[2023] JMCA App 26

JAMAICA

IN THE COURT OF APPEAL

BAIL APPLICATION NO COA2023B00001

FRANCIS BARTLEY-DOWNER v R

Donald Gittens for the applicant

Miss Loriann Tugwell for the Crown

28 September and 12 October 2023

Criminal law – bail pending appeal – section 13(1) of the Bail Act and section 31(2) of the Judicature (Appellate Jurisdiction) Act – the common law requirement of the existence of exceptional or special circumstances to justify grant of bail not met – no very good ground of appeal – no medical condition that cannot be addressed while applicant in custody – sentence not very short – danger that sentence may be served or substantially served before the hearing of the appeal, mitigated by order for prompt production of transcript

IN CHAMBERS

D FRASER JA

Introduction

[1] On 3 March 2023 the applicant, Mrs Francis Bartley-Downer, was convicted in the Manchester Circuit Court held in Mandeville in the parish of Manchester, for the offence of causing grievous bodily harm with intent. On 29 June 2023 she was sentenced to serve a term of imprisonment of two years, 11 months and 25 days. On 6 July 2023 the applicant filed both 1) an application for permission to appeal against her conviction and sentence and 2) an application for bail pending appeal.

[2] The application for bail came on for hearing on 25 July 2023. It was then adjourned to 17 August 2023, 31 August 2023 and 21 September 2023, pending information on the availability of the transcript of at least the sentencing phase of the trial. On 21 September

2023 the court was advised that the transcript of the sentencing of the applicant had been received that very morning by the Crown and dispatched to counsel for the defence. On the strength of that information, the matter was further adjourned to 28 September 2023 to afford time for the consideration of and fashioning of submissions informed by the transcript. The bail hearing proceeded on 28 September 2023.

Background

[3] The grounds of appeal stated in the applicant's application for permission to appeal against conviction and sentence are as follows:

> "1. The verdict of the Jury is unreasonable and cannot be supported having regard to the evidence.
>
> 2. The medical evidence or conditions advanced and set out in the Social Enquiry Report in relation to and on behalf of the Applicant or Appellant was not taken or sufficiently taken into account or given any or any adequate weight by the learned trial judge in the sentencing process.
>
> 3. The evidence of good character advanced in relation to and on behalf of the Applicant or Appellant was not taken or sufficiently taken into account or given any or any adequate weight by the learned trial judge in the sentencing process.
>
> 4. The learned trial judge erred in law in refusing to admit or allow character evidence proposed to be given by the son of the Applicant or Appellant.
>
> 5. In all the circumstances of the case, and the personal characteristics of the Applicant or Appellant, the sentence imposed by the learned trial judge was manifestly excessive.
>
> 6. The Appellant will crave the leave of this Honourable Court to file further grounds of appeal after receiving the record or any part thereof under Rule 3.7 or 3.8 or 3.9 of the Court of Appeal Rules 2002."

[4] Against that background, the grounds on which the applicant advanced her application for bail pending appeal were as follows:

> "(1) The applicant was granted bail prior to trial and remained on bail during the trial up to conviction.
>
> (2) The applicant faithfully fulfilled all the conditions of her bail.
>
> (3) There is a strong likelihood that the applicant will surrender to custody at the hearing of the appeal.
>
> (4) The medical conditions of the applicant as set out so far in the social enquiry report create an exceptional circumstance for her to be granted bail pending the determination of the appeal.
>
> (5) The applicant has a real prospect of success in the grounds filed so far against sentence.
>
> (6) If the applicant is not granted bail pending the hearing of the appeal there is a strong likelihood that the applicant would have already served the sentence by the time the appeal is heard, especially if the applicant become eligible by reason of good behaviour to serve only 2/3 of the sentence."

