

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NOS COA2020CR00014 & 15**

**BAIL APPLICATION NOS COA2020B00003 & COA2020B00006**

**IN THE MATTER OF CHRISTOBEL SMITH  
AND GARETH DAVIS**

**AND**

**IN THE MATTER OF APPLICATIONS FOR  
BAIL PENDING APPEAL**

**AND**

**IN THE MATTER OF APPLICATIONS FOR  
BAIL PURSUANT TO SECTION 13 OF THE  
BAIL ACT**

**Mrs Carolyn Reid-Cameron QC and Mrs Denive Barnett instructed by Carolyn  
C Reid & Co for the applicant Christobel Smith**

**Kemar Robinson instructed by Peter C Champagnie QC for the applicant  
Gareth Davis**

**Jeremy Taylor QC for the Crown**

**22 December 2020**

**IN CHAMBERS BY TELECONFERENCE**

**BROOKS P**

[1] On 9 October 2008 Mr Omar Marshall was killed by police officers at the rear of premises number 16 Blake Road in the parish of Kingston.

[2] The prosecution's case is that he was led there by a team of police officers which included the two applicants, Messrs Christobel Smith and Gareth Davis, and that Mr Marshall was unarmed at the time. The prosecution further asserted that Mr Marshall was shot by the applicants and succumbed to his injuries.

[3] The case for the defence was that the applicants acted in self-defence after they chased a man to the back of the premises at Blake Road. The applicants contended that the man turned around and pointed a gun at them and they fired at him because they were in fear for their lives. A firearm was recovered from the man after he was shot. Mr Smith insisted that he did not intend to kill Mr Marshall.

[4] The case was tried in the Home Circuit Court before a judge sitting with a jury. On 14 November 2019, the jury convicted both applicants. Mr Smith was convicted for manslaughter while Mr Davis was convicted for murder.

[5] On 7 January 2020, Mr Smith was sentenced to imprisonment for six years and 10 months. Mr Davis was sentenced to life imprisonment, but was ordered to serve 15 years before he would be eligible for parole.

[6] They have both filed applications for leave to appeal against their respective convictions. They have also applied to be admitted to bail pending the outcome of their appeal, as they are empowered to do by virtue of section 13(1) of the Bail Act, having been granted bail prior to their conviction.

[7] In answer to the court, counsel for the applicants, Mrs Reid-Cameron QC and Mr Robinson, as well as counsel for the Crown, Mr Taylor QC, are agreed that the applications for bail could be properly considered and granted even though the applicants had not yet been granted leave to appeal. Both Messrs Robinson and Taylor advocated the proposition that bail could be granted by a judge at first instance court, even before leave to appeal had been granted. The court also pointed out the provisions of section 31(2) of the Judicature (Appellate Jurisdiction) Act, which seemingly restricts the grant of bail to an “appellant”, and the definition of “appellant” in section 2 of that Act, which seems to include an applicant for leave to appeal.

[8] As counsel were asked to consider the matter without prior notice, the point will not be taken as settled. In light of what will be said below, the appropriate order at this point is to grant the applicants leave to appeal.

[9] The applications for leave to appeal and for the grant of bail pending appeal, converge. One of the bases for granting bail pending appeal, is that a proposed ground of appeal, either by itself or in combination with some other factor, or factors, satisfies the requirement that bail pending appeal should be exceptional circumstances. It is noted that in **Krishendath Sinanan and others v The State (No 1)** (1992) 44 WIR 359, Bernard CJ said, in part, at page 373:

“So that [a convicted person] 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....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...”

That principle has been approved and adopted by this court by Phillips JA in her judgment in **Linval Aird v R** [2017] JMCA App 26 (see paragraph [46]).

[10] In this case, counsel for the applicants assert that there is a good ground of appeal with a more than reasonable prospect of success. In addition, Mrs Reid-Cameron contends that Mr Smith would suffer exceptional hardship as a result of his medical condition if he were to remain in custody pending the hearing of his appeal. She pointed to the fact that his condition requires special medication and diet, both of which are denied him in the correctional institution. She added that his wife also suffers from a serious medical condition.

[11] The ground of appeal to which learned counsel refer is the complaint that the learned trial judge, in her summation to the jury, failed to direct them on the issue of the defence that is afforded a police officer in the execution of his duty to detect crime and to apprehend persons who are reasonably suspected of committing an offence. Learned counsel argued that the defence is contained in section 13 of the Constabulary Force Act and that the cases of **Vince Edwards v R** [2017] JMCA Crim 24 and **Leonard Lindsay and Tyrone Findlay v R** [2020] JMCA Crim 51, both require a trial judge to give that direction, when it is appropriate, whether or not it is relied upon by a police officer, who is on trial. Learned counsel argued that the learned trial judge’s failure to give the direction in this case is fatal to the conviction. This situation, they

submit, satisfies the requirement of exceptional circumstances, and enables the court to exercise its discretion in favour of granting bail to the applicants.

[12] Mr Taylor accepts that the learned trial judge did not give a direction in respect of the statutory defence. He, however, argued that the principle is not settled in this court that the omission will prove to be a fatal flaw in a judge's summation. This is not a case, therefore, he argued, that the appeal would probably succeed.

[13] Having considered the matter in the round, the court is of the view that an exceptional circumstance does exist. The failure of the trial judge to direct the jury on the defence afforded to a police officer by virtue of section 13 of the Constabulary Force Act is a strong ground of appeal. This is gleaned from the particularly strong comments made in **Findlay and Lindsay**, concerning the absence of a direction on section 13 of the Constabulary Force Act. Sinclair-Haynes JA, in delivering the judgment of the court, said at paragraph [153]:

"The learned judge was obliged to advise the jury of the statutory defence, even if that defence did not arise on the defence's case. Directions on self-defence alone would not suffice. An implied direction in these circumstances would be a non-direction and therefore a misdirection. In light of the foregoing, the failure of the learned judge to direct the jury to consider the statutory defence was fatal. This ground, therefore, succeeded."

[14] It must be said that, by themselves, none of the other reasons advanced by the applicants, namely:

- a. Mr Smith's medical condition;
- b. his wife's medical condition;

- c. the prior good character of the applicants; or
- d. the likely delay in the hearing of the appeal (proved not to be accurate as the learned trial judge's summation has already been produced and the transcript of the evidence is said to soon follow)

constitute exceptional circumstances for the purposes of the grant of bail pending appeal. They, however, together with the ground of appeal discussed above, combine to amount to exceptional circumstances, allowing for the grant of bail to the applicants.

[15] On those bases, therefore, the orders are as follows:

1. Leave to appeal against conviction and sentence for both applicants is granted.
2. The application for bail is granted for both applicants.
3. Bail is granted pending the hearing of the appeal in the sum of \$1,000,000.00 in each case with one or two sureties on the following conditions:
  - a. Each applicant and their respective sureties must enter into the undertakings required by rule 3.21 of the Court of Appeal Rules.
  - b. The undertakings are to be given before the superintendent of the correctional institution at which they are incarcerated, namely, the Saint Catherine Adult Correctional Centre.

- c. The applicants shall surrender all travel documents in their possession to the Registrar of the Court of Appeal.
- d. The applicants shall report to the Spanish Town Police Station, in the case of Christobel Smith, and the Stony Hill Police Station, in the case of Gareth Davis, every Monday, Wednesday and Friday between the hours of 6:00 am and 8:00 pm.
- e. A stop order is to be put in effect at all ports of exit.