[2021] JMCA App 8

JAMAICA

IN THE COURT OF APPEAL

BAIL APPLICATION NO COA2021B00008

RAYMOND MORGAN v R

Terrence Williams and John Clarke instructed by John Clarke for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Ms Jameila Simpson for the Crown

27 and 28 April 2021

IN CHAMBERS

BROOKS P

[1] This is an application by Mr Raymond Morgan for bail to be granted to him pending the hearing of an appeal against his convictions and sentences in the Resident Magistrate's Court for the Corporate Area, Criminal Division, as the Parish Court was then named. For the purposes of this judgment, the judicial officer will be referred to as "the Resident Magistrate". Although Mr Morgan's case is another instance where the justice system has failed a person in conflict with the law, the unfortunate situation in which Mr Morgan has found himself is that he does not qualify to be granted bail pending appeal, which may well be meritorious with regard to the sentence that was imposed on him.

Background

[2] On 7 February 2011, Mr Morgan was convicted of four counts of the offence of obtaining money by false pretences. He was, on the same day, sentenced to three years' imprisonment in respect of each count. The learned Resident Magistrate ordered that the sentences should run consecutively. The result would be that Mr Morgan would serve 12 years' imprisonment, subject to any administrative procedure under the Corrections Act that would benefit him.

[3] Mr Morgan states that he gave verbal notice of appeal at the time of his sentence. He also states that he completed a formal notice of appeal and grounds of appeal against the convictions and sentences (Form B1) and submitted it to the prison authorities. The Form B1, upon which he relies, is dated 12 February 2011.

[4] It is at this stage that matters took a turn that it is hoped will not be repeated in this jurisdiction. The following missteps took place:

a. the Form B1, which should have been filed at the Resident Magistrate's Court by 28 February 2011, was, instead, presented to the registry of this court on 7 March 2011, that is, outside the 21-day period allowed for grounds of appeal from convictions in the Resident Magistrate's Court (see section 296(1) of the Judicature (Parish Court) Act (the Act) (the relevant provisions of the Act are the same provisions that

applied in the Judicature (Resident Magistrates) Act, at the time of Mr Morgan's sentencing);

b. the registry of this court did nothing about the filing until 9 February 2012, when it sent the Form B1 to the Senior Resident Magistrate for the Resident Magistrate's Court for the Corporate Area; and

c. presumably because the Form B1 was late, nothing was done by the Resident Magistrate's Court, which neither replied to this court nor informed Mr Morgan of its stance in relation to his proposed appeal.

[5] The result of that series of unfortunate events, is that, 10 years after his conviction and the imposition of the sentences, Mr Morgan has served almost all of his sentences, as they were imposed, and perhaps would have been already released from prison if he had not filed an appeal.

[6] In deciding whether Mr Morgan's application for bail pending appeal should be granted, the following questions will be considered:

a. is there an appeal in place;

i. did Mr Morgan give notice of appeal to comply with section 294(1) of the Act; and

ii. did Mr Morgan's failure to file his grounds of appeal in time, terminate any appeal that may have been then in place;

b. does Mr Morgan qualify for bail under the Bail Act; and

c. do exceptional circumstances exist to allow for the grant of bail?

These questions will be answered in turn.

Is there an appeal in place?

[7] In deciding whether an appeal exists so that Mr Morgan may be granted bail pending appeal, it is necessary to determine whether he has satisfied sections 294 and 296 of the Act.

Did Mr Morgan give notice of appeal to comply with section 294(1) of the Act?

[8] Section 294 of the Act requires a convicted person, who wishes to appeal from the judgment of the Resident Magistrate, to either give verbal notice of appeal during the sitting of that court or give written notice of appeal to the Clerk of Courts of the parish, within 14 days of the judgment.

