JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 55/2015

BAIL APPLICATION NO COA2021B00006

OMAR ANDERSON v R

John Clarke for the applicant

Miss Venise Blackstock-Murray for the Crown

13 and 15 April 2021

IN CHAMBERS

EDWARDS JA

Introduction

[1] On 13 and 15 April 2021, I heard an application for bail pending appeal brought by the applicant, Omar Anderson, who was convicted of one count of illegal possession of a firearm and two counts of robbery with aggravation on 17 July 2015 in the Home Circuit Court Division of the Gun Court. On the count of illegal possession of firearm, he was sentenced to five years' imprisonment at hard labour. He was sentenced to seven years' imprisonment at hard labour on both counts of robbery with aggravation. The sentences were to run concurrently. The applicant filed notice of appeal against conviction and sentence on 26 July 2015, but, unfortunately, like what is happening far too

frequently to so many other appellants, his appeal was delayed because of the absence of the transcript of his trial. That transcript, now in the possession of this court, is endorsed as having been received on 21 July 2020. Many appellants in his position, whose sentences have expired before their appeals can be heard due to the unavailability of the transcript in their cases, have chosen to abandon their appeal. This is because an inmate who files an appeal, has his sentence suspended and is not treated as a prisoner until the appeal is heard and determined.

[2] Mr Anderson, as is his right, refused to abandon his appeal even though, according to counsel, he would have already served his sentence on count one and the end of the period of sentence on count two is fast approaching. On 12 August 2020, a single judge of this court considered the applicant's appeal against both conviction and sentence and refused it in both respects. He still awaits the consideration of his renewed appeal before the full court.

[3] The applicant's notice of application for court orders for bail pending appeal, which was supported by an affidavit sworn to by the applicant filed on 25 March 2021, set out grounds which were substantially centred around the delay in the hearing of his appeal against conviction and sentence. The grounds were that:

> i. "The Applicant's early date for release was the 17 March 2020. The Applicant would have been released from custody in relation to the material conviction from the 17 March 2020, if he had not appealed his sentence.
>
> ii. The Applicant has effectively served his sentence, or a substantial part of it, and a substantial miscarriage of justice

would be occasioned should he remain incarcerated pending the determination of his appeal.

iii. The Applicant is not a flight risk, he is appealing this matter to seek to have the record of his convictions erased.

iv. The Applicant has substantial, arguable grounds of appeal including an infringement of his constitutional rights in relation to the protracted period of time it took to receive [sic]

v. The interest of justice and the due administration of the court would be enhanced by the granting of the orders sought."

The applicable statutory provisions

[4] Counsel Mr Clarke, on behalf of the applicant, and Mrs Blackstock-Murray, on behalf of the Crown, both made comprehensive and erudite submissions in this case, for which I am grateful. Mr Clarke submitted that this court has the jurisdiction to grant bail pursuant to the Bail Act and section 31(2) of the Judicature (Appellate Jurisdiction) Act (JAJA). Mrs Blackstock-Murray submitted that, on the contrary, section 13(1) of the Bail Act prohibits the Court of Appeal from granting bail to persons who have been convicted, but who were not previously on bail. Section 31(2) of the JAJA, she contended, did not enlarge this court's jurisdiction but instead provides the statutory jurisdiction to the Court of Appeal to grant bail in accordance with the Bail Act.

[5] Section 9 of the JAJA vests in the court the powers of the former Court of Appeal immediately prior to the appointed day (1962), and such other jurisdiction and powers as may be conferred by any other enactment. Section 31(2) of the JAJA gives the court the power, if it seems fit, on the application of an appellant, to grant bail pending the determination of his appeal, in accordance with the Bail Act.

[6] Section 13 of the Bail Act of 2000 provides that a person who was on bail prior to conviction and who is appealing his conviction may apply to this court for bail. As the section is crucial to the question of whether the applicant can succeed in this application, I will set it out in full. It states as follows:

> "13-(1) A person who was granted bail prior to conviction and who appeals against that conviction may apply to the Judge or the [Judge of the Parish Court] 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."

[7] It is important to note that, although reliance was placed on authorities emanating from the courts of England and Wales, Trinidad and Tobago and Guyana, by counsel for the applicant, the corresponding provisions in those jurisdictions are not entirely the same as section 13 of the Bail Act. In those jurisdictions, the relevant provisions merely state that an "appellant" may apply for bail after conviction, whereas the provision in section 13 speaks to "a person convicted who was previously on bail". Therefore, the restriction in the Bail Act in this jurisdiction, does not exist in those jurisdictions.

The applicable principles

[8] The applicant has been convicted and has applied for bail. However, the applicant was not previously on bail prior to conviction and the question raised is whether this court has the jurisdiction to grant bail pursuant to the Bail Act, or in the circumstances of this case, pursuant to any other legal provision, as submitted by his counsel.

