

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COMMONWEALTH OF DOMINICA**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CLAIM NO. DOMHCV 0074 of 2022

BETWEEN:

MANDELL JOSEPH CYRILLE

Applicant

and

THE STATE

Respondent

Before:

The Hon. Mr. Justice Richard G. Floyd

High Court Judge

Appearances:

Mr. Wayne Norde and Ms. Gina Abraham-Thomas, Counsel for the Applicant

Ms. Marie Louise Pierre-Louis, State Counsel for the Respondent

2022: November 1st, 10th, 17th, 28th

JUDGMENT ON BAIL APPLICATION

[1] **FLOYD J:** This is an application for bail pending appeal. The applicant was born in the Commonwealth of Dominica on 4th December 1997. He is 24 years of age. He was charged after the complainant was attacked and seriously injured on 10th February 2018. The applicant was convicted of causing grievous bodily harm on 4th June 2021, following a trial with a jury. Prior to conviction, the applicant had received bail in the Magistrates' Court on 16th February 2018. Bail was renewed on 16th September 2019 and then granted in the High Court in September 2020. On each occasion, the applicant's mother, Anne Marie George, acted as surety. On

the day of his conviction, the applicant was granted bail pending sentence, with his mother again acting as surety.

- [2] On 30th July 2021, the applicant attended court, as required, and was sentenced to seven years in prison. He was also given a compensation order of \$5,000.00. An appeal was lodged, and on 26th October 2021, leave to appeal conviction and sentence was granted. The applicant now seeks bail pending that appeal.

The Position of the Parties

- [3] Learned counsel for the applicant submits that he is entitled to apply for bail. It should be granted as he has resided in the Commonwealth of Dominica all his life. He has ties to the community, in the form of family, a residence and employment. He has always lived with his mother. He has a young child that he supports. He is an electrician by profession.
- [4] The applicant's mother, Anne Marie George, is willing to continue to act as surety, just as she has always done in this case. The applicant can continue to reside with her. She owns real property, which is confirmed by way of documents filed, and has been employed at a local school for over 19 years.
- [5] Counsel for the applicant submits that **s. 22** of the **Bail Act, 2020 ACT 20**, allows for bail pending appeal, and **s. 6** sets out considerations where a person is convicted of an offence punishable by imprisonment and applies for bail. It is submitted that the applicant is not a risk under any of those considerations. The applicant has always abided by his bail conditions relative to this case, and has never failed to surrender himself into custody when necessary. He is not a flight risk.
- [6] Counsel for the applicant submits that the requirement to show exceptional circumstances in applications for bail pending appeal, as submitted by counsel for the respondent, is no longer necessary, as the common law bail considerations

are superseded by the **Bail Act** in Dominica. The applicant need only satisfy the requirements of that legislation.

- [7] Counsel for the applicant submits that the appeal in this case has merit. There are reasonable grounds, based upon the learned trial judge displaying bias towards the applicant during the course of the trial, and the learned trial judge misdirecting herself with regard to the issue of jury interference or tampering by the applicant.
- [8] Learned counsel for the applicant submits that there is a real risk that the applicant will serve his full sentence before his appeal is disposed of. As a result, he should be granted bail. To substantiate this claim, counsel for the applicant filed several notices of appeal for other cases in this jurisdiction, all of which, with the exception of one, remain outstanding. Three of those cases have not been resolved, seven years after the filing of notice of appeal. One case remains outstanding eight years later and another is unresolved nine years later. In one case, the applicant has served his five-year sentence, yet his appeal remains outstanding. Part of the delay in this jurisdiction, it is submitted, is caused by the lack of regular transcription services. Counsel for the applicant advised that there is no stenographer attached to the court. While learned counsel for the respondent took issue with this claim as a basis for delay, it was admitted orally that transcripts are not obtained in a timely fashion. Part of the reason for this is because the government stenographer works on transcripts on a part-time basis, in addition to her regular duties for other departments.
- [9] Despite indicating, in one of the two affidavits filed in response to this application, that the right to bail is lost after conviction, learned counsel for the respondent submits that the onus is on the applicant to show exceptional circumstances justifying the granting of bail pending appeal. It is further submitted that the applicant must show that there is a strong prospect of success in his appeal, in order for bail to be granted. Clarification was given in oral submissions by counsel for the respondent that where conviction has occurred, the presumption of innocence is lost, thereby increasing the concern that the applicant will abscond,

and not appear as required, if granted bail. The onus, therefore, shifts to the applicant to show cause why he should be released.

