

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 87/2015**

**BAIL APPLICATION NO COA2022B00003**

**OKENO HARRIS v R**

**John Clarke for the applicant**

**Mrs Kimberley Guy-Reid for the Crown**

**18, 26 February and 6 March 2025**

**Criminal law – Bail pending appeal – Requirement for exceptional or special circumstances to justify grant of bail satisfied – Sentence of 15 years almost fully served – Early release date within nine months – Danger due to operation of mandatory minimum sentence applicant may not be able to benefit from any reduction in sentence for post-conviction delay, if entitled – Section 31(2) of the Judicature (Appellate Jurisdiction) Act – Sections 5(1)(c), 5(2)(c) and 6(7) of the Bail Act, 2023**

**IN CHAMBERS**

**D FRASER JA**

**Introduction**

[1] On 15 October 2015 the applicant, Mr Okeno Harris, was convicted in the High Court Division of the Gun Court holden at King Street in the parish of Kingston, for the offences of illegal possession of firearm (count 1) and wounding with intent (count 2). This was in relation to an incident which occurred on 5 November 2012. He had been on bail prior to the start of his trial on 7 October 2015, when he was taken back into custody. He was sentenced on 16 November 2015 to five years imprisonment at hard labour on count 1 and, on count 2, the mandatory minimum sentence of 15 years imprisonment at

hard labour under section 20(2)(b) of the Offences Against the Person Act. Both sentences were ordered to run concurrently.

[2] Mr Harris' notice of appeal against conviction and sentence, dated 20 November 2015, was filed on 2 December 2015. In summary it alleged (1) "misidentity by the witness"; (2) "lack of evidence"; (3) "conflicting testimonies"; (4) "unfair trial"; and (5) "miscarriage of justice".

[3] The notes of evidence in this matter were produced on 11 December 2023. On 20 December 2023 a single judge of appeal refused him leave to appeal conviction and sentence. This was on the bases that the learned trial judge adequately dealt with the central issues of credibility and identification which arose in the trial, and the sentences were within the range of those imposed for offences of this nature; and, in fact, the sentence on count two was the mandatory minimum.

### **The application**

[4] On 4 February 2025 Mr Harris filed this application for bail pending appeal. The hearing of his renewed application for leave to appeal is scheduled for the week commencing 16 June 2025. Based on his being in custody since 7 October 2015, and considering his affidavit evidence, if Mr Harris is credited with all the time spent in custody, he should be eligible for early release by, if not before, 16 November 2025.

[5] The application was heard on 18 February and adjourned until 26 February 2025 at which time the court made the following order:

- 1) The applicant Okeno Harris is offered bail in the sum of \$300,000.00 with one or two sureties, with the following attached conditions. Mr Harris is to:
  - i. Report to the Bridgeport Police Station every Saturday between the hours of 6:00 am and 6:00 pm; and
  - ii. Surrender to this court for the hearing of his appeal which is scheduled for the week commencing 16 June 2025.

2) A stop order in respect of Mr Harris is to be placed at all air and seaports in the island.

[6] At that time the court indicated that brief reasons for the decision would be provided. I now fulfil that promise.

### **The submissions in summary**

#### Mr Clarke for Mr Harris

[7] Mr Clarke submitted that there were three bases on which Mr Harris was entitled to bail. Firstly, pursuant to sections 5(1) (c), 5(2) (c), and 6(7) of the Bail Act, 2023. This was because Mr Harris had been on bail prior to his trial (see **Omar Anderson v R** [2021] JMCA App 11) and there were exceptional circumstances justifying the grant of bail. These being that the appeal and any relief (such as a reduction in sentence) may be rendered nugatory, based on the effluxion of time, given how long Mr Harris has spent in custody; the fact that the sentence on count 1 has already been served; and his upcoming early release date in relation to the sentence imposed on count 2.

