[2012] JMCA Crim 56

JAMAICA

IN THE COURT OF APPEAL

BAIL APPEAL NO 2/2012

HUEY GOWDIE V R

Robert Fletcher and Mrs Nadine Atkinson-Flowers for the appellant

Miss Kerry Kemble for the Crown

9 October and 22 November 2012

IN CHAMBERS

BROOKS JA

[1] On 12 July 2012, at about 6:00 pm, the quiet of the up-scale, residential community of Beverly Hills, in the parish of Saint Andrew, was shattered by three explosions. The explosions came from the appellant, Mr Huey Gowdie's, licensed firearm. Mr Gowdie had used the weapon to shoot Mr Shango Jackson three times at close range. Both men had close connections to the premises where the shooting had taken place, and the circumstances of the shooting had all the characteristics of a domestic dispute.

[2] Mr Jackson succumbed to the resultant injuries and Mr Gowdie was subsequently charged with murder. He appeared before the Resident Magistrates' Court for the Corporate Area and applied to the learned Resident Magistrate, then presiding, to be

admitted to bail. The learned Resident Magistrate refused his application, and, on 15 August 2012, gave written reasons for her decision.

[3] Mr Gowdie was dissatisfied with that decision and applied, pursuant to rule 58.2 of the Civil Procedure Rules 2002 (CPR) for a judge of the Supreme Court to review the learned Resident Magistrate's decision. The application came before Campbell J on 5 September 2012, but the learned judge also denied Mr Gowdie's application for bail. Mr Gowdie has appealed against Campbell J's decision. The appeal was scheduled for hearing before a single judge of this court.

[4] When the bail appeal came on for hearing before me on 9 October 2012, no concern was expressed about the jurisdiction of a single judge to hear the appeal. Miss Kemble, for the Crown, informed me that the Crown knew of no basis on which bail should be denied Mr Gowdie. It was, therefore, not objecting to the grant of bail. I considered the witness statements that had been provided to the Resident Magistrate (although, curiously, not to Campbell J), and written and oral submissions from Mr Fletcher and Mrs Atkinson-Flowers, appearing for Mr Gowdie. I found, based on the statements, that the Crown's stance concerning bail was appropriate. I, therefore, at that time, made the following orders:

> "1) That the appeal is allowed.
> 2) That the Order of Mr. Justice Campbell refusing bail is set aside.
> 3) That bail is granted to the Appellant in the sum of Two Million Dollars (J$2,000,000.00) with one, two or three sureties.

4) The conditions of bail are:

a) The Appellant is prohibited from residing at, visiting or going within one kilometre of 50 Shenstone Drive, Beverley Hills in the parish of Saint Andrew;

b) The Appellant shall have no contact with any of the persons who have given statements in this matter with the exception of Annette Carrington-Jackson and Lauri-Ann Grant;

c) The Appellant shall surrender all travel documents to the Resident Magistrate Court for the Corporate Area;

d) A stop order shall be placed at all ports of exit for the island;

e) The Appellant shall report to the Matilda's Corner Police Station every Monday and Friday until the completion of his trial or further order of the Court."

[5] Appeals in respect of bail applications do not often come to this court and I have found no written judgments from this court, since the promulgation of the Bail Act in 2000, concerning such applications. This is an opportunity, therefore, to state the present law in relation to such applications. Having done so, I shall seek to apply the relevant principles to the instant case.

The Law

a. The Constitutional basis

[6] The fundamental principles for the consideration of an application for bail are firstly, that every citizen is prima facie entitled to his liberty and, secondly, when charged with a criminal offence, is presumed to be innocent until he has been proved or has pleaded guilty. These common law principles, which form part of the

underpinnings of our legal system have established that "the proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial, and that bail is not to be withheld merely as a punishment" (see **Noordally v Attorney-General and Another** [1987] LRC (Const.) 599 at page 601d).

[7] The principles of the liberty of the subject and the presumption of innocence became enshrined in Chapter III of the Constitution of this country in 1962. The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (hereinafter called "the Charter"), which replaced Chapter III, has not derogated from the principles that were enshrined in 1962. In fact, the Charter has retained those concepts in almost the same terms by which they were expressed in Chapter III.

