

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO COA2024CR00018

APPLICATION NO COA2024B00002

JASON BARRETT v R

Hugh Wildman instructed by Hugh Wildman & Company for the applicant

Jeremey Taylor KC for the Crown

2 and 5 April 2024

Criminal Law – Bail pending appeal – Whether exceptional circumstances exist – Mandatory minimum sentence – Whether mandatory minimum sentence is constitutional – The Charter of Fundamental Rights and Freedoms – (Firearms (Prohibition, Restriction and Regulation) Act 2022, ss 45(1)(a), 45(2), 101(2), 101(6) and 101(8)(a) – Criminal Justice (Administration) Act 2015, section 42D – Judicature (Appellate Jurisdiction) Act, section 31(2) – The Bail Act 2023, ss 5(1)(c), 5(2)(c), and 6(7) – Court of Appeal Rules, rule 3.21

IN CHAMBERS

ORAL JUDGMENT

BROOKS P

[1] On his account, Mr Jason Barrett did a very foolish thing. On 22 January 2023, not long after the passage of the Firearms (Prohibition Restriction and Regulation) Act 2022 ('the Act'), which stipulated hefty minimum sentences of imprisonment for breaches of its provisions, Mr Barrett took his wife's licensed firearm to a public place. The weapon was loaded with several rounds of ammunition. According to his report to the probation aftercare officer, he took the firearm without her knowledge or permission. His excuse is that he was going to a volatile community and took the firearm for "protection".

[2] Mr Barrett compounded his folly when he was confronted by the police and the firearm was found at the waistband of his trousers. He untruthfully told them that he had a licence for the weapon. His attempt at deception failed when the police officers properly insisted that he produce the licence for the weapon, and he was unable to do so. He then confessed his lack of authorisation to have the firearm in his possession. He was arrested and charged with the offences of unauthorised possession of a firearm and unauthorised possession of ammunition contrary to section 45(1) of the Act.

[3] He pleaded guilty to the charges on 17 May 2023 when he appeared before the Western Regional Gun Court. On 4 March 2024, the learned sentencing judge (‘the learned judge’), after considering character evidence from two witnesses, an antecedent report, and a social enquiry report in respect of Mr Barrett, sentenced him on each count of the indictment to 15 years’ imprisonment at hard labour and ordered that he would not be eligible for parole until he had served 10 years’ imprisonment.

[4] Mr Barrett has applied for leave to appeal against the sentence. He contends that the learned judge was wrong to have considered himself bound to impose a custodial sentence as stipulated by the Act. In this application, Mr Barrett has applied for bail pending the hearing of his appeal. He insists that he has a good chance on appeal of having the sentence set aside and the court imposing a non-custodial sentence.

The law

[5] The principles governing the consideration of applications pending appeal are now well settled. They were summarised in **Dereek Hamilton v R** [2013] JMCA App 21 at para. [3]:

“The issues to be assessed in an application for bail pending appeal were carefully considered by Phillips JA in **Seian Forbes and Tamoy Meggie v R** [2012] JMCA App 20. The learned judge of appeal, in her usual comprehensive style, pointed out that:

- a. this court has no inherent jurisdiction to grant bail to a convicted person;

- b. the statutory authority for the court to grant bail resides in [now section 5(1)(c)) of the Bail Act of 2023] and section 31(2) of the Judicature (Appellate Jurisdiction) Act;
- c. there is no entitlement to bail after conviction, as in the case of bail pending trial, this is because the presumption of innocence no longer exists;
- d. the grant of bail pending the hearing of an appeal resides in the discretion of the court, but that that discretion will only be exercised in the applicant's favour in 'exceptional circumstances';
- e. in considering whether exceptional circumstances exist, the court must, among other things, look at the likelihood of success on appeal;
- f. applications in appeals from the [Parish] Courts are treated differently from appeals from the Circuit Court, primarily because of the difference in the length of sentences and the fact that, in Jamaica, there is no statutory requirement that time spent awaiting the outcome of the appeal should be counted in the sentence that is handed down at the end of the appellate process; and
- g. where the sentence is a relatively short one and the likelihood of the appeal being heard within a short time is small, this may be considered 'exceptional circumstances', as justice may not appear to have been done if the appeal is successful, but the appellant has served most or a very substantial part of the sentence."

