

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NOS COA2021MSCR00002 &  
COA2021MSCR00003**

**BAIL APPLICATION NOS COA2021B00011 & COA2021B00010**

**LASCELLES GARDNER  
HORACE ELLIS v R**

**Isat Buchanan and John Clarke for the applicants**

**Kemoy McEkron for the Crown**

**15, 22 and 24 June 2021**

**IN CHAMBERS**

**FOSTER-PUSEY JA**

**Background**

[1] The applicants, Lascelles Gardner and Horace Ellis, who are or were serving members of the Jamaica Defence Force ('JDF'), applied for bail pending the determination of their appeals in this court. The matter originates from an incident which occurred on 15 February 2020, at the JDF Headquarters situated at Up Park Camp. The allegations surrounding the incident are that the JDF's service weapons, which were in the custody of the applicants, went missing after they had retired to bed on the JDF compound.

[2] This incident sparked much public attention and discourse. The applicants were charged with the offences of losing public property contrary to section 55(a) of the Defence Act, and disobedience to standing orders contrary to section 46(1) of the Defence Act. They were subsequently remanded for trial by court-martial, which was convened on 11 August 2020.

[3] The applicants were tried separately. At the court-martial both applicants pleaded guilty. Lascelles Gardner was sentenced to 670 days' imprisonment and 'discharge with ignominy from Her Majesty's Service'. Horace Ellis was sentenced to 610 days' imprisonment and 'discharge with ignominy from Her Majesty's Service'.

[4] On 12 October 2020, the findings of the court-martial were confirmed, but the sentences were varied as follows:

Lascelles Gardner - 88 days for time already served were remitted from the 670 days; and

Horace Ellis - 88 days for time already served were remitted from the 610 days.

### **The applications**

[5] On 30 March 2021, the applicants filed a Criminal Form C1 seeking permission to appeal against their convictions. However, no grounds of appeal were outlined. By notices of application filed 30 March 2021 they also applied for an extension of time within which to appeal. Further applications for extension of time, utilizing Court Martial Form C2, were filed on behalf of both the applicants on 26 April 2021.

[6] On 23 June 2021, both applicants filed amended applications for permission to appeal in which they outlined the grounds on which they wish to appeal their convictions. The applications for permission to appeal and for extension of time to do so have not yet been determined.

[7] The notices of application seeking bail pending appeal, were both filed on 23 April 2021 along with supporting affidavits. The applications first came up for hearing before a single judge on 25 May 2021. At that time, counsel for the applicants did not have the record of proceedings relating to the matter, and, as a result, the applications were adjourned to 15 June 2021 when they came up for hearing before me.

### **Proceedings in this matter**

[8] Counsel for the applicants, Mr John Clarke and Mr Isat Buchanan, and counsel for the Crown, Mr Kemoy McEkron, made submissions, which will be conveniently outlined later in the judgment. At the end of the hearing, I asked the Crown to file affidavits concerning the computation of the sentences of the applicants, and both counsel to make submissions on the relevance, if any, of the recent ruling of this court made in the consolidated case of **Dawn Satterswaite v The Assets Recovery Agency and Terrence Allen v The Assets Recovery Agency** [2021] JMCA Civ 28, on or before 18 June 2021 at 3:00 pm, after which my decision would be considered as having been reserved.

[9] Upon a review of the affidavits filed by the Crown, counsel were asked to again appear before me to answer certain queries, on 22 June 2021. Unfortunately, when the matter came up, counsel for the applicants indicated that the Crown had not served them with the affidavits filed on 18 June 2021. I then ordered that the Crown serve the affidavits on the applicants on 22 June 2021, and that the matter come up again before me on 24 June 2021.

[10] On 24 June 2021, having thoroughly considered the evidence, submissions and all the relevant material before me, I refused the applications for bail pending appeal. Oral reasons for my ruling were given, and at the end, I had indicated to counsel that I would reduce those reasons in writing. This is in fulfilment of my promise.

