



[2014]GCCCD 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

MISCELLANEOUS

CLAIM NO. 2014HCV0216

**IN THE MATTER OF STEWART v
REGINA, AN APPLICATION FOR BAIL**

Miss Nicole Burgher for the appellant

**Mr Jeremy Taylor, Senior Deputy Director of Public Prosecutions for the
respondent**

May 9 and June 5, 2014

**APPEAL – BAIL APPEAL FROM REFUSAL BY RESIDENT MAGISTRATE –
PRINCIPLES APPLICABLE – REASONS FOR REFUSAL**

SYKES J

[1] Mr Joseph Stewart is a police officer. On February 13, 2014, he went to the parish of St Elizabeth. He came with two other persons. He was eventually arrested and charged with illegal possession of firearm, illegal possession of ammunition, possession of ganja, dealing in ganja and trafficking in ganja. He

was first placed before the Resident Magistrate's Court for the parish of St Elizabeth on February 19, 2014. Bail applications were made twice before His Honour Mr Chester Crooks one of the Resident Magistrates for the parish of St Elizabeth. Both applications were refused. He applied for bail for the other Resident Magistrate, Her Honour Mrs Sonya Wint Blair. He feared no better. He appealed. This is the appeal.

[2] The appeal is supported by two affidavits. These are affidavits from his two attorneys, Miss Tamar Greene who made all three applications. The other is from Miss Nicole Burgher. Miss Greene's affidavit outlined what happened in St Elizabeth regarding to three unsuccessful bail applications. Miss Burgher's affidavit speaks her instructions from Mr Stewart. On May 9, 2014, this appeal was dismissed. The reasons are now presented.

[3] Miss Burgher indicated that Mr Stewart, on his arrival in St Elizabeth, received some information which caused him to conduct enquiries into what was believed to be illegal activities. It is said that those enquiries led to the recovery of vegetable matter resembling ganja and a firearm. Mr Stewart took possession of the firearm and discharged it, by firing the round in the chamber, because he could clear the round from the chamber. The St Elizabeth police arrived shortly after, took Mr Stewart in custody despite his protestations that he was a police officer on a legitimate visit to the parish.

[4] The prosecution put the matter differently. They say that Mr Stewart and his two companions traveled to St Elizabeth as part of an organised purchase of ganja from ganja farmers or ganja wholesalers who may not have farmed the product. Having completed his purchase, he decided to take possession of more ganja by the use of force. The Crown also say that one of Mr Stewart's alleged accomplices gave a statement which, unsurprisingly, sought to place most or all the blame at the feet of Mr Stewart. This alleged accomplice stated Mr Stewart was the prime mover behind the robbery of the ganja vendors. He says that all three of them went to St Elizabeth to purchase ganja and after the purchase, Mr

Stewart pulled his own firearm and decided to rob the vendor. The vendor, somehow, was able to raise an alarm. Mr Stewart was arrested.

The reasons of the Resident Magistrate

[5] Her Honour Mrs Sonya Wint Blair in her reasons, indicated that Mr Stewart's account was less than impressive. Her Honour indicated that Mr Stewart's account failed to explain why a shot was fired from his licensed firearm since he ought to know how to clear the chamber of live rounds. The learned Resident Magistrate also held that Mr Stewart did not explain why he and the two alleged accomplices left from Kingston to make the enquiries he did without the aid of other police officers but with two civilians.

[6] Her Honour concluded that Mr Stewart was a flight risk and not likely to return to face his trial. It was also said that there was a substantial likelihood of interference with the complainants as well as a strong likelihood that he may attempt to pervert the course of justice.

The submissions of Miss Burgher

[7] Miss Burgher has launched a strong challenge to the reasoning and reasons of the learned Resident Magistrate. Counsel submitted that the note of reasons provided by the Resident Magistrate does not show any analysis of the allegations and tying them in linear manner, moving from premise to premise in order to arrive at the conclusions stated. What was present was a narrative of the allegations of the Crown and the defendant's version followed by the conclusion with nothing to tie it all together.

[8] It is fair to say that Miss Burgher's examination of the reasons of the learned Resident Magistrate is well founded. This court has observed that the Resident Magistrate is not unique in her approach. Having seen a number of these

appeals from different parishes it may be fair to say that the methodology of compiling the reasons is common enough throughout the island.

[9] The terseness or absence of analysis is understandable. The Resident Magistrate's Court is a high volume court with too many cases and too little time. Understandably, in an effort to dispose of the matter with some dispatch and to provide the reason so that the defendant can pursue his appeal, brevity has become the order of the day.

The response of the Court

[10] The judgment of Brooks JA in **Huey Gowdie v R** [2012] JMCA Crim 56 has laid down the methodology for bail applications. His Lordship stated that bail applications are to proceed in a coherent, rational and systematic way. The application must be carefully considered and reasons given for the refusal or grant of bail.

