

JAMAICA

IN THE COURT OF APPEAL

BAIL APPLICATION NO COA2021B00014

SANJA ELLIOT v R

Norman Godfrey instructed by Brown, Godfrey and Morgan for the applicant

Ms Channa Ormsby for the Crown

26 October and 9 November 2021

IN CHAMBERS

SIMMONS JA

[1] This is an application by Mr Sanja Elliott for bail pending appeal. Mr Elliott was convicted on 15 May 2020 in the Manchester Parish Court after a trial by Her Honour Mrs Ann Marie Lawrence Grainger. He was charged on an indictment containing 32 counts with seven other defendants for the following offences:

- (i) Conspiracy to defraud;
- (ii) Engaging in a transaction involving criminal property;
- (iii) Possession of criminal property;
- (iv) Facilitating the retention of criminal property;
- (v) Causing money to be paid out by forged document;
- (vi) Obtaining money by false pretenses; and
- (vii) An act of corruption.

After a submission of no case, 26 of those charges remained, of which 18 concerned the applicant. He was convicted on 16 of those counts. On 27 July 2020 he was sentenced as indicated below:

Count	Offence	Sentence
1	Conspiracy to defraud	18 months imprisonment
2	Engaging in a transaction involving criminal property	30 months imprisonment
3	Possession of criminal property	30 months imprisonment
4	Possession of criminal property	30 months imprisonment
5	Possession of criminal property	30 months imprisonment
6	Possession of criminal property	30 months imprisonment
7	Engaging in a transaction involving criminal property	3 years' imprisonment
8	Engaging in a transaction involving criminal property	3 years' imprisonment
9	Engaging in a transaction involving criminal property	3 years' imprisonment
10	Possession of criminal property	30 months imprisonment
11	Possession of criminal property	30 months imprisonment
13	Engaging in a transaction involving criminal property	3 years' imprisonment
14	Engaging in a transaction involving criminal property	3 years' imprisonment
25	Obtaining money by false pretenses	2 years' imprisonment

26	Obtaining money by false pretenses	2 years' imprisonment
30	An act of corruption	18 months imprisonment

[2] The sentences for counts 2-11, 13 and 14 were to run concurrently and the sentences for counts 1, 25, 26 and 30 were to run consecutively with those counts. The totality of the sentence was therefore five years' imprisonment at hard labour.

Background

[3] The applicant has filed an appeal against his conviction and sentence and has now applied for the grant of bail pending the determination of his appeal. It was agreed that at the time of sentence, Mr Elliott gave verbal notice of appeal.

[4] The grounds of appeal on which the applicant intends to rely are as follows:

- "1. The verdict is unreasonable and is against the weight of the evidence.
2. The Learned Trial Judge erred in law when she rejected the Appellant's No Case Submission and thereby deprived him of a fair trial.
3. The Learned Trial Judge erred in law when she held that the interference with Prosecution witnesses by the Police and in particular with one witness in the presence of Prosecutors was not persistent so as to rise to the level of Abuse of the Process amounting to prosecutorial Misconduct and thereby deprived the Appellant of a fair trial."."

It was indicated that the applicant may seek permission to argue additional or supplemental grounds when the reasons for the decision become available.

[5] The notice of application was supported by the applicant's affidavit sworn to on 12 July 2021, the supplemental affidavit of the applicant sworn to on 12 October 2021 and

the affidavit of Danielle Archer sworn to on 11 October 2021. The two latter affidavits were concerned with the issue of whether the applicant had given verbal notice of appeal at the time of sentence. In the applicant's first affidavit, it was deposed that he had been granted bail on 30 June 2016 when the matter first came before the court and remained on bail throughout his trial until 27 July 2021 when he was sentenced. He stated that he had honoured all of the conditions of bail. The applicant also stated that he had never been charged with a criminal offence before these for which he has been convicted and that his appeal has a real prospect of success. He indicated that the trial lasted several months and as such, the notes of evidence are voluminous and there is no indication that they would be submitted to the court in the near future. This he said, will delay the hearing of his appeal.

[6] The grounds on which the application is based are that: there is merit in the grounds of appeal; there is a strong likelihood that the applicant will surrender to custody at the hearing of the appeal; the applicant's record with regard to his fulfilment of his obligations whilst on bail before sentence; and his favourable antecedent report and Social Enquiry Report.

Submissions for Mr Elliott

[7] Mr Godfrey, on behalf of the applicant, stated that the applicant was relying on ground three which has a great prospect of success and the issue of delay.

