 WIR 424, per Lord Bingham at pages 435-436)."

Applying the principles

[42] In considering the applications for bail, one must do so therefore within the context of whether the applicants have shown that special circumstances exist to warrant or justify the grant of bail. As already indicated the applicants hope to adduce fresh evidence on appeal. But the first hurdle is, was the evidence of Kemar Gayle available at trial? The evidence certainly is that many of his utterances with regard to the innocence of the applicants occurred before the trial of the applicants was completed. He had also pleaded guilty before their trial was completed. There does not appear at this time to be any acceptable reason proffered on affidavit to explain this. Additionally although the evidence may be relevant the next issue would be is it credible? While I may accept unhesitatingly that Kemar Gayle told Queen's Counsel all

that she has stated he said to her, and that the Inspector did hand her that note, I have far greater concerns about the credibility of Kemar Gayle and the truthfulness of the position now being taken by him. It could prima facie appear contrived. It may not therefore change the outcome of the case.

[43] With regard to the extract from the Station Diary, I am not sure that I ought to deal with this exhibit, attached as it was to the second supplementary affidavit of Velma Hylton QC, which was submitted to me after the hearing for the applications had been completed. But be that as it may, my short comment with regard to the extract from the diary is that it suffers from the same difficulties as the statement of Kemar Gayle, in that it appears that it was discovered, after learned Queen's Counsel had "redoubled her efforts" to obtain the same subsequent to the hearing of the applications, and having become aware that I had requested and had received, the statements of the prosecution witnesses. The extract from the Station Diary was therefore not before the trial court. This would be fresh evidence, and the questions which would arise would be "was it available at the trial?", " if not why not?" No explanation has been given. Further, "How useful would the information contained therein be, in the light of the other police statements?"

[44] In this case the sentences of imprisonment were not short, the range of years was five years to 10 years imprisonment but I was informed that the transcript may take two years to be produced, which could equate to a significant portion of the time of incarceration ordered by the learned trial judge. However the authorities seem to suggest that delay in securing the hearing of the appeal is not by itself an exceptional

circumstance to warrant the grant of bail after conviction. The sentences imposed would certainly not have been completed before the appeal ought to have been determined.

[45] I also do not find the submissions in respect of the fingerprint evidence compelling. The virtual complainant in her first written statement indicated that she was told by one of the applicants that there were four persons at her home that night. The fact that the fingerprints of Kemar Gayle, who has admitted that he was present, was not one of the persons that she saw and recognized, is in my view, not necessarily inconsistent with her evidence. Also the fact that there are no fingerprints of the applicants whom she said she saw and recognized is also not fatal in my view. There are too many other possible explanations for that situation. Additionally the complainant did not appear to say that there were only two men in the house, one of whom was *no*t Kemar Gayle.

[46] There is also the detailed description of the applicants, given by the complainant in her statement to the police two days after the incident, whom she says she saw for 30 seconds in good light and recognised as they entered her home, and whom she had known well for some time, and whom she had seen fairly regularly. In the statement of at least one police officer she is said to have named the applicants on the night of the incident, and she later identified them on identification parades.

[47] I realize that information provided in the statements given to the police does not necessarily become evidence given in court, but I was not told that there were extreme

variations, or any variations at all, between the statements and the evidence, and without the transcript I am unable to do otherwise than to say that the evidence may have unfolded as set out in the statements, and at the moment, I cannot say that this is a situation such as existed, in **R v Henry**, where, "it was manifest that a verdict adverse to the appellant is unlikely to be sustained…".

[48] With regard to the character directions of the trial judge which Queen's counsel has described as inadequate, I, naturally accept that Queen's counsel recollection may be accurate. However, it may ultimately be a matter of interpretation of the words used by the trial judge in her summation. As a consequence, I am hampered considerably without sight of the transcript, to be able to conclude whether or not the directions were as required in law. Further, in any event, as indicated previously, any such omission will not automatically result in an appeal being allowed. Additionally, one must remember that this matter did not take place before a jury but by a judge sitting alone, and whilst inscrutable silence is not permissible, the learned trial judge is really required to deal with the case in the manner established for dealing with the same and is not fettered as to the manner in which she demonstrates her awareness of that requirement (**R v Cameron** (1989) 26 JLR 453). So, scrutiny of the summation (which is for the benefit, not only of the parties, but for the assistance of the Court of Appeal) in order to ascertain whether she has complied with that understanding as to what is required, may be different, sitting as she was, without a jury. In any event it must be remembered that the character direction seems only relevant to the applicant Meggie.

Conclusion

[49] In the light of all of the above, I could not say that I am convinced on the merits that the appeal will succeed. As a consequence the applications for bail are refused. The applications for leave to appeal the convictions and sentences are adjourned until production of the transcript. Once the transcript is available, even in respect of the summation only, all the applications may be renewed, if thought desirable. All efforts should be made however to obtain the early production of the transcript to ensure an early hearing of the appeal itself.