[8] This was a real concern, counsel argued, considering that in several cases this and other courts had granted a reduction in sentence due to the breach of appellants' constitutional rights to have their convictions and sentences reviewed by a superior court within a reasonable time. He relied on the cases of **Allan Cole v R** [2010] JMCA Crim 67; **Curtis Grey v R** [2019] JMCA Crim 6; **Techla Simpson v R** [2019] JMCA Crim 37; **Solomon Marin v DPP** [2021] CCJ 6 (AJ) BZ; **Tussan Whyne v R** [2022] JMCA Crim 42; **Jahvid Absolam and Anor** [2022] JMCA Crim 50; **Evon Jack v R** [2021] JMCA Crim 31; and **Monah v The Queen**, GDAHCRAP 2021/0015 ECSC COA delivered on 23 February 2022.

Mr Clarke contended that when his renewed application for leave to appeal is heard it would be wrong for the court to refuse a reduction of Mr Harris' sentence on the basis that would be "an academic exercise", given that he has already served the period which

would be covered by the reduced time (see **Ray Morgan v R** [2023] UKPC 25 at paras. [70] to [73]).

[9] Secondly, Mr Clarke submitted that, provided there were exceptional circumstances justifying the grant of bail, there is a constitutional route to bail even for those persons who might be precluded under the Bail Act from being admitted to bail, as they had not been on bail prior to conviction. This route, he argued, has been acknowledged in a number of cases as follows:

- a) Parliament's apparent blanket prohibition on persons who were never on bail before conviction from receiving bail pending appeal, infringes their constitutional right to liberty as it is not demonstrably justified, given that a fair balance has not been achieved, as less intrusive measures could have been implemented (see **Charles v Attorney General** [2022] UKPC 31 at paras. 58, 62, 64 – 66, 69 – 75, 83, 85, 86, and 92);
- b) This court must interpret the relevant provisions of the Bail Act with "such modification, adaptation or qualification necessary" to ensure that the Mr Harris' right to liberty is not abrogated, abridged, or infringed (see **Toussaint v Attorney General** (2007) 70 WIR 167 48 at para. 34); and
- c) There exists a constitutional route for determining issues related to the court's jurisdiction on bail for individuals who have never been granted bail but may possess exceptional circumstances or reasons justifying bail (see **Keros Martin v DPP** [2025] UKPC 2 at paras. 38, 39, 40 and 42).

[10] This all in a context where, counsel submitted, the facts of this case clearly show that the constitutional issue is intertwined with the issue of bail (see **Solomon Marin v DPP** at paras. [47] – [51], [68], [72], and [86]).

[11] Thirdly, Mr Clarke advanced that Mr Harris may obtain his liberty as interim relief regarding the pending appeal that affects him, pursuant to the court's inherent/incidental

powers to make interim/conservatory orders in light the fundamental rights impacted, and to protect its processes (see **Duncan and Jokhan v Attorney General of Trinidad and Tobago** [2021] 4 LRC 570 at paras. [19] and [32]; and perhaps even in an appropriate case as a function of *habeas corpus* (see **Julian Washington v The King** [2024] UKPC 34 at para. 12 relying on **Cukurova Finance v Alfa Telecom Turkey** [2016] AC 923 para. 17).

[12] Mr Clarke stressed that the bail application case of **Omar Anderson v R** which stated that there was no constitutional right to bail was decided before **Duncan and Jokhan v Attorney General of Trinidad and Tobago**. He noted that when the full court heard the appeal of Mr Anderson, he was granted compensation from the time of his application for bail until the date of its order for his immediate release, as, by that time, he had already served his full sentence on one count and the date of his early release on the other count had passed (see **Omar Anderson v R** [2023] JMCA Crim 11). He urged the court to grant Mr Harris bail to avoid another such occurrence.

[13] In his written submissions Mr Clarke also contended that section 31(3) of the Judicature (Appellate Jurisdiction) Act was unconstitutional in so far as it may result in an inmate serving a period of deprivation of liberty not reckoned as part of his sentence, in breach of his constitutional rights to freedom, equal treatment, to be treated humanely and with respect for his human dignity (see **Barton v R** [2019] 3 LRC 421).

