[2021] JMCA App 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO COA2021CR00051

BAIL APPLICATION NO COA2021B00015

LESLIE WALKER v R

Peter Champagnie QC and Mrs Jacqueline Cummings for the applicant

Miss Renelle Morgan for the Crown

7 and 20 December 2021

IN CHAMBERS BY TELECONFERENCE

BROWN JA (AG)

Introduction

[1] The applicant was tried and convicted before Lawrence Beswick J ('the learned judge'), after a rare bench trial in the Saint Catherine Circuit Court on 10 June 2021 for the offence of rape. On 16 July 2021 the applicant was sentenced to 15 years' imprisonment with the stipulation that he serves 10 years' imprisonment before becoming eligible for parole.

[2] After the verdict was returned on 10 June, the applicant, who had previously been on bail, was remanded in custody by the learned judge. Following the remand of the applicant, there was a rather lengthy exchange between the learned judge and counsel, Miss Cummings, who appeared below for the applicant. That exchange included an unsuccessful entreaty for the applicant to continue on bail. At the end of the bench and

bar exchange, the matter was set down for a formal bail application to be made on 25 June 2021. It appears that an unsuccessful application for bail was made on that date.

[3] After the sentence was imposed upon the applicant, his counsel attempted to urge the learned judge to consider the question of bail pending the hearing of his appeal. The learned judge declined to entertain the application on the basis that the applicant had not yet filed an appeal.

The application

[4] By notice of application for court orders, Bail Application No COA2021B00015, filed 28 June 2021, the applicant Leslie Walker seeks the following orders:

> "1. That he may be granted bail pending appeal pursuant to section 13 (1) of the Bail Act upon such terms and conditions as this Honourable Court deems [fit].
>
> 2. Such other and/or further relief as this Honourable Court deems fit."

[5] The grounds on which the applicant seeks the orders are as follows:

> "(a) The applicant was convicted for the offence of rape in the Saint Catherine Circuit Court on June 10, 2021.
>
> (b) The applicant was sentenced on the 16th July 2021 to 15 years' imprisonment and has to serve 10 years before becoming eligible for parole.
>
> (c) The applicant was granted bail prior to the conviction on the [23rd] day of January 2018 and remained on bail until he was [convicted] on June 10, 2021."

[6] The applicant filed his notice and grounds of appeal on the same date as his application for bail. The grounds of appeal listed in the applicant's notice of appeal are as appear below:

"(a) The Learned Trial Judge, the Honourable Mrs Justice C Lawrence Beswick erred on the facts and was wrong in law in arriving at her findings that the offence of rape was committed against the compliment [sic] by the Appellant.

(b) The verdict was unreasonable having regard to all the evidence.

(c) Failure of the Learned Trial Judge to make any or any sufficient reference to, or comment on the credibility of the complainant, obvious weaknesses, contradictions, and inconsistencies in the case for the prosecution.

(d) The Appellant craves leave to file supplemental grounds of appeal upon receipt of the Record of Appeal."

Background

[7] The brief background of the facts upon which the prosecution relied at trial was extracted from the summation, as the full transcript was not to hand at the hearing of the application for bail pending the hearing of the appeal. The single count of the indictment alleged that the applicant had sexual intercourse with 'JW' on 2 February 2016 in the parish of Saint Catherine without her consent and knowing that JW did not consent or recklessly not caring whether she consented or not.

[8] JW testified that she was then a grade nine student at a high school in the parish of Saint Catherine, in which she also resided. On 2 February 2016, at about 6:40 am, she stood at a bus stop, dressed in her uniform, awaiting transportation to school. While she waited, the applicant who JW previously knew for about 10 years as a friend of her father, drove up in a jeep and offered a ride to school. JW accepted his offer. Instead of taking her to school, the applicant drove to his home. Initially, JW was left in the car while he went inside the house. He returned and invited her inside. JW followed the applicant inside his house and took a seat on the settee. The applicant appears to left JW in that room.

[9] Sometime after the applicant appeared, clad only in his underpants. He started to touch her on her breasts, then took her into the bedroom where he proceeded to have sexual intercourse with her above her protestations. After that the applicant took her to school.

[10] JW did not make a report of the incident until 25 June 2016 when she was taken to the police station by her parents. She had gone there initially to report something else. Subsequent to a medical examination, JW was discovered to be pregnant. In answer to her mother, JW alleged the applicant to be the putative father. At the time of the trial, JW's son was four years of age.

[11] The applicant gave evidence denying the charge. Chiefly, he denied ever having laid eyes on JW until the day he attended court. Furthermore, on the day and time of the alleged sexual assault, he was at home getting ready to attend the Jamaica Police Academy ('JPA') for a firearms training course. He arrived at the JPA at about 7:30 am and remained there until 4:00 pm. Corporal Romano Russell, firearms instructor at the JPA, testified on the applicant's behalf. Corporal Russell attested to the fact of the applicant's participation in the training on that date. However, he could not recall the applicant's time of arrival.