[5] The application for bail was supported by an affidavit of the applicant filed 11 July 2023 in which she averred that the sentence passed on her was excessive, considering her age and medical condition, and outlined her fear that imprisonment would cause her to be denied the eye surgery she was presently awaiting. Also advanced in support was an affidavit of Rebecca Mungalsingh, attorney-at-law, filed 11 August 2023, in which she averred that from instructions given by Mr Charles Benbow, the attorney-at-law who represented the applicant at her trial: a) the medical conditions of the applicant were not sufficiently taken into account or given adequate weight by the learned trial judge in the sentencing process; b) the evidence of good character advanced on behalf of the applicant was not sufficiently taken into account or given adequate weight by the learned trial judge in the sentencing process; and c) the learned trial judge erred in law in refusing to allow character evidence to be given by the applicant's son, especially in light of the negative references made (to "him" — I take this to be an error and that what was meant was to "her", the applicant) in the social enquiry report. Ms Mungalsingh provided a further affidavit filed 30 August 2023, which included evidence of failed attempts to obtain

an affidavit from Mr Benbow regarding the proceedings at trial or sentencing relevant to the grounds of appeal and the grounds of application for bail.

The submissions

Counsel for the applicant

[6] Having had the benefit of the transcript of the sentencing process, counsel for the applicant candidly conceded that the first ground of appeal could only proceed on the basis that the medical evidence was not sufficiently taken into account or given any adequate weight and that grounds three and four could no longer be sustained. Further, he accepted that the fifth ground lodged in support of the application for bail that, "the applicant has a real prospect of success in the grounds filed so far against sentence", could no longer properly be advanced, as some of those grounds had been eroded by the facts and events that transpired at the sentencing hearing, as revealed by the transcript.

[7] He, however, maintained that consideration of 1) the peculiar factors of the age and medical conditions of the applicant which raised the issue of whether a custodial sentence was appropriate in the first place and 2) the uncertainty when the transcript of the entire trial would become available, in the context of the applicant having been given a relatively short sentence, were factors that should move the court to find that there were exceptional circumstances that justify the exercise of discretion in favour of granting bail to the applicant.

[8] While relying specifically on the cases of **Ramon Seeriram v R** [2021] JMCA App 23, **Sanja Elliot v R** [2021] JMCA App 28 and **Omar Anderson v R** [2021] JMCA App 11, counsel indicated that he had no issue with the authorities relied on by the Crown. He noted that he was cognizant of the principle that the grant of bail pending appeal lies within the discretion of the court, and that previous cases in which the discretion was favourably or unfavourably exercised are therefore of limited value, except for the general principles that these cases establish or demonstrate.

Counsel for the Crown

[9] Regarding grounds one to three filed in support of the application, counsel for the Crown submitted that while in an application to grant bail pending an appeal, the conditions outlined under section 4(2) of the Bail Act are relevant, the overarching consideration is whether there are exceptional circumstances to move the court to postpone the applicant's sentence in circumstances where the court has ruled to curtail her liberty. She relied for this proposition on the cases of **Krishendath Sinanan et al v The State (No 1)** (1992) 44 WIR 359, and **Linval Aird v R** [2017] JMCA App 26.

[10] Counsel further argued that the serious and aggravated nature of the offence coupled with the fact that at sentencing no community member requested leniency for the applicant but rather justice for the victim, were not factors in favour of the grant of bail.

[11] In relation to ground four counsel maintained that the applicant's medical conditions were largely lifestyle diseases that can be controlled by a proper diet and exercise. Therefore, they did not constitute special circumstances sufficient to provoke the court's discretion to grant bail pending appeal. She cited in support the cases of **Seian Forbes and Tamoy Meggie v R** [2012] JMCA APP 20 and **Kurt Taylor v R** [2016] JMCA Crim 23.

[12] With respect to ground 5, counsel submitted that in her sentencing remarks the learned trial judge demonstrated that she followed the principles outlined in **Daniel Roulston v R** [2018] JMCA Crim 20 and took all relevant factors into account. Accordingly, counsel advanced that, in keeping with the principles outlined in **R v Ball** (1951) 35 Cr App Rep 164, there was no basis to suggest that there was any real prospect of success in the applicant's appeal against sentence.