[8] At least two sections of the Charter demonstrate the retention of those concepts. Section 14(1) sets out the right to liberty. It states, in part:

> "No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances-
> …"

Section 15(5) of the Charter speaks to the presumption of innocence. It states:

> "Every person charged with a criminal offence shall be presumed innocent until he is proven guilty or has pleaded guilty."

[9] In addition to those sections, section 14 (3) of the Charter, as did Chapter III, demonstrates that even before a person accused is brought before a court he is entitled to be:

> "...released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other stage of the proceedings"

[10] Unlike Chapter III, however, the Charter expressly stipulates the right to bail. It also requires the party seeking to deprive an accused person of his right to liberty, to show sufficient cause for keeping him in custody. Section 14(4) of the Charter states:

> "Any person awaiting trial and detained in custody **shall be entitled to bail** on reasonable conditions **unless sufficient cause is shown for keeping him in custody**." (Emphasis supplied)

As a result of their constitutional bases, the personal liberty of the subject, his right to freedom of movement and his right to bail, must be considered the norm to be presumed and enforced. It must be borne in mind, however, that these rights are not absolute, but are subject to conditions.

[11] In **Hurnam v The State** PCA No 53/2004 (delivered 15 December 2005), the Privy Council, while considering the equivalent, in the Mauritian Constitution, of section 14 of the Charter, quoted, without demur, from the decision of **Noordally**, in these terms:

> "…that the suspect's remaining at large is the rule: his detention on ground of suspicion is the exception and, even then, if he is not put on his trial within a reasonable time he has to be released." (see paragraph [5] of **Hurnam**)

The derogation of those fundamental rights should only be allowed for cogent reasons.

b. The statutory basis

[12] It is against this Constitutional background that the provisions of the Bail Act (the Act) must be considered. Section 3 of the Act states:

> "(1) Subject to the provisions of this Act, every person who is charged with an offence **shall be entitled to be granted bail** by a Court, a Justice of the Peace or a police officer, as the case may require.
>
> (2) A person who is charged with an offence shall not be held in custody for longer than twenty-four hours without the question of bail being considered.
>
> (3) Subject to section 4 (4), bail shall be granted to a defendant who is charged with an offence which is not punishable with imprisonment.
>
> (4) A person charged with murder, treason or treason felony may be granted bail only by a Resident Magistrate or a Judge.
>
> (5) Nothing in this Act shall preclude an application for bail on each occasion that a defendant appears before a Court in relation to the relevant offence." (Emphasis supplied)

[13] For the purposes of the ensuing analysis, only offences which are punishable with imprisonment shall be considered. Subsection (3) above, makes it clear that where the offence is not punishable with imprisonment, the accused shall (subject to very limited circumstances) be granted bail.

[14] Section 4 of the Act also sets the tone for the consideration of an application for bail. It stipulates the circumstances in which bail may be denied a person who is

charged with an offence that is punishable with imprisonment. The section reinforces the Constitutional provision that the onus is on those, who wish to deprive that accused person of his liberty, to show why bail should be denied. The section states, in part:

> "4. – (1) Where the offence or one of the offences in relation to which the defendant is charged or convicted is punishable with imprisonment, **bail may be denied** to that defendant in the following circumstances-
>
> (a) the Court, a Justice of the Peace or police officer is satisfied that there are **substantial** grounds for believing that the defendant, if released on bail would-
>
> (i) fail to surrender to custody;
>
> (ii) commit an offence while on bail; or
>
> (iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
>
> (b) …" (Emphasis supplied)

The rest of the subsection speaks to other circumstances in which bail may be denied. The section does not stipulate that if an undesirable situation does exist or has the potential of occurring, that bail must be denied; the word used is "may". It would seem that the section contemplates that bail may still be granted if conditions can be imposed which would prevent the occurrence of such a situation or at least minimise an unwelcome impact of such a situation. Section 6 sets out some of the conditions which may be imposed.