## **The evidence**

### The applicants' evidence

#### *Lascelles Gardner's evidence*

[11] Lascelles Gardner in his affidavits indicated a number of matters including that:

- a. On conviction he was sentenced to 670 days in custody, almost the maximum sentence possible; and

- b. He was subjected to an unfair trial for a number of reasons including that his guilty plea was not voluntary and he did not get the benefit of legal counsel or independent legal advice.

[12] In his 2<sup>nd</sup> supplemental affidavit filed on 18 June 2021 he stated as follows at paragraphs 3-8:

- “3. I crave leave of this Honourable Court to make this affidavit to assist the Court with accounting for the time in which I was released from the Red Fence Detention Centre on May 13, 2020 on bail before my Court Marshal [sic] Hearing.
4. I was questioned on Tuesday June 15, 2021 by my superiors as to whether I remember being released or remaining in custody as the Court of Appeal Judge wanted clarity on the time unaccounted for, following the hearing of my bail application earlier that same day.
5. For completeness I was in close arrest from February 16, 2020 to May 13, 2020, where I was informed by my superiors that I was granted bail and I was given leave for six (6) days from May 14, 2020 to May 19, 2020. I was free to go home which I did including being granted more than six (6) 'short pass' which was logged each time at HQ Co. 1JR building. I left the JDF camp situated at South Camp road and was free to visit my family. I was not under arrest and I was not restricted.
6. At the end of the Leave I returned to normal duties and was even issued with weapons. For clarity I was free to move about the camp and home and was not under any form of arrest from May 13, 2020 to August 10, 2020.
7. I was told that I am being granted bailed. Pursuant to the **rules of procedure** and my bail, and that I still had a pending Court Marshal [sic] hearing in which I was to make myself available when the date was set.

8. I was released from arrest and detention and continued my life and duties free from restrictions until my involuntary plea of guilt which resulted in my conviction at the court marshal [sic] hearing.” (Emphasis as in the original)

*Horace Ellis' evidence*

[13] Horace Ellis in his affidavits indicated a number of matters including that:

- a. On conviction he was sentenced to 610 days in custody, almost the maximum sentence possible; and
- b. He was subjected to an unfair trial for a number of reasons including that his guilty plea was not voluntary and he did not get the benefit of legal counsel or independent legal advice.

[14] In his 2<sup>nd</sup> supplemental affidavit filed on 18 June 2021 he stated as follows at paragraphs 3-8:

- “3. I crave leave of this Honourable Court to make this affidavit to assist the Court with accounting for the time in which I was released from the Red Fence Detention Centre on May 13, 2020 on bail before my Court Marshal [sic] Hearing.
4. I was questioned on Tuesday June 15, 2021 by my superiors as to whether I remember being released or remaining in custody as the Court of Appeal Judge wanted clarity on the time unaccounted for, following the hearing of my bail application earlier that same day.
5. For completeness I was in close arrest from February 16, 2020 to May 13, 2020, where I was informed by my superiors that I was granted bail and I was given leave for six (6) days from May 14, 2020 to May 19, 2020. I was free to go home which I did including being granted more than four (4) 'short pass' which was

logged each time at the HQ Co. 1JR building. I left the JDF camp situated at South Camp road and was free to visit my family. I was not under arrest and I was not restricted. Hereto a copy of the leave approval slip '**short pass**' and mark same as '**HE 1**'.

6. At the end of the Leave I returned to normal duties and was even issued with weapons. For clarity I was free to move about the camp and home and was not under any form of arrest from May 13, 2020 to August 10, 2020.
7. I was told that I am being granted bailed. Pursuant to the **rules of procedure** and my bail, and that I still had a pending Court Marshal [sic] hearing in which I was to make myself available when the date was set.
8. I was released from arrest and detention and continued my life and duties free from restrictions until my involuntary plea of guilt which resulted in my conviction at the court marshal [sic] hearing." (Emphasis as in the original)

#### The Crown's evidence

[15] In response, on 18 and 22 June 2021, the Crown filed affidavits which were sworn by Lieutenant Colonel Michael Deans, Senior Legal Officer in the JDF. Lieutenant Colonel Deans stated that under Military Law or the Defence Act there is no provision for bail. The applicants were kept in close arrest from 16 February 2020 until 13 May 2020 on which latter day they were released until the date of the court-martial on 11 August 2020.

