[2017] JMCA App 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 65/2017

APPLICATION NO 3/2017

LINVAL AIRD v R

Miss Dionne Meylor instructed by Dionne Meylor and Associates for the applicant

Miss Sophia Thomas for the Crown

15 August and 26 September 2017

IN CHAMBERS

PHILLIPS JA

[1] The applicant was tried in the Westmoreland Circuit Court before Martin Gayle J for the offence of murder of Miss Shana-Kay Clarke (Miss Clarke), and was convicted on 29 June 2017. He was sentenced to life imprisonment with eligibility for parole after 20 years.

[2] The applicant has applied for permission to appeal against conviction and sentence, and on 19 July 2017, pursuant to rule 3.3(1)(a) of the Court of Appeal Rules, he filed the said application on Form B1. The grounds of the application are set out below:

"(a) Judge entered into the arena, unfair biased summation.

(b) Judge erred when he failed to uphold a no case submission.

(c) Sentence manifestly harsh."

[3] Simultaneously with the filing of that application, the applicant filed an application for bail pending the hearing of the appeal and for such other relief as this court may deem just, in the interests of justice and the overriding objective of the rules. The applicant relied on seven grounds in support of his application for bail pending appeal summarised as follows:

1. Pursuant to section 13(1) of the Bail Act, which permits persons who had been granted bail prior to conviction and who have appealed that conviction, to apply for bail pending the determination of their appeal.
2. The applicant has a strong likelihood of succeeding on appeal based on the evidence contained in his affidavit.
3. There are exceptional circumstances which exist based on the principles enunciated in **Seian Forbes and Tamoy Maggie v R** [2012] JMCA App 20 and **Dereek Hamilton v R** [2013] JMCA App 21.

4. Pursuant to 31(1)(2) of the Judicature (Appellate Jurisdiction) Act which states that the court may grant bail if it deems fit in accordance with the Bail Act pending the determination of the appeal.
5. The applicant's character, antecedents, associations and community ties, suggest that he is a commendable citizen.
6. The applicant's record with regard to the fulfilment of his obligations under previous grants of bail.
7. The grant of bail would not jeopardize the proper administration of justice.

[4] The applicant filed an affidavit on 19 July 2017, sworn on the same date, wherein he deposed that he was a member of the Jamaica Constabulary Force and was 33 years old. He had been tried for the murder of Miss Clarke who had been killed on 11 April 2010.

[5] He deponed further setting out what he said had occurred on that fateful night. He stated that he had been sitting in his motorcar parked on Great Georges Street, Savanna-La-Mar, with Miss Clarke, when a lone gunman attacked them by shooting into the car. Miss Clarke was hit and succumbed to the injuries she had received from the gunshots. He later identified the killer as Mr Andre Campbell, but although Mr Campbell had been arrested, and charged with the offence of murder, a *nolle prosequi* was later entered by the Director of Public Prosecutions (DPP) in his favour. The applicant stated

that the investigating officer's evidence had been discredited as he had initially claimed that he had known him before the incident, but later, when challenged at trial, he had acknowledged that he had not known him previously. The applicant stated that the position initially taken by the investigating officer had been motivated by malice, and a total lack of knowledge of the case.

[6] He deponed further that he had filed an appeal against his conviction and that he had "an excellent chance at likelihood of success" in his appeal, and he set out his reasons for that belief which will be canvassed herein. While the applicant acknowledged that he was not entitled to bail, he maintained that there were exceptional circumstances that existed which should be considered in his favour. He set them out as follows:

1. He claimed that he had faithfully adhered to all the conditions set with respect to the grant of bail.
2. He claimed that he had no previous convictions, had served well in the force, was generally of good decent character with an "antecedent of honesty".
3. He was the father of a minor child Akayla born on 19 September 2009.
4. He claimed that the mother of the deceased had indicated to the court that there had never been any threats to her or members of the family during the period that he had been on bail.

5. He claimed that there was no likelihood of any interference with witnesses as the matter was now completed and there had not been any before.

6. He also claimed that he was not a flight risk, and that he believed that he would get justice in this court.

7. He understood the matter to be a serious one, but claimed that he was not a threat to society and had commenced learning the skill of welding while he had been on suspension from his duties as a member of the police force.

8. The transcript of the hearing would take two to three years to be produced and during that period he would have "served time innocently".

[7] The applicant also stated that the learned trial judge had interfered with the trial process, had meddled in the arena, constantly rolled his eyes, and went beyond his duty to assist the prosecution. That the case was based on circumstantial evidence, and the ballistic reports supported the fact that two guns had been fired that night which would have explained why he escaped injury, and the learned judge had failed to point this out to the jury. Additionally, the learned judge sent the jury out for their deliberations when it was late, at 3:34 pm, and he ought to have known that they would be weary. The judge also failed to deal adequately in his summation with the evidence of his good character and compared him to a "movie star in the 'Matrix'". He

stated that the expert evidence was contradictory, and the learned judge had failed to deal with that in his summation to the jury.