[13] Finally, in relation to ground six, counsel acknowledged that where the length of the sentence is such that the applicant would likely have served the sentence before the appeal is heard, that may qualify as an exceptional circumstance warranting the grant of

bail pending appeal. Counsel cited the cases of **Seian Forbes and Tamoy Meggie v R** [2012] JMCA App 20 and **Dereek Hamilton v R** [2013] JMCA Crim 69 in support. Counsel, however, advanced that the sentence in this case was not so short that the transcript was unlikely to be obtained before the appeal was heard in light of the fact that the transcript of the sentencing process was already available. Consequently, counsel maintained that this was not a factor that should cause the court to exercise its discretion in the applicant's favour.

The law

[14] A review of the cases relied on by counsel and others examined by the court, has disclosed the following list of principles governing the grant of bail pending appeal, which, though comprehensive, may not be exhaustive:

a) A person who is convicted has no right to bail pending appeal: **The State v Lynette Scantlebury**(1976) 27 WIR 103; **Krishendath Sinanan and others v The State**; and **Seian Forbes and Tamoy Meggie v R**. No such right exists by common law, statute or under the constitution: **Omar Anderson v R**;

b) This court has no inherent jurisdiction to grant bail: **Seian Forbes and Tamoy Meggie v R**; and **Omar Anderson v R**;

c) The power of this court to grant bail to a convicted person pending appeal is derived from section 13(1) of the Bail Act and section 31(2) of the Judicature (Appellate Jurisdiction) Act: **Seian Forbes and Tamoy Meggie v R**; **Omar Anderson v R**; and **Sanja Elliot v R**;

d) A precondition to the grant of bail pending appeal is that the applicant must have been granted bail prior to conviction: section 13(1) of the Bail Act; **Omar Anderson v R** and **Lascelles Gardner and Horace Ellis v R** [2021] JMCA App 18;

e) The discretion to grant bail pending appeal should be sparingly exercised: **The State v Lynette Scantlebury**; **Seian Forbes and Tamoy Meggie v R**; and **Linval Aird v R**;

f) Circumstances must be "exceptional" or "special" to justify the grant of bail to convicted persons who have been given a term of imprisonment: **The State v Lynette Scantlebury**; **Seian Forbes and Tamoy Meggie v R** and all cases following them;

g) In considering whether exceptional circumstances exist, the court must, among other things, look at the likelihood of success on appeal: **Seian Forbes and Tamoy Meggie v R**; **Dereek Hamilton v R**; and **Ramon Seeriram v R**. However, the possibility of the appeal being successful is insufficient, by itself, to constitute an exceptional or special circumstance: **Krishendath Sinanan and others v The State**;

h) Delay in securing the hearing of the appeal is not by itself an exceptional circumstance to warrant the grant of bail after conviction: **Seian Forbes and Tamoy Meggie v R**;

i) Depending on the circumstances of a particular case, exceptional circumstances may include where:

   (1) there is a danger/likelihood that the applicant may serve most or a substantial part of his/her sentence before the hearing of the appeal, due to the shortness of the sentence and the unavailability of the transcript: **Seian Forbes and Tamoy Meggie v R**; **Dereek Hamilton v R** and **Omar Anderson v R**, or the state of the court's diary: **Dereek Hamilton v R**. It is recognised that this is particularly a real risk in appeals from the Parish Courts, where custodial sentences imposed by those courts, may well have been served before the appeal comes on for hearing: **Dereek Hamilton v R** and **Nerece Samuels v R** [2015] JMCA App 51;

(2) there is a very strong ground of appeal: **R v Rudolph Henry** (1975) 13 JLR 55 and **Christobel Smith and another v R** [2020] JMCA App 50; and