[11] The primary reasons for this systematic approach are (a) the fundamental rule is that prima facie every person is entitled to liberty and (b) every person is presumed innocent until found guilty whether by trial or plea. These fundamental norms are now guaranteed rights in the Charter of Rights. Indeed, under the new bill of rights, it is expressly stated that any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions '**unless sufficient cause is shown for keeping him in custody**' (my emphasis).

[12] It is well established in constitutional jurisprudence that when a right is elevated to receiving protection by a constitution then that right is no ordinary right. The legislature decided that that right, because of its importance in the particular society, must receive special protection. Since the right to bail is now explicitly protected by the Constitution of Jamaica it necessarily means that the dictum of

that outstanding judge Carberry JA in **Grant v DPP** (1980) 30 WIR 246, 271 must be taken seriously. His Lordship observed:

The court may grant new and additional remedies, despite the existence of common law remedies covering the same ground; the only question that may arise is whether the adequacy of the existing remedies is such that no further additional remedy is necessary.

[13] His Lordship was speaking in the context of the previous bill of rights which had the proviso to section 25 (2) which provided that the court:

'shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.'

[14] It is true that there is strong authority for the proposition that even without this proviso, constitutional remedies should be seen as last resort (**Kemrajn Harrikissoon v Attorney General** (1979) 31 WIR 348, 349). Section 19 (4) of the new bill of rights states that the court may decline to grant redress if adequate remedies exist under other law. The difference between the previous section 25 (2) and current section 19 (4) is that in the case of the former the court must decline jurisdiction if adequate remedies existed under other law whereas under the latter the court is given a discretion to grant or refuse a constitutional remedy. The point being made is that once a right is given constitutional protection it is possible for the Constitutional Court to create remedies not available under other laws if the other remedies are not adequate which means that any right that is so protected is necessarily a special right.

[15] The consequence is that no citizen has to justify why he should be free. The common law established this and now the constitution provides for this. The burden is on those who want to deny him his fundamental human right to liberty to show why he should not be granted his freedom. The Jamaican Constitution of 1962 was based on the European Convention on Human Rights which itself came out the terrible conditions found in the death camps operated by the Third Reich of Nazi Germany and its allies and collaborators. The Europeans wanted to lay down base line conditions which should be met before a person is been deprived of his liberty. Jamaica made a deliberate decision to adopt many of these principles in its independence Constitution of 1962. In 2011, the legislature revised the Charter and strengthened the liberty provisions by adding section 14 (1) which provides that 'no person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law.' Reasonable in this context means grounds that the basis of the denial of liberty is not based on the any one's subjective suspicions but objective conditions which make the deprivation of liberty justified. Not only must the grounds be reasonable but the mechanics of the process must be fair and that those procedures must be established by law.

[16] In the event that section 14 (1) is met it is buttressed by section 14 (4) which emphasises that a person is entitled to bail unless sufficient case is shown otherwise. The protection does not end there. The very Bail Act states that a person may be denied bail if satisfied 'that there are **substantial** reasons for believing that the defendant if released on bail would' do any of the things indicated in the statute (section 4 (1) (emphasis added)). In other words, when one examines the bill of rights and the Bail Act a very good case has to be made out in order to justify refusal of bail.

[17] These principles were given practical effect by the Privy Council in **Hurnam v The State** PCA 53/2004 (delivered December 15, 2005). Lord Bingham in his seminal judgment made two points. First, when a person is arrested, two rights

are engaged. These are the right to freedom (bail) and the right to a trial within a reasonable time.

[18] Brooks JA took all of the above into account when essaying, at [21], his guiding principles to bail applications. His Lordship described the process outlines as exacting and 'requires careful preparation by the police and counsel for both the prosecution and the defence' ([22]). The Justice of Appeal noted that a 'meticulous approach is also required of the court considering the application' ([22]). The result is that this meticulous approach 'will require more time than was consumed in respect of such applications prior to the promulgation of the Act' ([22]).

[19] The methodology outlined by Brooks JA cannot be improved upon by this Court and so only a summary will be given. Time reading and applying paragraph 21 of his Lordship's judgment is time well spent. In succinct terms the steps are:

- a. allegations laid before the court;
- b. are there **substantial reasons** for refusing bail? Hearsay is admissible. Another name for reasons, in this context, is risks. To rephrase the requirement: what risks have been identified which would make it appropriate to deny bail.
- c. even if there are substantial risk the court must proceed further to determine whether there are conditions which can imposed that are sufficient to manage the identified risks;
- d. it is only after the court has concluded that the identified risks cannot be managed by appropriate conditions then a refusal of bail is justified. To use the constitutional language, if the risks can be adequately managed then there is 'sufficient cause has not been shown' to justify continued detention.