[8] The applicant's antecedent report indicated that he had had the benefit of a good education, in that he attended Little London Basic School and then Mannings High School where he obtained four Caribbean Examination Council subjects, and later obtained two more after attending the National Institute of Commerce at Savanna-La-Mar in Westmoreland. He subsequently attended Seaford Town Heart Academy. Subsequent to this, he began working at Grace Food Processors as a production assistant, then, later at Beaches, Negril as a kid's camp coordinator. He joined the Jamaica Constabulary Force at the age of 22 in 2006, where he was still so deployed at the time that he was arrested in 2010. The report also indicated that the applicant had a minor child who depended on him for support, and that he had no previous convictions. He was a very hardworking individual, whom the members of the community looked up to for advice, and that members were genuinely shocked when they heard the news of his arrest.

[9] The Social Enquiry Report (SER) spoke well of him. He had three siblings, two sisters and a brother. Initially as an adult he had resided with his mother, and thereafter with his brother. He had a good relationship with the members of his family. They described him as kind, caring, disciplined and hardworking and one who stands up for what he believes in. He had encouraged young persons to attend school and to be focused. He was generally in good health, and had enjoyed a happy and fun filled childhood with both parents and his siblings. He had been taught good morals,

attended good schools and had achieved a good education. He was industrious, had been employed consistently and had pursued his craft of welding and the operation of a taxi when he had been suspended from the force. The consensus of the community was that he was an intelligent, kind, caring and helpful individual who got along well with community members. He was not lazy and did not display aggressive behaviour. The residents were of the view that he was not a risk to himself or to other members of the community and at least one member asked for leniency on his behalf. However, it was noted that the applicant had not accepted the verdict of guilty and continued to maintain his innocence. The SER further indicated that he appeared not to show any remorse with regard to what had happened to the victim, and was only concerned about the predicament that he had now found himself in, and the serious situation that he faced.

The submissions

[10] Counsel for the applicant filed very detailed submissions. She set out the background of the facts of the case and submitted that the applicant had a "real prospect at being successful on his appeal as a number of irregularities of fact and law were committed at his trial". She listed 12 such irregularities and they are as follows:

> "A. The Scientific Evidence proved his innocence.
>
> B. The constant entering of the arena of the Trial Judge.
>
> C. The failure to disclose documents in the possession of the Crown in a timely manner.
>
> D. The unfair comments made by the Trial Judge inclusive of his tone.

E. Sending the Jury to retire after 3.30 pm on Thursday June 29, 2017 following a case that had lasted some three weeks and a summation that lasted 2 days.

F. The trial Judge failed to deal with the scientific evidence adequately or at all.

G. The trial Judge erred when he failed to [uphold] a no case submission that was made on matters of law and fact.

H. The Trial Judge did not deal adequately with the issue of good character that was not only brought out on the Crown's case through the Crown's witnesses but also by the Defense [sic] witness and the applicant himself.

I. The constant shifting of the bar by the crown by calling witnesses by surprise, since the indictment began with 11 witnesses and concluded with 17. In fact 1 witness who was to be called only to put in a statement of a person who could not be found examined evidence and went on to provide evidence inclusive of a slide show of his examination, although it was not contained in any statement provided to the defense [sic] who was only served with a statement indicating how he knew the absent witness' handwriting only shortly before he was called to the stand, he having travelled all the way from Kingston.

J. The putting in of the statement of the absent witness through the Investigating Officer to establish his whereabouts was improperly allowed as there was clear proof before the Court that the document being relied on was not worth the paper it had been written on.

K. This case was one based on circumstantial evidence and adequate directions were not given to the jury by the learned Trial Judge.

L. The verdict was not in accordance with, nor could it be supported by the evidence."

Additionally, it was submitted that:

> "M. There can be no good reason to oppose a grant of Bail to Linval Aird, although he has been convicted, that conviction is likely to be quashed.
>
> N. The record from the Short hand writers is likely to take several years before it is ready, (We have an appeal pending from a Gun Court case since 2015 and the record is still outstanding) and an innocent man would be made to serve time for a crime he did not commit."

[11] Counsel then endeavoured to place before the court the various instances, occurrences, material and matters on which she wished to rely in support of the above claimed irregularities in her application for bail pending appeal, by way of her written submissions, as opposed to sworn testimony, which I found to be quite irregular and completely unacceptable.