[6] Although it was not specifically stated in that quote, the onus is on the applicant to demonstrate that he qualifies for a grant of bail and that exceptional circumstances exist that should convince the court to exercise its discretion in his favour (see para. [42] of **Seian Forbes and Tamoy Meggie v R**). It should also be said that the mere possibility of success on appeal does not constitute exceptional circumstances for these purposes (see **Krishendath Sinanan et al v The State (No 1)** (1992) 44 WIR 359 at page 373). It is, therefore, for Mr Barrett to show, first, that he qualifies for a grant of

bail, and second, that exceptional circumstances exist which warrant the grant of bail to him pending his appeal against his sentence.

The statutory framework for the grant of bail pending appeal

[7] With the passage of the Bail Act, 2023 ('the Bail Act'), the relevant statutory provisions which allow the court to hear applications for bail pending appeal are:

- a. section 31(2) of the Judicature (Appellate Jurisdiction) Act) - applications for bail pending appeal;
- b. sections 5(1)(c), 5(2)(c), 6(7) of the Bail Act; and
- c. rule 3.21 of the Court of Appeal Rules.

[8] Section 31(2) of the Judicature (Appellate Jurisdiction) Act allows the court to grant bail pending appeal, under the provisions of the Bail Act. The subsection states:

"(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."

[9] The relevant portions of section 5(1) and 5(2) of the Bail Act provide this court's jurisdiction to grant bail pending appeal:

"5.—(1) The question of bail to a defendant shall be decided in accordance with this Act, by a deciding official—

...

- (c) after the defendant, having been convicted of an offence **other than an offence listed in Part II of the First Schedule**, in relation to which the defendant was **out of custody on bail immediately prior to the conviction**, applies for bail pending the determination of an appeal made by the defendant against the conviction or against any sentence of imprisonment imposed in respect of such conviction.

...

- (2) The deciding official for the purposes of subsection (1)—

...

- (c) in a case falling within subsection (1)(c), shall be either the Judge before whom the defendant was convicted or a Judge of the Court of Appeal.
..." (Emphasis supplied)

[10] It is important to note that section 5(1)(c) of the Bail Act does not apply to certain firearm offences. However, the section does apply to offences that are contrary to section 45 of the Act (see Part II of the First Schedule of the Bail Act.). Section 45 of the Act states:

"45.—(1) No person shall be in possession of—

- (a) any firearm or ammunition, without the appropriate firearm authorisation granted under Part V; or
- (b) a firearm that is not marked in accordance with section 29(1) (a) to (f) or 29(2).

(2) A person who contravenes subsection (1) **commits an offence.**

(3) For the avoidance of doubt, where any firearm or ammunition is carried in parts by two or more persons in company, each such person shall be deemed to be in possession of a firearm or ammunition, within the meaning of this Act." (Emphasis supplied)

A person who is convicted of an offence committed contrary to section 45 of the Act is not disqualified from being granted bail pending appeal. The penalty for a breach of the section is not set out in the section but rather in a later section of the Act. That will be discussed below.

[11] Section 6(7) of the Bail Act states:

"(7) On an application under section 5(1)(c) (application for bail by convicted defendant), the Judge may grant the application **if satisfied that exceptional circumstances so warrant**, and impose such conditions on the grant of bail as the Judge considers appropriate." (Emphasis supplied)

[12] If an applicant for bail pending appeal satisfies a judge of appeal that exceptional circumstances warrant the grant of bail, rule 3.21 of the Court of Appeal Rules requires undertakings that the offender and his surety will attend at the time of the hearing of the appeal.

Applying the principles to this case

[13] Having established the framework under which bail pending appeal may be considered, it may fairly be said that Mr Barrett is not disqualified from being granted bail. He:

- a. has filed an application for leave to appeal;
- b. has not been charged for an offence which falls under Part II of the First Schedule of the Bail Act; and
- c. was out of custody on bail before being convicted.