[9] As was noted in **Seian Forbes and Tamoy Meggie v R** [2012] JMCA App 20 by Phillips JA, at paragraph [27], the Court of Appeal has no inherent jurisdiction to grant

bail to a convicted person. That jurisdiction only arises from statute. The provisions of the Bail Act, in respect of convicted persons, recognizes that a person convicted has no entitlement to bail but in certain circumstances bail may be granted, at the discretion of the court, that is, if the court sees it fit to do so. This is so, as, whilst section 3 of the Act expressly provides that a person charged with an offence is entitled to bail there is no similar provision in respect of a convicted person. This is also in keeping with the constitutional right to liberty and the fact that one of the exceptions thereto is in execution of a sentence to which the person has been convicted (section 14(1)(b) of the Charter of Fundamental Rights and Freedoms ('the Charter'); as well as the presumption of innocence until proven guilty (section 16(5)).

[10] From a distilling of the principles in the case law, it is clear that where the court has jurisdiction to grant bail pending the determination of an appeal, the basis of the exercise of its discretion has always been the existence of, what the court views, as exceptional circumstances. Delay in the hearing of the appeal is not generally viewed as an exceptional circumstance.

[11] Phillips JA, in **Forbes and Meggie,** speaking to the requirement for exceptional circumstances to exist before bail is granted pending appeal said this, at paragraph [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."

[12] In **The State v Lynette Scantlebury** (1976) 27 WIR 103, the Court of Appeal of Guyana, at page 105 per Haynes C, accepted that there is no common law, statutory or constitutional right to bail pending appeal. The court relied on the principle that an appellant who applies for bail pending the appeal of his conviction would have to show special circumstances which made it just for him to be placed on bail.

[13] Although **Forbes and Meggie** mentions section 13 of the Bail Act, there was some indication from counsel for the applicant in that case, that the applicant had been on bail prior to conviction. No issue was raised and no decision was made in that case on the question of jurisdiction. It is, therefore, not helpful for our purposes.

[14] The case of **Krishendath Sinanan and others v The State** (1992) 44 WIR 359, from the Court of Appeal of Trinidad and Tobago, made it clear that although the court had inherent jurisdiction to act in cases of abuse of process of the court and oppression, it could not exercise any inherent jurisdiction where statutory provisions existed which regulated and placed limits on a particular procedure. The unfortunate events in that case were somewhat similar to those in this applicant's case, in that, there had been a delay in the provision of the judge's notes of evidence and the summation in order for the appellants to pursue their appeals. There is, therefore, no inherent jurisdiction to grant bail where the statutory jurisdiction exists in the JAJA and in the Bail Act.

[15] I have no difficulty in holding that exceptional circumstances exist in this case, such that if the court had the jurisdiction, it might think it fit that bail should be granted in the interests of justice. Those circumstances are:

(i) the delay in the hearing of the appeal brought on by the failure to provide the transcript; and

(ii) the fact that the applicant may have already served his sentences of five and seven years.

[16] Whilst I make no assessment on the prospect of success of the applicant's appeal, I, at the same time, do not accept that the strength of the applicant's case on appeal and his likely prospect of success, could play any part in the court's decision whether or not to grant bail in this case. There was a strong case made out against the applicant at his trial. A single judge has refused leave to appeal conviction and sentence on that very basis, amongst other reasons.

[17] Therefore, the two extant circumstances (listed at paragraph [15]) are the only relevant ones in the case. There is no doubt that authority exists for the grant of bail in those two circumstances. Haynes C, at page 106, referred to a number of those authorities in the judgment of **Scantlebury**. However, as I said earlier, that court was concerned with the case involving the appellant in general and was not concerned with a limiting provision as the one in section 13.

[18] Counsel for the applicant argued that notwithstanding the fact that section 13 of the Bail Act was a limiting provision which circumscribes the category of convicts (those previously on bail) who may apply to the court for it to exercise its jurisdiction to grant bail pending the determination of the appeal, the power to do so remains in section 31(2) of the JAJA, as well as, by way of a constitutional remedy. Counsel contended that, prior

to the passing of the Bail Act, this court always had the general power to grant bail pending appeal by virtue of section 31(2) of the JAJA, and that this power remained despite the subsequent passing of the Bail Act.

[19] That argument, in my view, can be given short shrift. Section 31 of the JAJA states in full:

> "31.-(1) An appellant who is not granted bail shall, pending the determination of his appeal, be treated in such manner as may be directed by rules under the Corrections Act.
>
> (2) 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." (Emphasis added)

Prior to the passing of the Bail Act in 2000, the provisions in section 31(2) was differently worded, in that, it merely stated that the Court of Appeal, on the application of an appellant, may, if it seems fit, admit him to bail pending the determination of his appeal.

[20] Contrary to the submission of Mr Clarke, section 31 (2) of the JAJA, in its current form, gives jurisdiction to this court to grant bail in accordance with the Bail Act. It is clear that this was a deliberate amendment to the JAJA in order to bring the jurisdiction of this court to grant bail, in line with the provisions of the Bail Act. Therefore, since the applicant had not previously been on bail prior to his conviction, he is not a person qualified for the grant of bail by this court, pending the determination of his appeal.