[12] By agreement, DNA results excluding the applicant as the putative father of JW's child was admitted into evidence.

Affidavit evidence

[13] In addition to his evidence at the trial, the applicant also relied on affidavit evidence. In his affidavit, the applicant said, amongst other things, that his attorney has advised him that his appeal "has a very real prospect of success"; that he will abide by the same terms and conditions of his previous grant of bail; and will surrender to the court when required.

[14] The applicant also said he is 50 years of age and a member of the JCF since 1997; the father of four children, two of whom are minors but they are all dependent on him

for financial support; and that his elderly mother who is afflicted with several medical conditions, including a heart condition, is financially dependent on him. During his suspension from active duty, he has been employed to Dr Jason McKay who is prepared to continue that employment. Dr McKay gave an affidavit to that effect.

The submissions on behalf of the applicant

[15] Mr Champagnie QC accepted that the grant of bail in the circumstances of this application is circumscribed by the presence of exceptional circumstances. To this end, learned Queen's Counsel advanced the following as fitting the characterization, exceptional circumstances:

i. Relying on para. 19 of the applicant's affidavit, there was no evidence that another person may have fathered the complainant's child. The prosecution should have established that the complainant was not intimate with any other person. The learned judge took judicial notice of this, which is to be contrasted with the DNA evidence (see transcript page 23 lines 22-25; page 6 lines 19-20).

ii. A confusion/misunderstanding that arose during the learned judge's summation (page 20 line 1 to page 21 lines 1-6). It was clear, Queen's Counsel argued, that the learned judge placed heavy reliance on this confusion in coming to her verdict of guilty.

iii. Treatment of the alibi. The learned judge did not fully appreciate it as she said it could be true (page 17 lines 9-22). Not enough weight was given to it. This is underlined by what she said at page 11 lines 19-25. Queen's Counsel submitted that it was almost a contradiction in terms to say both could be true.

iv. Having rejected the case for the appellant, the learned judge did not demonstrate that she returned to the case for the prosecution to see whether they had proven the case as required by law.

v. The appellant was a person of good character. Here Queen's Counsel relied on the affidavit of Dr Jason McKay.

vi. The likelihood that the appellant might serve the greater portion of his sentence before the appeal is heard.

[16] Learned Queen's Counsel cited **Andrewain Smith, Anna-Kaye Bailey and Durvin Hayles v R** Supreme Court Criminal Appeal Nos COA2019CR00042-44, Bail Application Nos COA2021B00004, 5 & 7, decision delivered 20 September 2021 for my consideration. However, this is a Memorandum of Reasons which has no precedential value by virtue of Practice Note No 1/2020.

Crown's submissions

[17] Signalling the Crown's opposition to the grant of bail, Miss Morgan's opening salvo was that she had heard no exceptional circumstance advanced and referred the court to para [46] of **Linval Aird v R** [2017] JMCA App 26. Learned counsel for the Crown also cited **Ramon Seeriram** [2021] JMCA App 23. It was Miss Morgan's further submission that the appellant will not have substantially served his sentence by the time his appeal is heard. This submission was premised on Miss Morgan's information that the court reporter responsible for the preparation of the transcript of the notes of evidence will return from vacation leave in two weeks from the date of this hearing. Her further information was that the transcript can therefore be ready in early 2022. Miss Morgan also posited that the court could make an order for the expedited production of the transcript.

[18] Miss Cummings was allowed a short reply. The sole point made by Miss Cummings was that even if the transcript were to become available as expected, the scheduling of

the appellant's appeal would still have to abide accommodation in the court's time-tabling of cases which presently extends some distance into the future.

Discussion

[19] It is settled law that this court has no inherent jurisdiction to grant bail to a convicted person per Phillips JA in **Seian Forbes and Tamoy Meggie v R** [2012] JMCA App 20, (`**Forbes and Meggie v R'**) at para [27]. This court, however, is clothed with a discretion to grant bail by virtue of the provisions of two legislative instruments: section 13(1) of the Bail Act and section 31(2) of the Judicature (Appellate Jurisdiction) Act. Since the applicant was on bail prior to his conviction, he is a qualified candidate for the consideration of bail, pending the hearing of his appeal. The question becomes, what are the guiding principles upon which this consideration of bail ought to be made?

[20] The relevant principles which guide the court in the consideration of an application for bail pending the hearing of an appeal, were distilled in a number of decisions, most notably **Forbes and Meggie v R** and **Linval Aird v R** [2017] JMCA App 26. Accordingly, those principles will only to a limited extent be traversed here.