[14] It is now necessary to determine if he has proved that exceptional circumstances exist to permit an exercise of discretion in his favour.

The submissions

[15] Mr Wildman, on behalf of Mr Barrett, argued that Mr Barrett was in possession of a licensed firearm, in that his wife had a licence for the weapon. Learned counsel also stressed that Mr Barrett was, before his conviction for this offence, of good character with an excellent reputation in his community and had no previous conviction for any criminal offence. In that context, learned counsel submitted, the learned judge in the court below erred in finding that he did not have the authority to sentence Mr Barrett to a non-custodial sentence. This, Mr Wildman submitted, was an abdication of judicial authority. He contended that the Act, in seeking to deprive judges of their sentencing power in such cases, was in breach of the Constitution. Learned counsel submitted that the sentence imposed on Mr Barrett is disproportionate and excessive and should be set aside on appeal. Mr Wildman further submitted that Mr Barrett's case amounts to exceptional circumstances which warrant a grant of bail pending appeal.

[16] Mr Wildman contended that the learned judge misunderstood the import of **Tafari Morrison v The King** [2023] UKPC 14 when he found that the case stated that a mandatory minimum sentence was not unconstitutional. Learned counsel argued that the Privy Council, in **Tafari Morrison v The King**, allowed for a departure from a mandatory minimum sentence if such a sentence was grossly disproportionate to the circumstances of the case and therefore would amount to inhuman or degrading punishment or treatment. Such a sentence, he submitted, would be incompatible with the Charter of Fundamental Rights and Freedoms ('the Charter') set out in the Constitution.

[17] The learned Senior Deputy Director of Public Prosecutions, Mr Taylor KC, on behalf of the Crown, submitted that the Act only allows for a non-custodial sentence if the conviction is before the Parish Court. Learned King's Counsel submitted that in the case of a conviction before the Circuit Court (including the High Court division of the Gun Court), there is only one penalty, that is imprisonment for life. Accordingly, Mr Taylor submitted, the learned judge:

- a. was correct in finding that he was obliged to impose a custodial sentence; but
- b. erred in imposing a sentence that was less than the mandatory minimum.

[18] In addressing the constitutional point, learned King's Counsel pointed out that it was open to the learned judge to have, under section 42D of the Criminal Justice (Administration) Act ('the CJAA'), reduced the pre-parole period of the sentence imposed on Mr Barrett, or have issued a certificate under section 42K of the CJAA. On those bases, Mr Taylor submitted that the options that will be open to this court on the hearing of the appeal are to either:

- a. remit the case to the High Court Division of the Gun Court for resentencing; or
- b. sentence Mr Barrett to the mandatory minimum sentence.

[19] In any event, Mr Taylor submitted, Mr Barrett has not demonstrated that his case possesses exceptional circumstances to warrant a grant of bail pending the determination of his appeal.

The analysis

[20] Although the learned judge handed down his decision in this case before the decision in **The Director of Public Prosecutions v Dennis Mundell** [2024] JMCA Crim 13 (which judgment was handed down 11 days after Mr Barrett was sentenced), that case confirms his finding that he was obliged to impose a custodial sentence. In that case, the Director of Public Prosecutions appealed from a sentence of four years and three months' imprisonment for the unauthorised possession of a firearm and ammunition that had been imposed on Mr Mundell.

[21] Brown JA, in delivering the judgment of this court, carefully examined the provisions of the Act and found that the penalty imposed for a breach of section 45(1)(a) of the Act was a mandatory penalty. He set out his reasoning at paras. [38] – [44] of his judgment. His reasoning may be summarised as follows:

- a. section 45(1)(a) does not prescribe the penalty for a breach of its provisions;
- b. section 101(2) of the Act states that the penalties for offences under the Act are set out in the Sixth Schedule of the Act;
- c. the Sixth Schedule stipulates that an offence contrary to section 45(2) of the Act, upon conviction before a Circuit Court (which for these purposes includes the High Court of the Gun Court), is "imprisonment for life";

- d. the practical consequence of section 101(6) is that where a term of life imprisonment is stipulated in the Act, it does not allow for a lesser term to be imposed;
- e. section 101(8)(a) of the Act stipulates that where the penalty is imprisonment for life, “the court shall specify a term of not less than fifteen years that the offender shall serve before being eligible for parole” notwithstanding anything in the Parole Act; and
- f. the judge at first instance in that case was wrong in saying that life imprisonment was the maximum penalty and fell into error in imposing the sentence that she did.