[8] In this regard, counsel relied on **Dereek Hamilton v R** [2013] JMCA App 21 (**'Dereek Hamilton'**), in which Brooks JA (as he then was) found that the delay in the production of the transcript was an exceptional circumstance in the consideration of whether bail pending appeal should be granted. Mr Godfrey indicated that the applicant having been sentenced to five years' imprisonment in total, would be eligible for release after 40 months which was two thirds of that sentence. Counsel reminded the court that the applicant has already served 15 months of his sentence and the notes of evidence have not yet been produced. It was submitted that based on the authorities, this is a good ground for the favourable consideration of bail pending appeal. Reference was made to

Omar Anderson v R [2021] JMCA App 11 in relation to this point. In that case Edwards JA stated:

“[15] I have no difficulty in holding that exceptional circumstances exist in this case, such that if the court had the jurisdiction, it might think it fit that bail should be granted in the interests of justice.

Those circumstances are:

- (i) the delay in the hearing of the appeal brought on by the failure to provide the transcript; and
- (ii) the fact that the applicant may have already served his sentences of five and seven years.”

[9] Counsel also relied on the following passage in **Seian Forbes and Tamoy Meggie v R** [2012] JMCA App 20 (**Seian Forbes**):

“[36] At the end of the day even if the threshold is not that exceptional, or very exceptional or even unusual circumstances must exist before the court can grant bail to a convicted person, in my view, there must be special circumstances which warrant a convicted person being admitted to bail. It is a discretion which the court exercises and which must of course be exercised judicially and responsibly, and must be dependent on the facts of each and every case.”

[10] Reliance was also placed on **The State v Lynette Scantlebury** (1976) 27 WIR 103 (**Scantlebury**) where Haynes C, at page 105, stated:

“From the narrative of the facts alleged, the petitioner is asking the court to admit her to bail on the grounds of: (a) her own ill-health; (b) her husband's ill-health; (c) the great hardship imposed on her family, including her daughters Althea (13) and Gerilyn (11); and (d) the real likelihood that her appeal will come on for hearing after she shall have served her sentence. I would say without any hesitancy whatever that, at least in the circumstances of this case, grounds (a), (b) and (c), separately or cumulatively, will not warrant her admission to bail. It is one of the unavoidable harsh and painful consequences of conviction and imprisonment that the immediate and close family of the convicted person will suffer hardships. It is impermissible generally to treat this factor as a ground for the grant of bail. As regards hers or her husband's state of health, this court makes two observations: One is, that it is conceivable without difficulty that an appellant's state of health might be, in certain circumstances, a ground on which to admit her to bail. But, as at

present advised, I am of the opinion that the circumstances must be very special indeed to make the state of health of the appellant's husband by itself, if at all, such a ground or an auxiliary one. In this case, it certainly is not. The other observation is, that the allegations as regards their state of health is unsupported by any medical evidence whatever. I will concede that it is not at all wholly inconceivable that in certain particular circumstances grounds (a), (b) and (c) cumulatively might justify a grant of bail. But they certainly do not do so in this case. Accordingly, in any event, I would not act on these grounds. I think, however, that the fourth ground deserves careful consideration."

[11] The court was also invited to consider the fact that the applicant had been on bail up to the date of his sentence. Specific reference was made to para [6] of **Dereek Hamilton** where Brooks JA stated:

"[6] In addition to whether exceptional circumstances exist, the tribunal considering the grant of bail pending appeal must also consider the other issues which any application for bail raises, including, whether the applicant will honour the conditions of his bail and whether the grant of bail would jeopardise the proper administration of justice."

[12] Mr Godfrey submitted that, although a conviction removes the presumption of innocence, consideration should be given to section 4(2) of the Bail Act which sets out the factors that should be taken into account by the court when considering an application for bail.

Submissions on behalf of the Crown

[11] Ms Ormsby, on behalf of the Crown, submitted that where a person has been convicted, the court's discretion should only be exercised in exceptional circumstances so as not to undermine the outcome of the trial process and the public interest. She stated that a convicted person is no longer clothed with the presumption of innocence and as such is not entitled to bail. Reference was made to **Scantlebury** in support of that submission.

[12] She argued that the discretion of this court to grant bail should be sparingly exercised and limited to the most exceptional circumstances. Reference was made to

Krishendath Sinanan and others v The State (No 1) (1992) 44 WIR 359 (**'Sinanan'**) and **Seian Forbes** in support of that submission. Ms Ormsby submitted that the applicant has not satisfied the test of exceptional circumstances as laid down by the authorities. It was also submitted that when the seriousness of the offences for which he has been convicted which also constitute a breach of the public's trust, is considered, the grant of bail would shock the public's conscience and open the floodgates.

[13] Where the likelihood of success of the appeal is concerned, Ms Ormsby argued that the mere possibility of success is not sufficient to constitute an exceptional circumstance to justify the granting of bail (see **Sinanan**).