[12] Those submissions having been served on 4 August 2017, the office of the DPP had their own response to this approach. They filed brief submissions on the law, as required, and essentially avoided any response to the detailed matters referred to in the submissions filed on behalf of the applicant. They set out the jurisdiction of this court to grant bail, the basis on which it ought to be done, the authorities issuing out of this court indicating the circumstances in which bail had been granted or refused as the case may be. Counsel for the DPP submitted that in the instant case the applicant was not entitled to bail. She submitted that the main ground highlighted and the irregularities set out thereunder in the application were not appropriate grounds for the grant of bail in the absence of the transcript, or any other documentary evidence upon which the court could adjudicate. There was no material before me, counsel submitted,

to ground the matters contained in the submissions. Counsel drew the distinction between the facts of this case with that of **Dereek Hamilton** and submitted that this was not an exceptional case, where the length of the sentence was important, as the appeal may not be heard within the period of time in the sentence which had been imposed. In this case, the sentence imposed was life imprisonment with 20 years before parole and the accused would suffer no injustice if ultimately his appeal was successful.

[13] When the matter came before me, I informed both counsel that I was not prepared to deal with the application in its current state. However, I did indicate that the issues to be canvassed in this application ought to be placed before me by way of affidavit, and as I had done in **Seian Forbes and Tamoy Meggie**, I was prepared to read the statements in the Crown's file as the transcript was not yet available, and particularly as counsel for the applicant was saying that the forensic reports were all in favour and supportive of the applicant's case, and therefore would satisfy the high threshold required to ground the application for bail pending appeal. The directives I gave were indeed complied with and I have reviewed all the additional documents that have been filed.

The affidavits

Affidavit filed on the applicant's behalf

[14] In her affidavit, counsel for the applicant deposed that she had represented the applicant at the preliminary enquiry, throughout the trial, and now in the appeal process. She set out the circumstances of the case according to the applicant's position,

and stated that while the applicant was at the hospital with the deceased Miss Clarke, Constable Marcus Porter visited the scene and took up the "spent shells" he had observed there and later handed them over to the initial investigator, Detective Sergeant Ethan Millller. She said that on the night of the murder, the scene of crime unit was called and other bullet fragments were found inside a nearby store called J Albert Music. The car, the service revolver, the spent shells and bullet fragments as well as the clothes that the applicant had been wearing were all taken to the Government Forensic Lab for forensic examination and ballistic testing.

[15] Counsel said that it was the Crown's case that the applicant shot Miss Clarke as she sat in the front passenger seat of his motor car, from the driver's seat where he had been sitting. However, the scientific evidence supported the innocence of the applicant. The scientific evidence which had been adduced came from the following witnesses:

1. Detective Corporal Wayne Lawrence, Scene of Crime Unit
2. Dr Murani Sarangi, Forensic Pathologist
3. Miss Sherron Brydson, Government Analyst
4. Sergeant Miguel Bernard, Government Ballistics Expert
5. Deputy Superintendent Carlton Harrisingh, Government Ballistic Expert

[16] Counsel deposed that Detective Corporal Lawrence established *inter alia*, that the car had been shot up from the outside, and that all the bullet holes show that the bullets entered the car from the outer left hand side of the motor vehicle. Counsel indicated that Dr Sarangi, in his evidence, said that he had measured all the entry and exit wounds to the body and the wounds were "through and through". No bullet had been recovered from the body, but the fatal wound had measured 9 cm. She said that it was Dr Sarangi's theory that the applicant had shot the deceased from the seat in the car beside her and that perhaps she had received the shot to her back as she tried to escape through the door of the motor car. The deceased had received three wounds to the left side of her body, and Dr Sarangi had accepted that they were distant wounds, yet he had maintained in evidence, she said, that they were inflicted from 24 inches away. He also, she stated, would not accept that they could have been inflicted as the deceased turned away to avoid the attack coming from the left which counsel stated was "a far more credible scenario". Dr Sarangi's theory, which was given by the Crown in its opening statement to the jury, was not, she said, supported by Detective Corporal Lawrence, who she said had testified that the shooter was outside the car.

[17] Counsel's recollection of Ms Brydson's evidence was that she had stated importantly, *inter alia*, that one bullet had measured 9 cm and had come from the outside of the vehicle into the inside of the same. The hole caused by the projectile had penetrated the car door since it "was a through and through hole of 9 cm on both sides". Ms Brydson was also supposed to have confirmed, that it was likely, that the similar size hole in the deceased was caused by the projectile with the same measured

size of 9 cm. Ms Brydson gave evidence, she said, that the damage to the car was to the back windscreen, the left side of the car and the front windscreen.