(3) the applicant's health conditions are such, that they cannot be adequately managed in custody: **Kurt Taylor v R** (by analogy);

j) In assessing the relevant circumstances, it should be considered that pursuant to The Correctional Institution (Adult Correctional Centre) Rules, 1991 a convicted person who has no prior convictions would normally serve only two-thirds of the sentence imposed: **Dereek Hamilton v R** and **Sanja Elliot v R**;

k) Other relevant factors, such as whether the applicant will honour the conditions of his bail and whether the grant of bail would "jeopardise the proper administration of justice", must also be considered. Section 4(2) of the Bail Act is relevant to those considerations: **Dereek Hamilton v R** and **Sanja Elliot v R**; and

l) Where the court exercises its discretion to grant bail to an applicant, it must impose certain obligations on that applicant, in accordance with rule 3.21 of the Court of Appeal Rules: **Dereek Hamilton v R**.

Analysis

[15] As indicated in his submissions, Mr Gittens accepts that the law is clear. His focus was primarily on two factors which he urged the court to find met the threshold of exceptional circumstances, justifying the favourable exercise of the court's discretion on behalf of the applicant. The combination of the age and medical conditions of the applicant was the first such factor. In her affidavit, the applicant relied on and incorporated her "Health History" outlined in the social enquiry report prepared for her sentencing, as reflecting her medical conditions. So far as relevant, that history outlines the following:

> "Subject said that she has had five (5) surgeries to her abdomen, and she still suffers from discomfort. Presently she

> is asthmatic, diagnosed with ulcer stomach, developing kidney issues, frequent urination, back pain, swelling of knees and a gum issue for which she received surgery on April 17, 2023, she is also slated for an eye surgery. She is also diagnosed with hypertension and high cholesterol. Subject presented a bag of medication, looking more like a mini pharmacy which, she mentioned that she uses to treat her myriad of illnesses…It was revealed that she never abused illicit drugs or imbibed alcoholic beverages."

[16] Counsel for the applicant indicated that he would seek to advance on the first ground of appeal that the medical evidence was not sufficiently taken into account or given any adequate weight by the learned trial judge in her sentencing remarks. The transcript, however, reveals otherwise. In the plea in mitigation by learned counsel for the applicant, who appeared at trial, the age and medical conditions of the applicant were used as the main bases on which he urged the court to impose a lenient sentence. The learned trial judge specifically reviewed and considered all that was said about the applicant's medical conditions in the plea in mitigation, the reports from the Mandeville Regional Hospital, Medcare Centre and Dr Lloyd Tenn. Significantly, there was nothing indicated in any of those reports that the medical conditions of the applicant could not be managed, or that any surgery that was outstanding could not be accessed with the applicant being in custody. Therefore, the health considerations which led to the sentence being suspended in the **Kurt Taylor v R** matter, do not appear to operate in the instant case.

[17] Only three years were added to the usual starting point for aggravating conditions, for, in the words of the learned trial judge, "a very serious offence", where in an unprovoked and premeditated attack, the applicant poured boiling water over the victim who was sitting looking into a book. This resulted in him suffering a frightening and painful ordeal, extensive physical scarring as well as psychological and emotional scarring. Conversely, the discount of seven years for mitigating factors primarily due to the age and medical conditions of the applicant was hefty. In those circumstances, it is difficult to see how it can be successfully maintained that insufficient consideration or weight was given to the applicant's medical conditions.

[18] The concession of counsel for the applicant regarding the contention that the applicant had a real prospect of success in the sentencing grounds filed so far, was well made. Without finally deciding the matter, which must await the hearing of the appeal, as submitted by learned counsel for the Crown, it appears the learned trial judge faithfully followed the principles outlined in **Daniel Roulston v R**. The learned trial judge established that a custodial sentence was warranted in light of the seriousness of the offence and the need for the court to send a message that such behaviour would not be condoned. She stated the maximum sentence, outlined the normal range and commenced her computation at the usual starting point. She considered all the aggravating factors, including the nature and manner of the commission of the offence, its effect on the victim and an adverse social inquiry report, in which the applicant was described as someone who was unfriendly and would get into conflict with others. She also considered all the mitigating factors including the applicant's age, previous good character, medical conditions and a character letter from the acting principal of the Brown's Town Community College. The learned judge additionally addressed her mind to the different aims of sentencing. Despite the heinous nature of the offence, she gave the mitigating factors more than twice the weighting of the aggravating factors and also deducted the five days the applicant spent in presentence custody, to arrive at her final sentence.