[14] She stated that there are no exceptional circumstances in this case, as it must be established on the face of the record, that the applicant's appeal has a good prospect of success. Reference was made to **R v Rudolph Henry** (1975) 13 JLR 55 in which Graham-Perkins JA stated at page 56:

"I entertain not the least doubt, however, that where it is manifest that a verdict adverse to an appellant is unlikely to be sustained by reason of the total absence of proof of those matters which it is essential to establish in order to constitute the offence charged, an applicant ought, without the least delay, to be admitted to bail..."

[15] It was submitted that the applicant's case does not satisfy the above criteria. On the contrary, the evidence against him was cogent and overwhelming. Ms Ormsby argued that the learned judge conducted a thorough and balanced assessment of the issues and dealt with them in accordance with the law.

[16] Ms Ormsby submitted that the fact that there may be a delay in the hearing of the appeal due to the delay in securing the notes of evidence, that possibility, without more, does not constitute an exceptional circumstance. Reference was made to **Sinanan** in support of that submission.

[17] It was acknowledged that the relatively short sentence that was imposed on the applicant may give the court some pause as to whether bail should be granted. It was

however submitted, that at this time, there was no material before the court to demonstrate that it is likely that the applicant would have served his sentence before the notes of evidence are produced. Ms Ormsby indicated that this point was considered by Brooks P in **Ramon Seeriram v R** [2021] JMCA App 23 where the sentence was two years and nine months. The learned President, whilst acknowledging the short duration of the sentence, stated thus in para [22]:

“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.”

[16] In concluding, Ms Ormsby reiterated that there are no exceptional circumstances which would justify the grant of bail. In circumstances, she submitted that the application ought to be refused.

Analysis

[17] The Court of Appeal derives its power to grant bail to a convicted person pending appeal from section 13(1) of the Bail Act and section 31(2) of the Judicature (Appellate Jurisdiction) Act. Section 13(1) of the Bail Act states as follows:

“13--(1) 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.”

And section 31(2) of the Judicature (Appellate Jurisdiction) Act, states:

“31--(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.” (Emphasis supplied)

[18] This discretion, based on the authorities, is to be sparingly exercised. In **Seian Forbes** Phillips JA stated:

“[28] The court is clearly exercising a discretion when considering the grant of bail, as the statute refers to the Court acting ‘if it deems fit’. However there are several authorities going back over 100 years, indicating that that discretion ought to be sparingly exercised. In **Edgar Gordon** [1912] C Cr A 183, the court referred to the course as an unusual one and refused bail to a prisoner on the basis that no sufficient reason had been shown. In **John Henry Charles Ernest Howeson, Louis Hardy** [1936] 25 C CR A, 167, Talbot J made this succinct statement referring to a similar application: ‘The Court sees in this case none of those exceptional circumstances which alone justify the granting of bail by this court, and the applications must be refused’.

[29] In Jamaica and the Caribbean the law has been stated somewhat similarly over the years. In **R v Marsh** (1965) 9 JLR 217, in circumstances where the applicant had been convicted on several counts of an indictment charging falsification of accounts, fraudulent conversion, larceny, uttering and embezzlement and was sentenced to 18 months imprisonment, and applied for bail pending appeal, and attached a certificate from the prison medical officer to the effect that the applicant was a person of a nervous disposition and when subjected to undue stress and strain and nervous tension was liable to develop a nervous breakdown, and that continuous imprisonment was detrimental to his health, this court (Duffus P, Lewis J.A and Swaby JA (Ag)) held that: ‘After conviction and sentence, the court will exercise the power to admit an appellant to bail only in exceptional circumstances, and no exceptional circumstances had been shown by the applicant.’”

The above principle was also approved in **Linval Aird v R** [2017] JMCA App 26.

[19] This principle was also discussed by Haynes C in **Scantlebury** at page 105. He stated:

“It is accepted law that it is a matter of discretion. An appellant has no common law or statutory or constitutional right to bail. But like all other discretionary powers it must be exercised judicially. If appellants are admitted to bail freely on appeals from the verdict of juries, a dangerous situation could arise inimical to the public interest. In England, under the Court of Criminal Appeal Act 1907, a similar statutory discretion to admit an appellant to bail existed until its repeal. A study of the many judgments of the Court of Criminal Appeal there would indicate the considerations by which that court

did so and its successor is guiding itself in the exercise of this discretion.

These authorities are clear that the circumstances must be 'exceptional' to justify the grant of bail to persons convicted by juries: **Gordon** ((1912) 7 Cr App Rep 182); **Gott** ((1921) 16 Cr App Rep 86); **Wise** ((1922) 17 Cr App Rep 17); **The Duke of Leinster** ((1923) 17 Cr App Rep 147); **Davidson** ((1927) 20 Cr App Rep 66); and **Howeson** ((1936) 25 Cr App Rep 167). Indeed in **Joseph Greenberg** ((1929) 21 Cr App Rep 106), the Lord Chief Justice said ((1929) 21 Cr App Rep at p 106): 'It is only in very exceptional cases that bail is granted in this Court'."