[18] The evidence of Sergeant Bernard, counsel stated, was only supposed to be adduced to put in the statement of the forensic report of Deputy Superintendent Harrisingh, and so ought to have been short. However, she stated that Sergeant Bernard had given evidence that he had examined the car years after the incident, (which somehow, she stated, was still at the forensic lab), in fact, just before giving his testimony. According to counsel, Sergeant Bernard's evidence proved the innocence of the applicant, as he stated that most of the shots had come from the left, outside of the car, and that the shot that had been identified by Ms Brydson as the fatal shot, could have hit the passenger, gone through the driver's seat, and lodged in the right rear door. This, counsel said, would have explained why the applicant had not been hurt in the incident. Sergeant Bernard, she said, had also stated that one particular shot in the windscreen had come from inside the car to the outside of the car. This, she said, supported the applicant's position that he had fired through the windscreen, although differing from Detective Corporal Lawrence who had said that all shots came from the outside of the car. Sergeant Bernard, she said, also cleared up the evidence that the spent shells from the applicant's gun had been found inside and outside the car, as the spent shells could, he said, have fallen through the window, once it had been open. Unfortunately, counsel complained, this aspect of the evidence had not been explained to the jury.

[19] Sergeant Bernard also pointed out, counsel stated, that according to the ballistics report two guns had been fired that night. There were two distinct bullets from two different guns. He confirmed that one gun could not use two different types of bullets, and that each bullet, once fired had its own fingerprint. He also interpreted Deputy Superintendent Harrisingh's statement which was prepared in 2016, six years after the incident, to say that the phrase "entry hole that exited the from windscreen" meant that the shots came from outside the motor vehicle.

[20] Counsel concluded in her affidavit that Sergeant Bernard's evidence had therefore shown that the Crown's theory was incorrect, his evidence was not challenged by the Crown, and generally all the evidence adduced by the Crown witnesses proved the innocence of the applicant. There was no explanation for the existence of the two guns, and the expert evidence that gunshots came from the outside of the car. Further, there was the evidence of Detective Inspector Henson Smalling that only one gun had been issued to the applicant.

[21] Counsel also deposed that the prosecution of the case had been biased, malicious and had egregious acts of professional misconduct. One of her complaints was that the question and answer session which had been conducted by Detective Corporal Owen Grant with the applicant, had been done after the report which had been prepared by him, had been submitted to the DPP. Also, she said, the report was skewed and cast several aspersions of complicity with the applicant and other members of the force. This she said, had been done in an effort to explain the two different types of spent shells which had been found. In fact, Detective Corporal Grant had said that

the guns of the other members of the police force would have been taken for testing. However, that had never been done, and when those two officers had been called by the Crown to give evidence, no such suggestions were ever made to them.

[22] Counsel therefore stated that Detective Corporal Grant had lied to the DPP in order to get a ruling adverse to the applicant, which ruling she said was done on 30 June 2010, although the applicant had not been charged until 20 September 2010. What was concerning, as a result of that, she averred, was that the Bureau of Special Investigations (BSI) agents attended on the offices of Mr Campbell's attorney on 30 August 2010 and recorded a statement from him, and thereafter they once again approached the DPP to enter a *nolle prosequi* in favour of Mr Campbell, at a time when the applicant had not yet been charged. So, between 20 September 2010 and 11 March 2011, counsel averred, both men had appeared in court in respect of the same offence of murder, until the *nolle prosequi* had been entered against Mr Campbell. It was incredible, counsel posited, that the police had believed the word of a man twice charged with murder, over the word of a policeman with an unblemished record, without any independent supportive evidence. Counsel also complained that the statement of Mr Campbell had not been served on her until the date when Detective Sergeant Lawrence had given evidence.

[23] Counsel complained that Detective Corporal Grant had given evidence that he had known the applicant before the incident, and then had agreed under cross-examination that he had not known him before the incident in Westmoreland. She therefore queried why Detective Corporal Grant had been so clearly untruthful. It was

clear to her, she stated, that at all times he had intended to misrepresent the applicant's case, and mislead the DPP in order to secure a conviction of the applicant. She stated categorically, that save and except the evidence of the said Detective Corporal Grant and Detective Sergeant Lawrence, the evidence from all the other Crown witnesses supported the innocence of the applicant.

[24] Counsel complained bitterly that the learned trial judge had made unfair comments throughout the trial, and his tone in the summation throughout his recall of the unsworn statement of the applicant would have led one to believe that the applicant's defence was incredible, akin to the "Matrix" movie. She stated that the learned judge failed to appreciate that the case was based on circumstantial evidence and that all the scientific evidence had exonerated the applicant. Additionally, the fact that a senior police officer in Westmoreland had been implicated, at the same time as the trial of the applicant, in the death of a young civilian girl who worked at the station there, and with whom he had shared a relationship, required the learned trial judge to take greater care to ensure that the applicant received a fair trial.