[14] Mr Clarke accepted that the applicable principles and threshold that Mr Harris had to reach to obtain bail pending appeal were summarised in the case of **Francis Bartley-Downer v R** [2023] JMCA App 26 at para. [14].

#### Mrs Guy-Reid for the Crown

[15] Mrs Guy-Reid submitted that the statutory basis for Mrs Harris' application for bail pending appeal was section 31(2) of the Judicature (Appellate Jurisdiction) Act and section 5(1)(c) of the Bail Act, 2023. She argued that bail pending appeal was not a right, but was conditional upon the court's subjective discretion based on the specific

circumstances of each case. She indicated the applicable principles were summarised in the cases of **Seian Forbes and Tamoy Meggie v R** [2012] JMCA App 20, **Jason Barrett v R** [2024] JMCA App 9 and **Dereek Hamilton v R** [2013 JMCA App 21.

[16] Mrs Guy-Reid advanced that even the existence of exceptional circumstances, without more, did not automatically entitle Mr Harris to bail. She maintained that the main issue was the likelihood of success in the actual appeal. This likelihood she contended was low as a single judge of appeal had reviewed his transcript and initial grounds of appeal and declined to grant him leave to appeal. She maintained this stance even in light of the fact that since that time Mr Clarke had filed supplemental grounds of appeal on behalf of Mr Harris. She also noted how difficult it was for grounds of appeal challenging findings of fact to succeed. She relied on the case of **Everett Rodney v R** [2013] JMCA Crim 1 in support of that submission.

[17] Mrs Guy-Reid further submitted that (i) the delay in the availability of the transcript, (ii) the early release date of Mr Harris and (iii) the fact that the operation of the mandatory minimum may, on the hearing of the renewed application for leave to appeal, prevent any reduction in sentence as relief, in the confirmed absence of a certificate under section 42K of the Criminal Justice Administration Act, did not amount to exceptional circumstances warranting the grant of bail to Mr Harris.

### **Discussion and analysis**

[18] While I have not adverted to all the submissions made by counsel on either side or all the authorities relied on, I assure counsel that the material placed before the court has been adequately considered. In light of the basis of the decision that was made, there was, however, no need to canvass the submissions in any greater detail.

[19] Since the passage of the Bail Act, 2023 the statutory framework and rules governing applications for bail pending appeal are:

- a) Section 31(2) of The Judicature (Appellate Jurisdiction) Act;

- b) Sections 5(1)(c), 5(2)(c) and 6(7) of the Bail Act, 2023; and
- c) Rule 3.21 of the Court of Appeal Rules.

[20] Section 31(2) of the Judicature (Appellate Jurisdiction) Act, which grounds this court's jurisdiction to grant bail pending appeal in accordance with the Bail Act, provides:

"(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."

[21] Sections 5(1)(c), 5(2) (c), and 6(7) of the Bail Act, 2023 outline the circumstances in which this court may grant bail pending appeal. They provide:

"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."

"5 (2) The deciding official for subsection (1) —

...

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

"6 (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."

[22] Rule 3.21 of the Court of Appeal Rules outlines certain obligations that the court must impose on the grant of bail and administrative procedures in support of that grant.

[23] The case law which has interpreted this court's power to grant bail was summarised in the case of **Francis Bartley-Downer v R**, cited by Mr Clarke. That case was decided shortly before the Bail Act, 2023 came into force. The general principles have, however, not changed since the passage of that Act as evidenced in the outline of the relevant case law in the matter of **Jason Barrett v R** [2024] JMCA App 9, decided after its passage.