[15] It is section 4 (2) that addresses the matters which the court that is considering an application for bail, must take into account. It states:

"(2) In deciding whether or not any of the circumstances specified in subsection (1) (a) exists in relation to any defendant, the Court, a Justice of the Peace or police officer shall take into account-

(a) the nature and seriousness of the offence;

(b) the defendant's character, antecedents, association and community ties;

(c) the defendant's record with regard to the fulfilment of his obligations under previous grants of bail;

(d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having failed to surrender to custody;

(e) whether the defendant is a repeat offender, that is to say, a person who has been convicted on three previous occasions for offences which are punishable with imprisonment; or

(f) any other factor which appears to be relevant including the defendant's health profile.

[16] It would have been noticed that section 4 (2) allows the prosecuting authorities to provide information on the antecedents of the defendant. Thus, information on previous convictions, other pending charges, unsavoury associations and comments made by the defendant or his known associates, may be provided to the court. This information assists in determining the risk posed to the interest of the public. The court considering an application for bail, as contrasted with undertaking a trial, is entitled to consider this material.

[17] Section 4 (2) (a) speaks to the nature and seriousness of the offence. At this time the court is faced with large numbers of persons charged with very serious offences, especially, murder, illegal possession and use of firearms, sexual offences, obtaining money by false pretences (especially from persons located outside of the island, in what is known as "the lotto scam") and other numerous offences of that ilk. In **Hurnam**, their Lordships decided that the seriousness of the offence, by itself, is not a basis to refuse bail. Their Lordships said at paragraph [15]:

> "The seriousness of the offence and the severity of the penalty likely to be imposed on conviction may well…provide grounds for refusing bail, but they do not do so of themselves, without more: they are factors relevant to the judgment whether, in all the circumstances, it is necessary to deprive the applicant of his liberty."

The point that their Lordships emphasised is that "bail is not to be withheld merely as a punishment" (**Hurnam** at paragraph [5]).

[18] The next sections of the Act to be considered are sections 5 and 6. These speak to the conditions which may be imposed where the court decides to grant bail to an accused person. Section 5 stipulates the circumstances that must exist to authorise the imposition of conditions. It states:

> "5. - (1) Where a defendant is granted bail, the conditions specified in subsections (2) and (3) of section 6 shall not be imposed unless it appears to the Court, a Justice of the Peace or police officer that it is necessary to do so-
>
> (a) for the purpose of preventing the occurrence of any of the events referred to in section 4; or

(b) to enable inquiries or a report to be made into the defendant's physical or mental condition.

(2) Subsection (1) shall apply to any application to the Court to vary the conditions of bail or to impose conditions in respect of bail which has been granted unconditionally."

As mentioned before, section 6 subsections (2) and (3) set out some of the conditions which may be imposed on an accused person who is granted bail.

[19] Sections 8 through 11 are concerned with the authority given to a judge of the Supreme Court after a refusal, by a Resident Magistrate, of an application for bail. Despite the fact that rule 58.1 (1) of the CPR stipulates that the application to a judge of the Supreme Court is by way of a "review [of] a decision by a magistrate about bail", the statute speaks to the application being an appeal. The rules, being subsidiary legislation, may not supersede the provisions of the Act (see section 29 (d) of the Interpretation Act). Sykes J, in **Stephens v The Director of Public Prosecutions** 2006 HCV 05020 (delivered 23 January 2007), carried out a thorough discussion of the issue of whether the exercise before the judge of the Supreme Court is a review or an appeal.

[20] I respectfully agree with Sykes J, that the correct interpretation of the Act is that the exercise before the judge of the Supreme Court is to be conducted as an appeal. I would only add, as a recommendation as to approach, the words of caution set out by Lord Diplock in **Birkett v James** [1977] 2 All ER 801 at page 804. Although given in the context of an interlocutory appeal in a civil case, the guidance is not inappropriate

for appeals from the decision of a Resident Magistrate in respect of an application for bail:

> "It is only very exceptionally that an appeal on an interlocutory order is allowed to come before this House. These are matters best left to the decision of the masters and, on appeal, the judges of the High Court whose daily experience and concern is with the trial of civil actions.... Where leave is granted, an appellate court ought not to substitute its own 'discretion' for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account; or (2) as in **Ward v James** [[1965] 1 All ER 563], in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations.

c. The principles guiding an application

[21] Bearing in mind those Constitutional and statutory foundations, the following principles may be of assistance to a court which is considering an application for the grant of bail. These principles may be distilled from the judgments in a number of cases including **Hurnam**, **Stephens**, and **Thelston Brooks v The Attorney General and Another** Claim No AXA HCR 2006/0089 (a decision of the Eastern Caribbean Supreme Court in the High Court of Justice in the territory of Anguilla (delivered on 15 January 2007)).

1. It is an international principle "that the right to personal liberty, although not absolute…is nonetheless a right which is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention…" (**Hurnam** – paragraph [16]).

2. The court should "begin with the high constitutional norm of liberty and therefore lean in favour of granting bail (i.e. restoring the constitutional norm)" (**Stephens** – paragraph [25]).

3. It should then consider the allegations against the accused. It should not "undertake an over-elaborate dissection of the evidence" (**Hurnam** – paragraph [25]).

4. It should then "consider whether there are grounds for refusing bail" (**Stephens** – paragraph [25]). The grounds to be considered include:

> "(i) the risk of the Defendant absconding bail,
>
> (ii) the risk of the Defendant interfering with the course of justice,
>
> (iii) preventing crime,
>
> (iv) preserving public order, and
>
> (v) the necessity of detention to protect the Defendant." (**Brooks** – paragraph [19])

In this context, the court may receive information which would not normally be receivable at a trial, including hearsay evidence. This information could concern previous convictions and unsavoury associations or practices of the accused person (see section 4 (2) of the Act). **In re Moles** [1981] Crim. L.R. 170 is authority for stating that the "strict rules of evidence were inherently inappropriate in a court concerned to decide whether there were substantial grounds for believing something, such as a court considering an application [for bail]".

Further guidance in this area may be gleaned from the judgment of Chilwell J in **Hubbard v Police** [1986] 2 NZLR 738. The learned judge said at page 739:

> "There are two main tests involving factual questions which have to be considered by the Court in determining whether to grant or refuse bail. They are, first the probability or otherwise of the defendant answering to his bail and attending at his trial, and, secondly, the public interest.
>
> So far as the first factor is concerned, the criteria to be considered include:
>
> (i) The nature of the offence with which the person is charged, and whether it is a grave or less serious one of its kind.
>
> (ii) The strength of the evidence; that is, the probability of conviction or otherwise.
>
> (iii) The seriousness of the punishment to which the person is liable; and the

severity of the punishment that is likely to be imposed.

(iv) The character and past conduct or behaviour of the defendant.

(v) Any other special matter that is relevant in the particular circumstances to the question of the likelihood of the accused appearing or not appearing.

Public interest criteria include:

(i) How speedy or how delayed is the trial of the defendant likely to be?

(ii) Whether there is a risk of the defendant tampering with witnesses.

(iii) Whether there is a risk that the defendant may re-offend while on bail.

(iv) The possibility of prejudice to the defence in the preparation of the defence.

(v) Any other special matter that is relevant in the particular circumstances to the public interest."

5. The court should then consider, as is required by section 4 (1) (a) of the Act, "whether the grounds for refusing bail are substantial" (**Stephens** – paragraph [25]).

6. Thereafter, if it finds that there are substantial grounds for refusing bail, the court would "consider whether imposing conditions can adequately manage the risks that may arise and how effective those conditions [would] be" (**Stephens** – paragraph [25])

7. If a Resident Magistrate hears and refuses an application for bail, or imposes conditions for the grant of

bail, the Resident Magistrate must, if the accused person is not represented by counsel, inform the accused person of his right to appeal. The Resident Magistrate should also give reasons in writing for the decision. (Sections 8 and 9 of the Act)

8. An appeal to a judge of the Supreme Court is subject to the provisions of the CPR. The Director of Public Prosecutions, who is to be served with the notice of the appeal (pursuant to rule 58.2 (5), must be given adequate time in order to prepare a response. If sufficient notice has not been given, counsel appearing for the Director may wish to apply for an adjournment in order to obtain proper instructions in order to consider a response to the appeal.