[25] She said that the learned trial judge should have upheld the no-case submission, as all the facts in the case had supported the innocence of the applicant. She claimed that as a matter of law:

1. the Crown had failed to prove the ingredients of the offence;

2. the Crown had also failed to prove the requisite *mens rea* for the offence of murder; and

3. the evidence led by the prosecution was at its highest weak, and tenuous, and no reasonable jury properly directed ought to have had to rely on the same, and any conviction on that evidence would be unreasonable and unsustainable.

[26] Counsel stated that she was sure that the transcript would show that the learned judge had entered into the arena and caused the trial to be prejudiced. He had taken over the prosecution in spite of the fact that there were two counsel representing the Crown. She said that he had stated, in a discussion in chambers in answer to a query from her, that both Crown counsel were junior and inexperienced counsel, whereas she had been a Resident Magistrate previously, which position as perceived by him, lay heavily on her. Further, after questioning Sergeant Bernard at length, he had said that he had done his own research on how one gun could be used to issue two different types of bullets, which information when put by him to the witness had not been accepted by the witness.

[27] She deposed that the applicant had a good profile which was not one of a killer, but of a humble hard working man, which was evident from his antecedents and the SER. He had been granted bail early in the process and he had adhered to all conditions of bail strictly, and had not interfered with the integrity of the trial process in any way. He was not a flight risk, she stated, but a hard worker and was not violent at all. He

had been working hard since he had been put on suspension, and was a fit and proper person to be granted bail, and there were persons willing to assume surety for him. Counsel also pointed to the fact that all the Crown witnesses who knew the applicant spoke well of him, which would support his case that he is a person of good character and a man of truth.

[28] She referred to section 13 of the Bail Act and stated that the applicant had satisfied all the requirements referred to therein, and that his character, and antecedents are all "exceptionally adequate". Further, the evidence of him having committed the crime notwithstanding the verdict of guilt "suffers from a real paucity of truth". There was, she stated, a real prospect of success on appeal, and as the record from the short hand writers was likely to take several years to be completed and ready for the hearing of the appeal, she posited that an innocent man would have served several years for a crime that he did not commit. Exceptional circumstances existed in his case, she stated, that would warrant that bail be offered to the applicant. She therefore asked the court to act within the provisions of the Judicature (Appellate Jurisdiction) Act and the Bail Act, and grant the applicant bail pending appeal.

Affidavit filed on the Crown's behalf

[29] The affidavit filed on behalf of the Crown was sworn to by Ms Patricia Hickson, an attorney-at-law in the offices of the DPP who conducted the applicant's trial in the Westmoreland Circuit in 5 June 2017. Mr Andre Wedderburn appeared with her. Counsel stated that there were constant rumblings from the defence counsel throughout the trial, but she felt assured that the transcript when produced would

accurately recount all of them. She further stated that the transcript is needed in order to make a proper assessment of the propriety or otherwise of the learned judge's conduct of the trial and the evidence as it had unfolded. However, she indicated that the position now being taken by counsel for the applicant in the application for bail pending appeal, was malicious as counsel had not made any objections (even after requesting audience with the learned judge) to the learned judge with regard to his or anyone's conduct during the trial.

[30] Counsel indicated that there were 11 witnesses on the back of the indictment and others were called by way of a notice to adduce. She stated that the trial lasted longer than had been initially anticipated but there had not been any complaint about the length of the matter. There was, she stated, one witness at the back of the indictment who had not been called, who had taken the samples to the laboratory, but no issue had been taken at the trial in respect of the integrity of the exhibits. There were other witnesses that could not be located and evidence had to be taken pursuant to section 31D of the Evidence Act and that she said, had been done without demur. She explained that initially the prosecution had been informed that Detective Corporal Lawrence could not be located so efforts were made to adduce evidence from a witness with regard to his handwriting. There was she said no objection to this. However, that witness was later abandoned as Detective Corporal Lawrence was ultimately located, gave evidence and was cross-examined by the defence.

[31] Deputy Superintendent Harrisingh, although warned for court attendance was found to be out of the jurisdiction and despite all efforts, could not be located, and so

the current ballistics expert, who had worked with him and could identify his signature, spoke to the findings in his report, and was available to answer questions with regard to it from the defence. This procedure, counsel deposed, was not objected to by the defence. In fact, she stated that defence counsel was informed at every stage of the course of action to be adopted by the Crown, and no objection had been taken.

[32] Counsel testified that the learned trial judge had operated within the confines of the rules in respect of asking for clarification on matters or recalling witnesses and defence counsel had been able to ask questions with regard thereto, as she thought fit. Additionally, counsel averred that as far as she knew, all documents had been duly served on the defence, (save and except, she said, the statement of the ballistics expert who came to give evidence in lieu of Deputy Superintendent Harrisingh). She deponed that if the documents had not been disclosed, she would have assumed that defence counsel would have made that known and taken the necessary objection to the evidence being adduced prior to the trial having commenced. Counsel stated that it ought not to be the case that defence counsel at the trial could raise no objections, but then later question the propriety of the judge's conduct in the Court of Appeal.