[18] 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 (see **Dereek Hamilton**). In this regard section 4(2) of the Bail Act is relevant. It states:

"(2) In deciding whether or not any of the circumstances specified in subsection (1) (a) exists in relation to any defendant, the Court, a Justice of the Peace or police officer shall take into account-

- (a) the nature and seriousness of the offence;
- (b) the defendant's character, antecedents, association and community ties;
- (c) the defendant's record with regard to the fulfilment of his obligations under previous grants of bail;
- (d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having failed to surrender to custody;
- (e) whether the defendant is a repeat offender, that is to say, a person who has been convicted on three previous occasions for offences which are punishable with imprisonment; or
- (f) any other factor which appears to be relevant including the defendant's health profile."

[19] Mr Godfrey has argued that the delay in the production of the transcript satisfies the requirement for exceptional circumstances. He has also directed the court's attention to the applicant's good conduct whilst on bail prior to his sentence. Despite counsel's very

able submissions, I disagree. A person who has been convicted has no right to bail. This was confirmed in **Sinanan** at page 372 by Bernard CJ, who stated thus:

"...a person who has already been convicted of a criminal offence, unlike one who has only been charged with one, is no longer presumed to be innocent. So that he has no right to bail but in certain circumstances may, in the discretion of the court, be granted bail. **The principle to be extracted from all the cases is that the circumstances must, however, be exceptional.** The mere fact that there will be a delay in securing a hearing of the appeal is by itself not such an exceptional circumstance as to warrant the grant being made; see *R v Pike* (1954) 109 Can CC 396. The delay, if any, could be due to a host of unavoidable or exceptionable circumstances. **Further, the mere possibility of success on the appeal is not sufficient in itself to constitute an exceptional or special circumstance to justify the granting of bail. In the absence of any other special circumstance, bail should not be granted unless the court is convinced on the merits that the appeal will probably succeed;** see *R v Marsh* (1935) 25 Cr App Rep 49 and *Beechin v R* (1957) 125 Can CC 360. Where the sentence is slight and the appeal cannot be brought on in good time or in all probability it is very likely to be called up after the expiration of the term of sentence, these situations may constitute such an exceptional circumstance as to warrant the granting of bail; see *R v Selkirk* (1925) 18 Cr App Rep 172, *R v MacDonald* (1928) 21 Cr App Rep 26, *R v Waxman* (1930) 22 Cr App Rep 81, *R v Stewart* (1931) 23 Cr App Rep 68, and *The State v Scantlebury* (1976) 27 WIR 103. It is otherwise where the term of imprisonment is long; see *R v Garnham* (1910) 4 Cr App Rep 150." (Emphasis supplied)

[20] I have noted that a convicted person who has no prior convictions would serve only two-thirds of the sentence imposed (see The Correctional Institution (Adult Correctional Centre) Rules, 1991). It would indeed, be an injustice if the applicant's appeal were to be successful and he had remained in custody up to the time when he would have been released or for a significant portion of the duration of his sentence. Mr Godfrey has relied on this court's decision in **Dereek Hamilton** and **Nerece Samuels v R** [2015] JMCA App 51 ('**Nerece Samuels**'). Respectfully, those cases do not assist the applicant. In **Dereek Hamilton** and **Nerece Samuels** the applicants were sentenced to six months' imprisonment. The transcripts were not available and there was a real danger that the

applicants would have each served their sentences by the time the appeal was heard. In **Nerece Samuels**, the circumstances surrounding the applicant's guilty plea and sentence were questionable. Those factors tipped the scale in favour of the applicant.

[21] The production of the transcript in this case, based on the most recent communication from the Manchester court's office, is not likely to be completed until January 2022. Mr Godfrey has indicated that a reasonable time by which the appeal should be heard would be within nine to 12 months of this hearing. That timeline can be met. A tentative date for the hearing of the appeal has been set for the week of 10 October 2022, with the expectation that the record will be completed as indicated above. This is an appropriate case in which an order for the "prompt preparation of the transcript" may ensure that the appeal is heard within the timeline indicated by counsel for the applicant.

[19] Mr Godfrey has also argued that there is great merit in the appeal. The likelihood of success is not apparent on the face of the record. In the absence of the notes of evidence, I am unable to reach any reasoned position on that point.

[20] In light of the above, it is ordered as follows:

1. The application for bail is refused.
2. The transcript of the trial should be promptly prepared and produced to this court.