[9] Mr Morgan, in an affidavit filed in support of his application, deposed that he gave verbal notice of appeal at the time that he was sentenced. As the record from the now Parish Court is not yet available to verify that statement, Mr Morgan will be accepted at his word for these purposes. A similar position was taken by this court in **Hugh Richards v R** [2014] JMCA Crim 48, where the court stated, at paragraphs [35] and [36]:

> "[35] … Despite, or perhaps because of, the fact that it took the Resident Magistrates' Court seven years to produce the notes of the proceedings in this case, the notes were incomplete. They end with a recording of the proceedings, or at least a part thereof, on 28 August 2007. There is no record of the decision of the learned Resident Magistrate or, significantly, whether verbal notice of appeal was given. The absence of these aspects of the record was said to be due to the relevant notebook, in which they are contained, being lost.
>
> [36] In the absence of that record or any indication to the contrary, and in the other circumstances of this case, this court is prepared to proceed on the basis that Mr Richards gave verbal notice of appeal and that his appeal was, therefore, preserved for the purposes of section 294."

Accordingly, it will be held, for these purposes, that Mr Morgan has complied with section 294 of the Act. The failure to give written notice within 14 days of his conviction will not presently be counted as disqualifying Mr Morgan from asserting that he has a pending appeal.

Did Mr Morgan's failure to file his grounds of appeal in time, terminate any appeal that may have been then in place?

[10] Mr Morgan is next required to show that his appeal is not to be deemed abandoned for failing to file his grounds of appeal within 21 days of his conviction and sentence. Section 296 of the Act states that on such a failure, "he shall be deemed to have abandoned his appeal".

[11] **Hugh Richards v R** also decided that the handing of a notice of appeal to the prison authorities, within the stipulated time, did not constitute compliance with the time restrictions established by section 294 of the Act. A similar reasoning would apply to the

time restrictions contained in section 296 of the Act. In a deserving case, however, this court may apply the proviso contained in section 296(1) of the Act, which mitigates the effect of the subsection. The proviso states:

> "Provided always that the Court of Appeal may, in any case for good cause shown, hear and determine the appeal notwithstanding that the grounds of appeal were not filed within the time hereinbefore prescribed."

[12] In **Hugh Richards v R**, this court applied that proviso in similar, though less egregious, circumstances, to the present case. The court would, therefore be entitled to do so in Mr Morgan's case. A single judge of appeal does not, however, have that authority.

[13] Before considering the next issue, it is necessary to address a submission that Mr Williams made on behalf of Mr Morgan. Learned counsel submitted that time restrictions such as those in sections 294 and 296 of the Act have been disapproved by the Privy Council as being unconstitutional. Mr Williams cited **Hamilton and Another v The Queen** [2012] UKPC 31 (**Hamilton v The Queen**), in support of his submissions in this regard.

[14] **Hamilton v The Queen** does not provide the support that learned counsel contends. Their Lordships, in that case, were not dealing with legislation from the Parliament of this country, but rather the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 (the 2009 Rules). The 2009 Rules restricted the time within which an application for leave to appeal to Her Majesty in Council, could properly be filed. The

Board stated that that restriction was not in breach of the European Convention on Human Rights. Their Lordships stated, in part, at paragraph 15 of their judgment:

> "…Restricting access to the courts by the imposition of time limits is not incompatible with the European Convention, so long as the very essence of the right is not impaired, the restriction pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved: *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, para 59, *Stubbings v United Kingdom* (1996) 23 EHRR 213, paras 53–55 and *Pérez de Rada Cavanilles v Spain* (1998) 29 EHRR 109, para 44. It has not been suggested that rule 11(2) of the 2009 Rules fails to meet this standard."

[15] The Board granted the application in that case to extend the time within which to file a notice of appeal. Their Lordships noted, however, that they would not abolish the time restriction that the relevant rule imposed.

Does Mr Morgan qualify for bail under section 13 of the Bail Act?

[16] Although Mr Morgan would not qualify for the grant of bail by a single judge of appeal, that is a situation that could be cured. He still has to satisfy the provisions of the Bail Act to establish that he qualifies to be granted bail pending appeal. Section 31(2) of the Judicature (Appellate Jurisdiction) Act (JAJA) is the provision that authorises this court to grant bail to an appellant. The section states:

> "(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."