[33] Counsel said that the judge had not erred in refusing to uphold the no-case submission as she had argued before him that the defence had not satisfied the requirements of **R v Galbraith** [1981] 2 All ER 1060, in that the witnesses had not been so discredited, and the evidence was not so tenuous that it should not be left to the jury, and although the evidence was circumstantial, it pointed in one direction, namely against the applicant. She also said that the learned judge had dealt correctly

with the issue of good character as based on the repetition by defence counsel of the applicant's good character that had seemed to be her only defence.

[34] Counsel accepted that the scientific evidence had featured prominently in the case, and she also acknowledged that the jury had retired at 3:34 pm, but she indicated that they had returned a unanimous verdict in twenty minutes, and she stated that the transcript would adequately disclose the facts as they emerged at the trial.

[35] Counsel highlighted nine points in response to those made by counsel for the defence in her affidavit. They are as follows:

1. Dr Sarangi found that all the entry wounds measured 9 cm, not just the one pointed out by defence counsel, and so it had been submitted by counsel for the prosecution that at the very least the wounds were inflicted from a distance of 2 feet (at least).
2. There was no objection to the evidence of Sergeant Miguel Bernard. He had examined the motor car which was still housed at the forensic lab, and he had pointed out the trajectory of the bullets based on the bullet holes in the car. He had produced a CD and defence counsel had had an opportunity to cross-examine on it.
3. Counsel stated that the ballistics report showed that all the projectiles, both from inside and outside the

vehicle, including two expended bullets found inside the car, came from the applicant's firearm, except two fragments that did not have sufficient markings in them to be analysed adequately, and five spent shells that were removed from the scene by Constable Porter, before the scene of crime personnel processed the scene. It was the prosecution's case therefore that the two expended bullets found inside the car, placed the applicant outside the car firing in, as it would have been implausible, perhaps even impossible for him to have been seated in the driver's seat, returning fire to an assailant outside the vehicle, when the two expended bullets that matched his firearm were found inside the vehicle.

4. It had come out in cross-examination of Detective Corporal Grant, that Constable Porter had removed spent casings from the scene after having been called by the applicant, however the jury was directed to disregard this evidence as hearsay.

5. There was a bullet hole in the driver's seat in respect of which one would have expected the driver (the applicant) to have been injured which was the

evidence of the ballistics expert. The applicant's account was that he had been moving counter clockwise in the seat while firing, yet he had received no injuries not even minor ones.

6. The issue of non-disclosure was remedied, and defence counsel cross-examined all the witnesses in relation to Mr Campbell's statement, although she had stated that she had not received it. Mr Campbell's statement provided a reason to have taken the applicant into custody for Miss Clarke's murder. The questions dealing with this aspect of the case came mostly from the defence in cross-examination.

7. The demonstrations by the ballistics expert with regard to the possible ways that the spent casings from the applicant's firearm could have been found outside the motor vehicle, were inconsistent with the applicant's version of how the events unfolded on the night of the murder.

8. The learned trial judge's summation was full and dealt with all aspects of the case including the defence of self defence.

9. It was clear that the jury rejected the applicant's case as he had not proffered a proper defence in his unsworn statement.

[36] Counsel concluded by saying that the jury accepted the evidence adduced by the prosecution, and not the interpretation placed on the evidence by the defence. The interpretation of the evidence given by the prosecution accorded with the evidence adduced in the case. She also stated that the learned judge did not take over the case by inappropriate gestures, stares or otherwise. The jury, she maintained, rejected the applicant's story that Mr Campbell was his attacker. There was a witness who gave evidence leading up to the incident who stated that he had not seen anyone else on the scene at the time. Also, the applicant was the only person who had pointed out Mr Campbell, and as there was no other material against him, the DPP in her wisdom entered a *nolle prosequi* against him. The report made to the DPP was not biased, she insisted, and it was not improper to charge the applicant after the statement had been taken from Mr Campbell, nor was it improper to take the statement from Mr Campbell in his attorney's office. Additionally, there was no basis to conclude that the applicant had been charged because he had been involved in the arrest of other colleagues as there was no evidence to support that claim. The police at the Westmoreland Police Station, she said, believed the applicant's account with regard to what happened that night until the ballistics report showed differently, and it was therefore correct for the police to send the file to the DPP for a ruling. The ruling by the DPP was made after a detailed perusal of all the information and material disclosed.

[37] At the end of the day, counsel deponed the jury found that the witnesses for the prosecution were credible. She stated that it was the good work of the BSI officers that had revealed the applicant's concocted story which meant that he was intent on sending an innocent man to prison for his crime. The evidence she said, pointed in one direction only, and that was the guilt of the applicant for the murder of Miss Clarke and the jury had so found.