Is there a possible constitutional route to the grant of bail?

[21] The authorities are clear on the point that there is no inherent jurisdiction to grant bail pending the determination of an appeal, there is no statutory jurisdiction to do so outside of section 31 of the JAJA, and there is no constitutional entitlement to bail pending appeal. Mr Clarke has submitted that there are cases which seem to suggest that constitutional redress may be granted in the form of bail to avoid "further contravention of the appellant's fundamental rights". It is unclear from his submissions, however, whether he was suggesting that the remedy could be granted, not pursuant to the Bail Act, but pursuant to the inherent jurisdiction of the court as the guardian of the constitution to ensure that the rights of the citizen under the Charter is not abridged, fettered or abused.

[22] Whatever may have been the basis of his contention in this regard, to invoke the court's jurisdiction in the context of a breach of fundamental rights under the Constitution, it is necessary that the applicant shows conduct towards him which challenges, 'collides' or 'threatens to collide' with his rights under the Charter and also, that such right is not 'protected by existing law' (see Bernard CJ at page 375 in the case of **Sinanan**).

[23] In this case, although the applicant is not qualified for the grant of bail by virtue of section 13 of the Bail Act, he was convicted under penalty of existing law. The only question, therefore, is whether he has successfully invoked this court's jurisdiction as guardian of the Constitution.

[24] Section 14 of the Charter provides that no person shall be deprived of his liberty except on a reasonable ground and in accordance with fair procedures established by law in the circumstances outlined. Section 14(1)(b) refers to the execution of the sentence of a court in respect of a conviction for a criminal offence. The applicant was tried and convicted in a court of law and duly sentenced by a properly constituted court. He was, therefore, deprived of his liberty by due process of law. However, that is not the end of the matter, according to Mr Clarke.

[25] Mr Clarke submitted that with respect to the sentence of five years the applicant had already served his sentence. Before that he had been on remand for four years before trial. With respect to the sentence of seven years, he was in danger of completing that sentence before his appeal is heard. The applicant was convicted on 17 July 2015 for the offences indicated at paragraph [1] herein. The sentence of seven years on counts two and three were to run concurrently and have also been substantially served. Undoubtedly, there has been an undue delay in the hearing of his appeal caused by the delay in the provision of the transcript of his trial. This delay, Mr Clarke says, will likely place the applicant in a category where his conviction could be quashed on appeal, as a result.

[26] Mr Clarke argued that the applicant's constitutionally guaranteed right to a fair hearing within a reasonable time has been breached. He cited the Privy Council case of **Tapper v DPP** [2012] 1 WLR 2712, which indicated, in reliance on the **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72, that a delay in hearing a criminal charge within a reasonable time is a breach of the right to a fair trial, for which there should be such a remedy as may be just and appropriate. That remedy would depend on

the nature of the breach, stage of proceedings, and so on. If the breach is established before the hearing, the appropriate remedy may be public acknowledgment of the breach, action to expedite, and perhaps, bail if the defendant is in custody.

[27] That decision was made in context of section 20(1) of the Constitution, where the right to a fair trial within a reasonable time was interpreted by the court to encompass the right of review by a superior court within a reasonable time, a right which was not specifically mentioned in section 20(1). This was prior to the Charter which now specifically provides for the right to have sentence and conviction reviewed by a superior court.

[28] Mr Clarke did point to section 16 of the Charter which, he says, provides for trial in a reasonable time (section 16(1)), a right to obtain the trial record within a reasonable time (section 16(7)), and the right to have sentence and conviction reviewed by a superior court (section 16(8)). Notably, however, subsection (8) of section 16 does not refer to the right to have conviction and sentence reviewed by a superior court "within a reasonable time", unlike section 16(1) and section 16(7). Bearing in mind that there is now that separate and distinct provision for the right of review of conviction and sentence by a superior court, which bears no limitation as to time, the case of **Tapper** must now be read in that light.

[29] In my view, the possibility of exercising a discretion to grant bail as a remedy for delay is not the same as saying that there is a jurisdiction to grant bail pending appeal under the Constitution, where no such jurisdiction exists in law.

[30] No doubt this hindrance to the grant of bail posed by the lack of jurisdiction to do so, may have been recognized by the Privy Council in **Tapper**, where the Board used the word "perhaps" when it said bail could be granted as a possible remedy for delay in the trial of a criminal charge.

[31] In my view, taking into account the circumstances of this case, and the fact that this court has no jurisdiction to grant bail to this particular applicant, the most appropriate remedy, and one which it is in the jurisdiction of the court to grant, is an expedited hearing, the transcript having now been lodged in this court.

[32] Bail is refused and the matter is set for an expedited hearing in the week commencing 26 April 2021.