[24] One significant change, however, is that after the decision in the bail application case of **Omar Anderson v R** have come the cases of **Duncan and Jokhan v Attorney General of Trinidad and Tobago**, **Keros Martin v DPP** and others, which support the view that there is a constitutional route to bail, where a defendant was not on bail prior to his conviction and hence precluded from being granted bail under the Bail Act. As noted in the submissions of Mr Clarke, when the **Omar Anderson v R** matter came on appeal, he was granted compensation from the time of his bail application until the time of his order for immediate release, as by that time his early release date had passed. This court, however, declined to rule on whether section 13 of the then Bail Act which precluded the grant of bail to a person who was not previously on bail before conviction (the spirit of which is reproduced in section 5(1)(c) of the current Bail Act), was constitutional, as it was unnecessary for the determination of the appeal. I also mention in passing that in the appeal case of **Omar Anderson v R** the court determined, after a very detailed analysis, that section 31(3) of the Judicature (Appellate Jurisdiction) Act is constitutional (see paras. [178] to [252]). It is, therefore, important to note that that issue, though it does not affect the determination of this application, has already been settled by this court.

[25] It is, however, unnecessary in this case to consider the merits of any constitutional route to bail and to what extent such route or routes may apply in Jamaica. Mr Harris falls squarely under the provisions of the Bail Act, 2023 as he was on bail prior to conviction. Therefore, the sole issue for determination was whether, in keeping with section 6(7) of the Bail Act 2023 and the case law, there were "exceptional circumstances" justifying the grant of bail to Mr Harris.

[26] In **Francis-Bartley Downer v R** at para. [14] i) to j)), when looking at what may constitute exceptional circumstances, the following was stated:

“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;**”

[27] To para. [14] i) (1), I add the case of **Ramon Seeriram v R** [2021] JMCA App 23 which was later reviewed in **Francis Bartley-Downer v R** and featured significantly in the decision. The high threshold was such that, despite Ms Bartley-Downer being 72 years old (as revealed by a review of the file, though her age is not mentioned in the judgment), beset by some health conditions and the subject of a relatively short custodial sentence, in that case exceptional circumstances were deemed not to exist permitting a grant of

bail. An order for speedy trial was instead made seeking to ensure that the matter came on for hearing within a reasonable time, given the length of the sentence.

[28] There are two factors which combined to move this court to grant Mr Harris bail. Firstly, because he is currently just over nine months from his early release date out of a 15-year custodial sentence imposed on count 2. Secondly (a) when his appeal is heard, given the eight-year delay in the availability of the transcript, previous authorities suggest, he may, even if his application for leave to appeal conviction is dismissed, be entitled to relief by reduction of sentence of a magnitude greater than nine months; and (b) he may be unable to obtain any of that relief. Why? This court has held that credit for time served on pre-sentence remand may not be granted — in the absence of a certificate under section 42K of the Criminal Justice Administration Act, which gives that power to this court (see **Ewin Harriott v R** [2018] JMCA Crim 22) — if it would take the sentence below the mandatory minimum. Thus, on the hearing of his appeal, it is possible the court could hold that the mandatory minimum sentence on count 2, also precludes a reduction in sentence below the mandatory minimum due to post-conviction delay, thus affecting the relief he could obtain for the delay in his appeal being heard.

[29] These concerns are palpable. While the limiting effect of the interpretation of the mandatory minimum in **Ewin Harriott v R** and cases which followed it, has been addressed today in the matter of **Cecil Moore v R**, Supreme Court Criminal Appeal No 25/2016, judgment delivered 6 March 2025 (with reasons to follow) by a historic nine-member panel of the court, Mr Harris cannot recoup time already served. There is, for example, precedent in the form of **Curtis Grey v R** and **Techla Simpson v R**, where post-conviction delay of four years and six years respectively, led to a reduction of one and two years in the respective cases. By the time Mr Harris' renewed application for leave to appeal comes on for hearing, the delay will be more than nine years. Then, he will be exactly only five months from his early release date. Even if on the hearing he is determined to be entitled to only a one-year reduction in sentence, he could not fully benefit. There is every indication, therefore, that the delay in in this matter may occasion actual prejudice to Mr Harris.

[30] Guided also by the eventual outcome of the **Omar Anderson v R** appeal case, where compensation had to be ordered from the date of the unsuccessful bail application to the immediate release date, it is clear that exceptional circumstances exist in this case justifying the grant of bail. It was for the above outlined reasons that the order recorded at para. [5] was made.