[20] As can be seen from this summary, bail applications are no longer perfunctory exercises but a serious exercise because it involves the possibility of depriving a citizen of one of the highest human rights which has received Charter protection. In some instances, a formal hearing on oath may have to be undertaken. This is how serious it is. Is this time consuming? Yes. Does it mean that valuable time is consumed? Yes. But is this too high a price to pay for liberty? Some have argued that the two most fundamental rights are right to life and the right to freedom. Absent these two rights and the other rights cannot be properly exercised.

[21] How then is this process indicated by his Lordship to be reflected? This court, in full recognition of the burdens of the Resident Magistrate's Court would suggest that a standard form be developed, based on the Bail Act and Brooks JA's judgment. This form should have a space for allegations (can be supplemented by additional sheets where necessary). There follows:

- a. any response by the defendant;
- b. any substantial reasons for refusing bail;
- c. the risk factors listed in the statute and those stated in case law and ticked as appropriate;
- d. if the risks cannot be managed by conditions then that should be stated with reasons.

[22] The reasons need not be elaborate but should indicate a consideration of the allegations, the risks and some indication of why the risks cannot be managed by conditions. If this is done then it would go a long way in ensuring that there is proof that the 'meticulous approach' suggested by Brooks JA actually took place. This court is not saying that the learned Resident Magistrate did not approach the matter meticulously but it needs to be brought out in the reasons. The

suggested standard form ensures that the mind of the judge is brought to all the relevant factors and the appropriate response is given.

[23] It may be said that this is imposing greater burdens on the Resident Magistrates and that may well be true but the rule of law requires that reasons be given for decisions and there be actual evidence or proof that the relevant matters were considered. Nothing less is expected of a judicial officer. The giving of reasons contributes to judicial accountability and reduces arbitrary decisions.

Application to the instant case

[24] The learned Resident Magistrate may well have formed the view based on what she was told that the case was very strong and that in and of itself suggested that the defendant may be flight risk. The learned judge may well have formed the view that the circumstances of the crime suggested that the defendant may be able to interfere with the witnesses. Unfortunately, this was not brought out clearly in the notes provided.

[25] This court is authorised by section 11 to grant, refuse or vary the conditions of bail. It means that this court is expected to go through the same process expected of the Resident Magistrate when dealing with this appeal. The court has examined section 4 (2), (3) and (4) of the Bail Act. Under section 4 (2) of the six conditions listed there, only those at (a) and (f) are relevant. The others at (c), (d) and (e) do not arise. Those related to previous grants of bail, committing other offences while on bail and being a repeat offender. They don't arise because the defendant has no previous convictions, was not previously charged and is out on bail and is not a repeat offender.

[26] Section 4 (2) (a) and (f) refers to the nature and seriousness of the offences **and** any other factor which appears to be relevant including the defendant's

health profile. Section 4 (3) refers to the defendant being kept in custody for his own protection.

[27] Section 4 (4) do not arise for consideration since the factors listed there have not arisen in the present case.

[28] The charges laid against the defendant are serious and carry severe sentences if convicted. The charge of illegal possession of firearm suggests that the defendant, as a serving member of the police force, had access to illegal guns. The police force does not distribute illegal guns to its members. This would suggest that defendant may be exposed to persons who are handlers, traders or dealers in illegal guns. However, Lord Bingham reminded in **Hurnam** that the seriousness of the offence is not, without more, a reason to deny bail.

[29] A court is entitled to draw on its judicial experience and the experience in the country where the court is located. The allegations of the Crown suggest well organised criminal activity. An allegedly illegal gun was recovered by the police. Miss Burgher suggested that Mr Stewart, if granted bail, would reside with his family. One of the concerns of the court was a public safety concern particularly the safety of the defendant and his family. It is no longer unusual for criminal gangs to inflict punishment on an erring member of their organisation. The loss of a firearm is seen as a very serious matter by some gangs. The loss in this case was to the police. Jamaica has sufficient experience from which it can be said that in some kinds of cases family members are at greater risk than others. The allegations suggest that Mr Stewart may be part of an organised drug trafficking gang. The court is fully aware that Brooks JA admonished that courts should not conduct an over-elaborate dissection of the allegation. Here, it is common ground that the defendant left Kingston to go to St Elizabeth. It is common ground that ganja came into his possession. It is common ground that a shot or shots were fired and it is common ground that he did not seek the assistance of other police officers from any police division to assist him in what he says were lawful enquiries into alleged criminal activity in St Elizabeth.

[30] It was not readily apparent how the imposition of conditions would minimise the risk to family members who were said to be living in densely populated residential area. It is not clear how the defendant would be protected if indeed he had an illegal gun given to him by his gang member to effect the robbery.

[31] Drive-by shootings have become a common feature of criminal activity in Jamaica. If such an event took place in a densely populated community the risk of serious injury to other members of the public is very high. For these reasons, the appeal is dismissed. However, this is without prejudice to the defendant's right to make future applications for bail if there is a sufficient change of circumstances.

Disposition

[32] Appeal dismissed.