[22] Brown JA summarises the applicable principle at para. [43] of his judgment:

“To put the matter squarely, a person convicted before a Circuit Court, which includes the High Court Division of the Gun Court ... for being in unauthorised possession of a firearm and ammunition (formerly possession without a firearms user’s licence), is to be sentenced to imprisonment for life. While there is no adjectival modifier before the statement of the punishment in the Sixth Schedule, **we are of the opinion that the sentence is mandatory**. When the Sixth Schedule is read together with section 101(8), the sentence for being in unauthorised possession of firearm and ammunition is life imprisonment with the stipulation that the convicted person serves a minimum term of 15 years’ imprisonment before becoming eligible for parole.” (Emphasis supplied)

[23] **Tafari Morrison v The King** must next be considered. Mr Wildman relied heavily on para. 54 of their Lordship’s judgment, asserting that, contrary to the learned

judge's view, they did not stipulate that the mandatory minimum sentence was constitutional. Their Lordships, in that paragraph, said:

"The Court of Appeal found that a sentence of just under 13 years imprisonment would have been appropriate in the absence of a minimum sentence provision. As indicated earlier the Court appears to have double counted the discount for the appellant's age. **In any event the Board is satisfied that it cannot be said that the sentence imposed was grossly disproportionate and hence that it could be incompatible with the Charter on the basis that it was an inhuman or degrading punishment or treatment.**" (Emphasis supplied)

[24] Although Mr Wildman argued that their Lordships considered the CJAA, he is not correct on that submission. Their Lordships merely mentioned the CJAA, but did not consider it in **Tafari Morrison v The King**. They said, at para. 23 of their judgment:

"Jamaica subsequently passed section 42 of the Criminal Justice (Amendment) Act 2015 which establishes a mechanism for relief from the effects of the minimum sentence provisions where the Court of Appeal considers such a penalty manifestly excessive and unjust. **No application on behalf of the appellant was made under this provision and the Board does not, therefore, express any view about the operation of that legislation.**" (Emphasis supplied)

[25] By way of contrast, it should be noted that Brown JA, at para. [78] of **The Director of Public Prosecutions v Dennis Mundell** specifically dealt with the CJAA in the context of sentencing for a breach of section 45(1)(a) of the Act. He said:

"On the contrary, and by the fact that it has not been specifically excluded, the offence of being in the possession of a firearm without the appropriate authorisation under section 45(1)(a) of the Firearms Act, 2022, is not subjected to the same or similar exclusion in relation to the CJAA.... Therefore, the provisions of the CJAA would apply in calculation of any pre-parole period. In consequence of that, the learning in cases such [as] **Meisha Clement v R** and **Daniel Roulston v R** would also be applicable. It should be said that in the exercise of the narrow discretion given under section 5(2) of the Firearms Act, 2022, it would be a counsel

of prudence for sentencing judges to abide by the learning in **Meisha Clement v R** line of cases.”

[26] The learned Senior Deputy Director is, therefore, correct in stating that, with the option of applying the provisions of section 42D of the CJAA (section 42K would not apply since Mr Barrett pleaded guilty), the Act did not take away judicial discretion. As a result, the likelihood of its provisions in respect of a breach of section 45 of the Act thereof, being declared unconstitutional, is not high. Accordingly, Mr Barrett has not shown that exceptional circumstances exist in order to justify a grant of bail pending the determination of his appeal.

[27] It is, however, not necessary for this judgment to express any view as to the course the court should take upon the hearing of the appeal.

Conclusion

[28] Although Mr Barrett is not disqualified from being granted bail pending the hearing of his appeal, he has not demonstrated that exceptional circumstances exist to warrant a grant of bail.

[29] I, therefore, refuse his application for bail pending appeal.