Discussion and Analysis

Applicable principles

[38] There are two statutory instruments which authorise 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:

> "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 (Appellate Jurisdiction) Act which reads:

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

[39] Section 4 of the Bail Act refers to certain circumstances in which bail may be denied and others where if they do not exist bail may be considered, for instance in section 4(2) the following matters are set out:

> "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."

[40] This court has made it clear in **Forbes and Meggie** that 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 support in some statutory provisions (as indicated above) which defines the persons empowered to exercise the jurisdiction and the manner in which it is to be exercised (see **In Re Lyttleton** (1994) 172 LT, 61 TLR 180 **Ex parte Blyth** [1944] KB 532).

[41] It was also stated in **Forbes and Meggie** that the court in utilising that jurisdiction was exercising a discretion, as the statute refers to the court acting, "if it

seems fit", and that there are several authorities over many decades which have indicated that the discretion ought to be sparingly exercised.

[42] In the Court of Appeal of Trinidad and Tobago in **Krishendath Sinanan et al v The State (No 1)** (1983) 44 WIR 359, Bernard CJ stated at page 367:

> "A clear distinction has to be drawn between the granting of bail before conviction of an offence and the granting of bail after conviction of an indictable offence. In the case of the former, the party is presumed to be innocent whereas in the latter case this presumption is, on the happening of this event, i.e. his conviction, no longer of any application until and unless the conviction is later quashed. Until and unless that event occurs, the individual's right to his liberty or life is by due process of law curtailed or for that matter terminated in due course if the execution of the process of the court has to be carried out. Consequently different principles apply to each."

[43] Indeed Bernard CJ continued to explain on page 371 that:

> "Application for bail by a person after he has been convicted by a jury is a very 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..."

[44] Bernard CJ commented, endorsing Haynes C in the **The State v Lynette Scantlebury** (1976) 27 WIR 103, that after conviction the appellant has no statutory, common law or constitutional right to bail pending the determination of the appeal. The

court does have the discretionary power to do so, which discretion must of course be exercised judicially.

[45] The circumstances, the learned Chief Justice emphasized, must be exceptional to justify the grant of bail to persons convicted by juries. In his opinion, the mere fact that there might be delay in securing the hearing of the appeal, was not by itself an exceptional circumstance as he said that could be due to a "host of unavoidable or exceptional circumstances".

[46] He also indicated at page 373 that:

> "...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."

[47] The above position had been stated many years earlier in this jurisdiction by this Court in **R v Marsh** (1965) 9 JLR 217 where the court made it clear that after conviction and sentence, the court will exercise the power to admit an appellant to bail "only in exceptional circumstances". Graham-Perkins JA in **R v Rudolph Henry** (1975) 13 JLR 55 opined that this court ought not to formulate a catalogue of principles by reference by to which an application by an appellant to be admitted to bail may be determined, particularly since the learned judge of appeal was of the view that the phrase "in the exceptional circumstances of the case" was vague and indeterminate and ought to be avoided. However, in that case he made it clear that if it is manifest that an adverse verdict is unlikely to be sustained as there has been a total absence of proof of

matters which are essential that the Crown establish in order to constitute the offence charged, then the appellant ought to be admitted to bail "without the least delay".

[48] In **Chamberlin v The Queen** [1983] HCA 13, the High Court of Australia in dealing with an application for bail pending appeal, noted that the jury's ruling should be given its true significance and not considered that it is awaiting confirmation from the Court of Appeal. As a consequence, one must show exceptional circumstances to obtain what that court sees is in effect suspension of the jury's verdict.

[49] Chancellor Haynes in chambers in the Court of Appeal in Guyana in **The State v Lynette Scantlebury** opined that as frequently occurs the sentence may be a short one and it may be administratively impossible, or unlikely to hear the appeal before the sentence terminates. If, however the appeal is heard before the sentence ends, and the appeal is successful, justice may not appear to be done if the appellant has served most or a substantial part of the sentence, by that time. The court held that that could be considered an exceptional circumstance in respect of which bail could be granted pending appeal.

Applying the principles

[50] In this case the applicant was convicted of a very serious offence, that of the murder of Miss Clarke. He was sentenced to life imprisonment with eligibility for parole after 20 years. The facts of this case are therefore very different from those of Mr Dereek Hamilton who had been convicted for the offence of unlawful wounding in the Resident Magistrate's court for the parish of Saint Elizabeth and had been sentenced to

nine months imprisonment at hard labour. As normally a convicted person serves only two-thirds of the sentence imposed, and at the hearing of the appeal, the notes of evidence were not yet available, the learned judge of appeal indicated that it would be an injustice if the appeal were to be successful and the applicant remained in custody during that time. Bail was therefore granted pending appeal, with the necessary requirements pursuant to rule 3.21 of the Court of Appeal Rules.