[16] Lascelles Gardner's sentence of 670 days which was imposed on 11 August 2020 is being computed as follows:

- a. He received 88 days' remission for time already served;  
and
- b. An additional 223 days' remission is due in accordance with paragraph 23(1)(c) of the Defence (Imprisonment

and Detention) Regulations which provides that a soldier under sentence in excess of 28 days is entitled to a remission of one-third of his sentence.

[17] The applicant, Lascelles Gardner is to be released with remission on 5 August 2021. However, without remission his release date is 16 March 2022.

[18] Horace Ellis' sentence of 610 days which was imposed on 11 August 2020 is being computed as follows:

- a. He received 88 days' remission for time already served;  
and
- b. An additional 223 days' remission is due in accordance with paragraph 23(1)(c) of the Defence (Imprisonment and Detention) Regulations which provides that a soldier under sentence in excess of 28 days is entitled to a remission of one-third of his sentence.

[19] The applicant, Horace Ellis is to be released with remission on 26 June 2021. However, without remission his release date is 3 January 2022.

## **Submissions**

[20] As indicated above, both counsel, on 15 June 2021, made submissions and at this point I wish to outline them.

### The applicants' submissions

[21] Counsel for the applicants, Mr Buchanan and Mr Clarke, consistent with the affidavit evidence of the applicants, submitted that the applicants had been granted bail prior to conviction. They relied on section 31(2) of the Judicature (Appellate Jurisdiction) Act ('JAJA'). Counsel also submitted that this court has powers pursuant to sections 141-144 of the Defence Act to review the convictions of the applicants, who desire to appeal

their convictions, as pursuant to section 2 of the JAJA, they are deemed appellants. In addition, counsel submitted that the rules of this court apply to the Defence Act (see section 158 of the Defence Act) and the applicants had grounds of appeal which were likely to succeed at the hearing of an appeal.

#### The Crown's submissions

[22] On the other hand, counsel for the Crown, Mr McEkron, submitted that the applicants had not been granted bail prior to their conviction, and so did not satisfy the jurisdictional pre-requisite for the grant of bail pending appeal. He relied on the case of **Omar Anderson v R** [2021] JMCA App 11. He did not take issue with the submissions of counsel for the applicants that the issues that they wished to raise on appeal were worthy of exploration.

### **Analysis and discussion**

#### The applicable law

[23] Sections 141-158 of the Defence Act provide for persons convicted by court-martial to, with the leave of this court, pursue an appeal in this court challenging their conviction or sentence. The applicant should apply for leave within 40 days of the date of the promulgation of the finding of the court-martial in respect of which the appeal is proposed to be brought, utilizing the prescribed form, and specifying the grounds to be pursued. The court may extend the period within which an application for leave to appeal is required to be lodged (see section 142(3) of the Defence Act).

[24] The court shall allow an appeal if it thinks that the finding of the court-martial is unreasonable, or cannot be supported having regard to the evidence, or involves a wrong decision on a question of law or that, on any ground, there was a miscarriage of justice (see section 143(1) of the Defence Act). The Director of Public Prosecutions is to undertake the defence of the appeal (see section 148 of the Defence Act). Any judge of the court may give leave to appeal or extend the time for the application, and if a judge



refuses any such application, the applicant is entitled to have the application determined by not less than three judges of the court (see section 157 of the Defence Act).

[25] Subject to the provisions of Part VI of the Defence Act, any rules of court in force in relation to the hearing of criminal appeals by the court shall apply to the hearing and determination of an appeal by the court. If anything is required or authorized to be prescribed, it shall be prescribed by rules of court (see section 158 of the Defence Act).

[26] Upon a review of the Defence Act and Defence (Imprisonment and Detention) Regulations, I did not see any specific provisions addressing the question of bail, and neither counsel has brought any such provision to my attention.