[19] The only ground of appeal that does not involve sentence is the omnibus ground challenging conviction which complains that, "[t]he verdict of the Jury is unreasonable and cannot be supported having regard to the evidence". As outlined by the learned trial judge, the jury must have accepted that the unsuspecting victim was injured by the applicant in an unprovoked, premeditated attack. In answer to the Crown's case the applicant gave an unsworn statement and called no witnesses. This court has not been favoured with any indication of what the nature of the applicant's defence was. Neither has there been any outline of why the verdict should be considered suspect, in a context where the victim has been injured, and this court has not been told that the applicant complained of receiving any injury in the incident, or denied involvement therein.

[20] The court accepts that the applicant does not yet have the benefit of the transcript of the evidence, nor, based on affidavit evidence, access to the opinion of defence counsel who appeared at the trial, to inform more particular grounds challenging conviction. The fact is, however, there is a dearth of any material on the basis of which the court could conclude that the applicant has any very good ground of appeal against conviction. There being no apparent very good ground of appeal against conviction or sentence, including the specific complaint about the inadequate consideration and weighting of the applicant's medical conditions, the grounds filed cannot therefore suffice as an exceptional circumstance, justifying the grant of bail to the applicant: **R v Rudolph Henry** and **Christobel Smith and another v R**.

[21] What now remains is consideration of the other factor relied on by counsel for the applicant; that the applicant has been given a relatively short sentence, it is uncertain when the transcript of her trial will become available and, consequently, there is a danger that she may serve her sentence or a substantial part thereof, before her appeal is heard. In **Ramon Seeriram v R**, relied on by counsel for the applicant, the sentence imposed on Mr Seeriram who applied for bail pending appeal, was two years and nine months. Brooks JA, (as he then was), had this to say at para. [22]:

> "Exceptional circumstances have been found to exist in respect of cases where the sentence is likely to have been served before the appeal is heard…The length of the sentence in this case has caused some hesitancy in this analysis. The hesitancy may, however, be overcome by taking steps to eliminate the risk of a delay in the production of the transcript. An order for the prompt preparation and production of the transcript may ensure that the appeal is quickly brought on for hearing."

Ultimately in that case, bail was refused as no exceptional circumstance was demonstrated.

[22] No indication has been given when the transcript of the evidence will be available in the instant case. However, happily, the transcript of the sentencing phase of the trial

is already to hand and has helped to inform the assessment of the application for bail. The sentence is marginally longer than the one passed in **Ramon Seeriram v R**, which was not found to be short enough to qualify as an exceptional circumstance, where the transcript was not yet available.

[23] Though admittedly the shorter of the two parts, the fact that the part of the transcript dealing with the sentencing of the applicant is already to hand, may bode well for the early availability of the other part containing the evidence of the trial. That provides some indication that, should the court make an order for the prompt preparation and production of the rest of the transcript, similar to the ones made in **Ramon Seeriram v R** and in **Sanja Elliott v R**, such direction may ensure that the appeal comes on quickly for hearing.

Conclusion

[24] The review of the relevant circumstances in this matter has not disclosed that there is a likelihood of success in the applicant's appeal. Neither has it been shown that the medical conditions of the applicant and any outstanding surgery required by her, cannot be managed or accessed while she remains in custody. The availability of the sentencing portion of the transcript makes it likely that an order for the prompt preparation and production of the rest of the transcript, could ensure that the appeal comes on quickly for hearing. In the premises, there is therefore no exceptional or special circumstance justifying the court exercising its discretion to grant bail pending appeal to the applicant.

[25] Accordingly, I make the following orders:

(1) The application for bail pending appeal is refused.

(2) The transcript of the trial should be promptly prepared and produced to the parties and this court.