[51] In the instant case, even if the applicant was only to serve two-thirds of his sentence of life imprisonment with eligibility for parole after 20 years, that period of sentence would certainly not have elapsed before the transcript in relation to the matter has been produced and the date scheduled for the hearing of the appeal. One must also remember that the trial was only concluded in June of this year, and so any delay being experienced in the production of the transcript in this case, would not by itself make the circumstances of this case exceptional to warrant the grant of bail to the applicant pending the determination of the appeal

[52] As indicated, Bernard CJ stated in **Krishendath Sinanan v The State** that bail should only be granted to a convicted person if there are special circumstances, for instance, unless the court is convinced on the merits that the appeal will probably succeed. Although Graham-Perkins JA in **R v Rudolph Henry** had concerns about the use of the phrase "in exceptional circumstances", he granted bail pending appeal as an ingredient of the offence had not been proved, and the conviction therefore in those circumstances appeared to be clearly wrong.

[53] But what is the situation in the instant case? The transcript in this case has not been produced. There is no information as to when it will be produced but the trial was only completed three months ago. In respect of this application before me however, I am at a clear disadvantage not having the notes of evidence or the summation of the learned trial judge to the jury. I have read all the statements submitted to me by counsel which were on the Crown's file, particularly the scientific forensic evidence reports, as both counsel were of the view that these reports featured prominently in the case. The difficulty that I have however is that both counsel have completely different interpretations of the evidence that was adduced before the jury in the court below, and as we all know, the evidence does not always unfold in court in keeping with the statements previously given. This poses a serious problem for a single judge of appeal hearing this type of application, at this stage, to do justice, when the notes of the evidence as adduced before the court are not yet available, and also, bearing in mind the statement of caution made by Bernard CJ that granting bail pending appeal after conviction by a jury has the potential to undermine the system of trial by jury, and is therefore inimical to the public interest.

[54] In the instant case the defence is saying that the evidence entirely supports the innocence of the applicant. How could he have been the killer when he was seated in the driver's seat beside Miss Clarke, and there was evidence of bullets coming from the outside of the car. They must have come from the lone gunman outside the vehicle firing bullets into the vehicle, striking the deceased causing her fatal injuries. There were two guns with different bullets, the defence says, and the applicant, a policeman,

had only been issued one gun. Additionally, he had a strong profile of a hardworking man of good character, not one of a killer.

[55] The prosecution says that the applicant is guilty of the murder of Miss Clarke. There was evidence of spent shells and expended bullets in and outside the motor vehicle, all of which came from the applicant's gun. The applicant's version of how the incident had occurred did not accord in any way with that of the expert evidence. The applicant, they say, was trying to blame an innocent man for his crime. The jury convicted him unanimously within a period of 20 minutes. The conviction was not perverse. It was entirely consistent with the evidence adduced by the prosecution.

Conclusion

[56] It may well be, that the applicant, on a review of his antecedents and the SER has a good character with positive community relations and ties, and that having been granted bail in the court below, there was evidence that he had complied with the conditions attached thereto, and that he may do so again if bail were offered to him in this court. There is no evidence that he is a flight risk. But unfortunately, these considerations are not at the forefront of the deliberations in respect of whether the applicant, now a convicted person after trial should be granted bail pending appeal. A distinction has to be drawn and different principles apply.

[57] There is no way with the competing versions and interpretations of the evidence by counsel outlined above, that I could be convinced at this stage, based on the statements in the Crown's file only, without the transcript of the proceedings,

(particularly with regard to the challenge to the judge's alleged entering into the arena, and his conduct of the trial), and including the summation to the jury, (in respect of which there has been much complaint) that the appeal has merit, and will probably succeed. It is not possible at this stage with the information before me that I could be convinced that there was an ingredient of the offence that had not been proved, and that the evidence in its entirety supports the applicant's innocence. I am simply not able to come to any conclusion in that regard or otherwise. However, in order to grant bail pending the determination of the appeal, I must be convinced that the appeal on the merits will probably succeed. That would satisfy the "exceptional circumstances" referred to in the cases. In my view, they do not exist at this stage in this matter. The application for bail pending appeal must therefore be refused.

[58] Counsel for the defence should make every effort to try to obtain the notes of evidence in this case as quickly as possible. The application for leave to appeal the conviction and sentence was not formally before me but in any event that would be adjourned, and once the transcript of the proceedings is produced, even if only in respect of the summation to the jury, the application for bail can be renewed if thought necessary, but it would be better if the entire transcript be produced with dispatch, so that the application for leave to appeal itself can be heard.