[27] Section 4 of the Court of Appeal Rules ('CAR') contains rules dealing specifically with appeals to the court from a court-martial. It explicitly provides that sections 1 and 3 of the CAR apply to these appeals, subject to the provisions of section 4 of the CAR. An application for permission to appeal is to be pursued by completing Form C1 and filing it with the registrar, while applications for extension of time must be in Form C2.

[28] Since section 3 of the CAR also applies to appeals to the court from a court-martial, rule 3.21 is relevant. This rule addresses the steps to be taken when the court admits an appellant to bail pending the determination of his or her appeal.

*The main statutory provisions governing the grant of bail pending appeal*

[29] Section 13(1) of the Bail Act provides that it is a person who was granted bail prior to conviction that may be granted bail pending appeal. It states:

"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." (Emphasis supplied)

[30] There were certain definitions in the Bail Act which I took into account in considering the applications. For instance, section 2 provides definitions of "bail in criminal

proceedings”, “conviction”, “court”, “defendant”, “surrender to custody” and “vary”. It states:

“bail in criminal proceedings’ means bail which may be granted-

(a) in or in connection with proceedings for an offence, to a person charged with or convicted of the offence;

‘conviction’ includes-

a finding of guilt;

‘Court’ includes a Judge or a Resident Magistrate;

‘defendant’ means a person charged with or convicted of an offence;

‘surrender to custody’ means, in relation to a person released on bail, surrendering himself into the custody of a court or the police at the time and place appointed for him to do so;

‘vary’ in relation to bail, means imposing further conditions after bail is granted or varying or revoking conditions imposed in relation to the grant of bail;”

[31] Upon a review of the Bail Act there were other sections that threw light on the issue concerning proceedings under the Defence Act, of which courts-martial are a part. Sections 4(1)(b) and 4(4)(c) of the Bail Act respectively state:

“4(1) Where the offence or one of the offences in relation to which the defendant is charged or convicted is punishable with imprisonment bail may be denied to that defendant in the following circumstances;

...

(b) **the defendant is in custody in pursuance of the sentence of a Court or any authority acting under the Defence Act;**

...

4(4) Bail may be denied to a defendant in relation to an offence which is not punishable with imprisonment if-

...

(c) **the defendant is in custody in pursuance of a sentence of a Court or any authority acting under the Defence Act.**" (Emphasis supplied)

Therefore, based on sections 4(1)(b) and 4(4)(c) of the Bail Act, it may be arguable that the term "bail in criminal proceedings" would apply in the present context.

[32] I also believe that these sections of the Bail Act clearly contemplate the possibility of the grant of bail where a defendant is in custody in pursuance of the sentence of an authority acting under the Defence Act such as a court martial.

[33] The JAJA is a part of the statutory framework touching on the grant of bail pending appeal. Section 31(2) states:

"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 supplied)

Further, section 32(1) states:

"Subject to subsection (2) **the powers of the Court** under this Act to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and **to grant bail to an appellant** and to give directions regarding computation of sentence **may be exercised by any Judge of the Court** in the same manner as they may be exercised by the Court, and subject to the same provisions; but, if the Judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court." (Emphasis supplied)

*Relevant legal principles*

[34] Of significant note, decisions of this court have emphasized that this court does not have any inherent jurisdiction to grant bail to a convicted person. Phillips JA, in **Linval Aird v R** [2017] JMCA App 26, stated at paragraph [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). (Emphasis supplied)

[35] The court may only grant bail pending appeal if the applicant was previously on bail. In **Omar Anderson v R**, Edwards JA at paragraphs [9], [10] and [20] said:

“[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.

...