9. All the material which was placed before the Resident Magistrate should be placed before the judge of the Supreme Court hearing the appeal.

[22] The process outlined above, requires careful preparation by the police and counsel for both the prosecution and the defence. A meticulous approach is also required of the court considering the application for bail. The approach will require more time than was consumed in respect of such applications prior to the promulgation of the Act.

[23] The exacting nature of the process explains why, although section 3 (5) of the Act states that nothing in the Act "shall preclude an application for bail on each occasion that a defendant appears before a Court in relation to the relevant offence", the decided cases suggest that fresh applications should not be made unless there is new material to be placed before the court. The court should, however, not give the impression that it is refusing to consider a renewal of an application for bail, but it should enquire of counsel, if there is any new material to be advanced (see **R v Slough Justices *Ex parte* Duncan and Another** (1982) 75 Criminal Appeal Reports 384 at page 389). The starting position of any renewed application "must always be the finding of the position when the matter was last considered by the court" (per Donaldson LJ **R v Nottingham Justices *ex parte* Davies** [1980] 2 All ER 775).

[24] Having set out those general principles the circumstances of the instant case may now be considered.

The instant case

[25] It is unnecessary and perhaps, inappropriate to carry out a detailed analysis of the statements secured by the police in the instant case. It will be sufficient to observe that some of the witnesses, including the brother of the deceased Mr Jackson, alleged a shooting without any aggressive action by Mr Jackson. In contrast to that position, Mr Gowdie's paramour (who is Mr Jackson's estranged, former wife) and her daughter, both alleged that Mr Jackson was advancing aggessively on Mr Gowdie when the latter fired the shots.

[26] In his affidavit evidence, Mr Gowdie revealed that he is a businessman with an established organisation and was a licensed firearm holder and had no previous convictions. He indicated his intention to turn up for his trial if he were granted bail.

[27] The learned Resident Magistrate in comprehensive written reasons concentrated on the seriousness of the offence and the number of shots which were fired. She took the view that the prosecution's case was ready and an early hearing was possible. The status of the witnesses concerned her. She stated that the ones who were not connected to Mr Gowdie were, unlike him, "not persons in positions of influence". She was anxious to have their testimony in place.

[28] Although the document produced to me, and was said to be representing Campbell J's order, was not signed, it indicated that Campbell J also stressed the seriousness of the offence and seemed to be of the view that the statements did not support self defence. The learned judge agreed with the reasons of the learned Resident Magistrate.

[29] It seems that neither the learned Resident Magistrate nor Campbell J, considered the principal question of whether Mr Gowdie would attend his trial. The learned Resident Magistrate alluded to the public interest factor when she inferred that the possibility of interference with the witnesses existed. It did not appear, however, that there was any evidence concerning the probability of that occurrence. Nor did it appear that she considered a method of eliminating the perceived risk. For these reasons, I

find that the learned Resident Magistrate erred in her consideration of the application for bail and therefore, her decision may be overturned.

[30] There were no written reasons from Campbell J, but in light of the concession by Miss Kemble there was no need to formally request same from him.

Conclusion

[31] The principles concerning applications for bail demonstrate that they are to be carefully prepared and considered. Such careful approach will require more time to be devoted to each application. Applications should therefore not be renewed on each occasion that the accused is brought before the court unless there is new material to be considered which was not before the court at the time of the previous application.

[32] It is hoped that the principles that have been set out above will assist judicial officers in arriving at a consistent approach to the question of bail, bearing in mind, of course, that each case must be considered on its own facts. Transparency and the need for consistency require that reasons be given for each refusal of bail so that a court considering the matter, whether by way of appeal or by way of a fresh application, may better analyse the appeal or application which is before it.

[33] The issue of whether a single judge of this court may properly consider an appeal from a decision of a judge of the Supreme Court to refuse bail, should be considered where the court has had the benefit of submissions by counsel.