[17] It is section 13 of the Bail Act that authorises the grant of bail, pending appeal, to convicted persons. In order to qualify for bail under that section, however, the offender, must have been granted bail prior to conviction. Section 13(1) 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 is convicted or a Judge of the Court of Appeal, as the case may be, for bail pending the determination of his appeal."

[18] Mr Morgan was not granted bail prior to his conviction and thus would not qualify for bail under section 13.

[19] Mr Williams submitted that section 4(1) of the Bail Act is applicable to this situation. Learned counsel argued that section 4 also gives the court authority in cases of conviction. Alternatively, learned counsel submitted that, prior to the passing of the Bail Act, this court was empowered to grant bail. It also inherited the powers of the former Court of Appeal, which included the power to grant bail. He relied, in part, for these submissions on section 9 of the JAJA.

[20] Mr Williams' submissions cannot succeed. The backdrop to the analysis of those submissions is that an appellate court has no inherent jurisdiction to grant bail (see paragraph [27] of **Seian Forbes and Another v R** [2012] JMCA App 20).

[21] The first reason that Mr Williams' submissions fail is that section 4(1) of the Bail Act stipulates the circumstances in which the court may deny bail. It does not address the grant of bail. Section 4(1) of the Bail Act states, in part:

> "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 –" (Emphasis supplied)

[22] The interpretation that the ability to deny bail presumes the ability to grant it, cannot be properly applied when the statute provides specifically, in section 3, for the grant of bail to persons charged with offences, and in section 13, for the grant of bail to convicted persons.

[23] The second flaw in Mr Williams' submission is that prior to the Bail Act, section 31 of the JAJA unconditionally allowed this court to grant bail pending appeal. Section 31(2), as it then was, stated:

> "(2) The Court of Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal."

This court's jurisdiction to grant bail before the passing of the Bail Act, was, therefore, not only statutory, but expressly so. There is no basis to seek to investigate the power that the former Court of Appeal exercised in respect of bail, or the jurisdiction by which it did so.

[24] Based on that analysis, Mr Morgan does not qualify to be granted bail. It is therefore unnecessary to analyse whether exceptional circumstances exist in order to decide whether he should be granted bail. If that was a pertinent consideration at this time, Mr Morgan's dire circumstances would easily qualify as exceptional. If he had had an appeal in place, he would, technically, not have yet begun to serve his sentence.

Against that background, the fact that he has been incarcerated for 10 years would be considered oppressive, especially since the record of proceedings has not yet been produced, and it is not known when it will be produced. There would, therefore, be no method of determining when his appeal would be heard. If there were an appeal in place,

[25] Mr Clarke, who appeared with Mr Williams, asserted in his written submissions, that a grant of bail is appropriate in this case as:

> "a) the delay in the hearing of the appeal is wholly caused by the failure of servants and agents of the state and is in contravention of [Mr Morgan's] fundamental rights;
>
> b) the period that [Mr Morgan] has been in custody pursuant to the trial court's sentence has been so protracted that otherwise he would be released; and
>
> c) [Mr Morgan] has good grounds of appeal"

[26] These are not matters that can properly be advanced at this time. The first two issues speak more to constitutional redress. With respect to item c), it must be stated that Mr Morgan has not identified any ground of appeal against his conviction. Although his notice of appeal is against both conviction and sentence, his itemised complaints are directed at flaws in the sentencing process. Any success that he would have in this regard would be purely formal, as he has already served the sentences.

Conclusion

[27] Although Mr Morgan may be found by the court to have an appeal in place, a single judge of the court is, at this stage, bound to treat his appeal as having been

abandoned pursuant to section 296 of the Act. Even if that were not so, Mr Morgan does not qualify for bail pending appeal as he does not satisfy the requirement of section 13 of the Bail Act, since he was not granted bail prior to his conviction. His application must, regretfully, be refused.

Order

The application for bail pending appeal is refused as there is no appeal in place before the court.