[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.**" (Emphasis supplied)

[36] The learned author, Dana S Seetahal, in her book entitled, Commonwealth Caribbean Criminal Practice and Procedure (2001), in addressing the issue of bail on appeal, noted at page 80:

### **"Bail on appeal**

'Bail' granted on appeal does not strictly conform to the usual definition of bail, which relates to pre-trial release. The defendant in such circumstances would have been convicted of the offence and would now be applying for bail pending the hearing of his appeal. **The fact that he has been found guilty by a competent tribunal means that the defendant has lost his constitutional right, so to speak, to bail that attaches to a person arrested and 'charged' with an offence.** In a considered judgment in *Sinanan et al v The State (No 1) (1992) 44 WIR 359*, the Trinidad and Tobago Court of Appeal considered the applications of several convicted murderers for bail pending their appeals. This was prior to the Trinidad and Tobago Bail Act, which prohibits the grant of bail for murder.

The court confirmed that in keeping with the common law, there was no inherent jurisdiction in the court to grant bail to a person who had been convicted of murder. They emphasised that the constitutional right to bail in Trinidad and Tobago was restricted to persons who had been arrested but not yet tried for an offence. Finally, the court reiterated that the granting of bail to persons who have been convicted by a

jury is a facility that is sparingly and only in very 'exceptional circumstances' to be used. This, they held, was the approach of most if not all Commonwealth countries. In this regard the court commended the principles stated by the Guyana Court of Appeal as to bail on appeal after conviction by a jury in: *State v Scantlebury* (1976) 27 WIR 103, pp 105–06. A convicted person who applies for bail in such circumstances is no longer presumed innocent and has no right to bail." (Emphasis supplied)

[37] Having considered the evidence and submissions, I believe that the essential issue to be determined in this matter is whether the applicants were granted bail prior to conviction, so as to satisfy this jurisdictional requirement.

[38] None of the statutes to which counsel have referred define bail, however in my view, there has never been any confusion as to what bail means in court proceedings. I find it useful however at this point to examine various definitions of bail. Bail is defined in the following way in certain legal dictionaries:

"An accused person is admitted to bail when he is released from the custody of officers of the Law on his giving security or accepting certain specified conditions" (see *Osborn's Concise Law Dictionary*, 7<sup>th</sup> Edition)

"May be either a person or an amount of money or property given to secure the release of a prisoner from jail or to pledge a prisoner's appearance in court at a certain time and place" (see *Dictionary of Law*, 1<sup>st</sup> Edition)

"To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order that he may be safely protected from prison, to which they have, if they fear his escape, etc., the legal power to deliver him" (*Jowitt's Dictionary of English Law*, 2<sup>nd</sup> Edition)

"A security such as cash or a bond; esp., security required by a court for the release of a prisoner who must appear in court at a future time" (*Black's Law Dictionary*, 9<sup>th</sup> Edition)

[39] Also, in Commonwealth Caribbean Criminal Practice and Procedure (2001), the learned author, at page 73, defined bail. She said:

“Bail is defined as pre-trial release in criminal proceedings. It may be considered a contract whereby an accused person is relieved on certain terms from custody to his surety or sureties. If granted bail, the defendant signs a bond in court offices or the prison, undertaking to appear for his trial. This is the contract, which is ‘guaranteed’ by a surety or sureties, as specified in the court order...”

[40] From the above definitions and excerpts, bail in general, and certainly bail under the Bail Act in Jamaica, has a connotation of either conditions, surety, security or a binding over to attend court or the relevant proceedings. Under the Bail Act, the grant of bail arises out of a formal process in respect of which there would be documentary proof of its grant by the relevant authority.

[41] While the applicants have stated that they were free to come and go after 13 May 2020, I am not satisfied that freedom to come and go, by itself, can mean that bail was granted. This would be giving bail a meaning that, as far as I am aware, has never been utilized in this country. In addition, clearly, when one looks at the provisions of the Bail Act in general, freedom to come and go, by itself, would not satisfy the meaning of bail granted under the Bail Act. The grant of bail pending appeal is circumscribed by statute, and in this matter the only relevant statutory provisions to which the court has been referred are those in the JAJA and the Bail Act.

### **Conclusion**

[42] I am not satisfied that the applicants were granted bail prior to their conviction and consequently this court is precluded from granting them bail in the circumstances.

[43] The applications for bail pending appeal are therefore refused.