[21] From a reading of the authorities, the following principles may be distilled:

a) The discretion given to the court to consider bail pending the hearing of an appeal ought to be exercised sparingly, judicially and responsibly, and is dependent on the facts of each case (**Forbes and Meggie v R**, at paras. [28] and [36]);

b) The exercise of this discretion is circumscribed by the requirement that bail should only be grant in exceptional circumstances (**Forbes and Meggie v R**, at para [29]; **Linval Aird v R**, at para. [46]);

c) The burden is on the applicant to show that there are exceptional circumstances warranting the grant of bail pending the hearing of his appeal (**Forbes and Meggie v R**, at para. [32] relying on **The State v Lynette Scantlebury** (1976) 27 WIR 103)

d) The mere possibility of success in quashing the conviction is an insufficient factor, by itself, to amount to exceptional circumstances (**Linval Aird v R**, at para. [46]);

e) A conviction which is unsustainable on the face of the record, is an exceptional circumstance. What is contemplated is that there is such an absence of proof, that it may be fairly said the case ought to have failed at the bar of **R v Galbraith** [1981] 2 All ER 1060 or withdrawn from the jury's consideration at the close of the case for the defence (**Forbes and Meggie v R**, at paras. [37] - [38]. Applying **R v Arthur McKenzie and Anthony McKenzie** (1974) 12 JLR 1563 and **Krishendath Sinanan and others v The State (No 1)** (1992) 44 WIR 359); the possibility of success on appeal must therefore be more than borderline;

f) Where the sentence imposed on the applicant is one of short duration, this may be an exceptional circumstance where the possibility of hearing the appeal may not arise before the applicant serves his sentence, with the accompanying risk of injustice to the applicant (**Forbes and Meggie v R**, at paras. [32] and [33]);

g) However, delay in securing the appeal is not by itself an exceptional circumstance (**Linval Aird v R**, at para. [45]; **Forbes and Meggie v R**, at para. [34]).

[22] There was convergence in the submissions of Mr Champagnie and Miss Morgan on the basic fact that the grant of bail is conditional on the establishment of exceptional circumstances. They diverged, however, on whether exceptional circumstances are present in this application. As learned Queen's Counsel confirmed in answer to the court, the essence of his list of exceptional circumstances is a challenge to the safety of the conviction. In short, Queen's Counsel's argument for the grant of bailed was premised on the likely success of the applicant's appeal against his conviction.

[23] This challenge to the safety of the conviction is not grounded in any point of law; save for the implication that the learned judge shifted the burden of proof, by failing to demonstrate that she returned to the prosecution's case before pronouncing her verdict. The proposed grounds and the submissions betray a challenge to the learned judge's findings of facts, her treatment of the complainant's credibility and the sufficiency of the evidence upon which the adverse verdict was returned. These are all matters which fell within the purview of the learned judge's jury mind. The law governing the approach of an appellate court where the challenge to a conviction is based on the findings of fact, credibility and or the sufficiency of the evidence may now be considered to be trite (see, for example **R v Joseph Lao** (1973) 12 JLR 1238; **Alrick Williams v R** [2013] JMCA Crim 13; and **Williard Williamson v R** [2015] JMCA Crim 8).

[24] Bearing in mind the restraint advocated in the authorities cited in the preceding paragraph, it would be injudicious to make more than a preliminary assessment of the likely success of the applicant's appeal, in the absence of the transcript of the evidence. My perusal of the summation has led me to the preliminary view that the learned judge was entitled to arrive at the findings of fact that she did, based on the references to the evidence in the summation. Therefore, I have not been driven to conclude that the conviction is likely to be quashed on appeal. I am therefore inclined to agree with counsel

for the Crown that a consideration of the challenges to the conviction do not, by themselves, disclose anything in the nature of exceptional circumstances.

[25] That would have been the end of the matter, save for the effort of Miss Cummings to fortify the assertion of exceptional circumstances by pointing to the possible delay in the appeal coming on for hearing, even if the Crown's optimism concerning the availability of the transcript of the evidence is well-placed. As said above, delay by itself is not an exceptional circumstance. To be fair to Miss Cummings, I did not understand her to be inviting me to consider this in isolation from the submissions made by learned Queen's Counsel. However, even if I agreed with Miss Cummings, since neither Queen's Counsel's submissions nor Miss Cummings' point individually approximate the standard, they could only impact the grant of bail cumulatively.

[26] My reason for disagreeing with Miss Cummings is that I share the optimism of learned counsel for the Crown concerning the likely availability of the transcript of the notes of evidence in early 2022. The observation that the hearing of the applicant's appeal would have abide the time-tabling of appeals in the court, speaks to the possibility of the applicant serving an appreciable portion of his sentence before his appeal is heard.

[27] The material before me does not lend itself to more than the possibility of reasonable delay in the production of the full transcript. The applicant's trial and sentencing exercise concluded on 16 July 2021. The production of the summation was completed in November 2021. With the imminent return from vacation leave of the court reporter concerned, and against the background of the relatively timely production of the transcript of the summation, there is no plausible reason to doubt the timely availability of the full transcript. Secondly, the minimum period of 10 years' imprisonment stipulated to be served before parole, is not a short sentence. While there have been inordinate delays between conviction and the hearing of an appeal in the past, there is no reason to think such a delay will bedevil this appeal.

Order

The application for bail pending appeal is refused.