[10] Counsel for the respondent submits that the evidence against the applicant was overwhelming at trial, as is confirmed by the unanimous verdict of guilt from the jury. The appeal is not based on evidence tendered at trial. There is, therefore, no reasonable prospect of success on appeal. The grounds of appeal are tenuous. The issue of juror interference was successfully dealt with by the learned trial judge by way of *voire dire*. The issue of bias was not raised by defence counsel during the trial, and is without merit. No details of the alleged bias are given by the applicant in his notice of appeal. On that point, however, counsel for the applicant submits that it would require a transcript to flesh out the details of alleged bias and, therefore, the difficulty in obtaining a transcript is further accentuated.

[11] As to sentence, counsel for the respondent submits that the learned trial judge followed the **Eastern Caribbean Supreme Court Sentencing Guidelines**, and imposed a sentence of seven years. This was less than the recommendation of the State prosecutor, and far less than the maximum penalty of fourteen years. The sentence was fit and the conviction sound. There is no real prospect of success to the appeal, and therefore bail should be denied.

The Law

[12] The entitlement to judicial interim release or bail, arises from the right to liberty and the presumption of innocence. In Dominica, this flows from the **Bail Act** and the constitution. In this case, the presumption of innocence no longer exists, as the applicant has been convicted and sentenced. However, that does not end matters. **Section 1(a) of the Constitution of the Commonwealth of Dominica** indicates that every person in Dominica is entitled to fundamental rights and freedoms including life, liberty, security of the person and the protection of the law. **Section 3(1)** confirms that a person shall not be deprived of his personal liberty save as may be authorized by law. **Section 22** of the **Bail Act** allows a person who was

granted bail prior to conviction, and who appeals that conviction, to apply for bail pending the determination of her/his appeal. Under **s. 6(1)**, conditions are set out whereby a court may refuse a bail application by someone accused or convicted of an offence punishable by imprisonment (emphasis added).

- [13] Under **s. 6(1)**, the court may refuse bail if satisfied that the defendant will, if released, fail to surrender into custody; will commit an offence while on bail; will interfere with witnesses or evidence; or will otherwise pervert the course of justice. The court may also refuse bail if satisfied that the defendant should be kept in custody for his own protection; for the protection of the community; if he is a child, for his own welfare; for the preservation of public order; is serving a sentence; it has not been practicable to obtain sufficient information for want of time; the production of a report or further inquiries are necessary and that requires detention; he has previously breached conditions of bail; has no fixed address; or has given misleading information as to his name, address or identity.
- [14] Under **s. 6(2)**, the court shall have regard to several factors when considering bail. This includes the nature and seriousness of the offence and the probable method of dealing with the defendant if convicted; the character, antecedents, associations, and community ties of the defendant; the defendant's record of complying with bail previously; the strength of the evidence against him; and the length of time he would spend in custody if bail was refused.
- [15] Applications for bail pending appeal are, however, more unique than traditional bail applications brought by accused persons. They require further examination. The demonstration of exceptional circumstances by the applicant has been consistently required by the courts. At **s. 7-176 of Archbold Criminal Pleading, Evidence and Practice 2013**, it is indicated that the true question is whether there are exceptional circumstances which would drive the court to the conclusion that justice can only be done by the granting of bail. Such circumstances will exist where it appears, *prima facie*, that the appeal is likely to succeed or where there is a risk that the sentence will have been served by the time the appeal is heard. A

further determining factor would include where the hearing of the appeal would be delayed for some months, in order for a transcript to be prepared.

[16] In the case of **Careem Bedminister v The Queen**¹, the learned Justice of Appeal Edwards, confirmed the position that bail should be granted pending appeal only in exceptional circumstances. While the seriousness of the offence is a factor, the court must ask, are the circumstances relied upon in the application exceptional? This will include a consideration of the merits of the appeal. The court also considered the length of time for the appeal process and the gathering of transcripts, stating that *“this is not the type of case where a factor in favour of bail pending appeal is that the unavailability of the transcript of the evidence is likely to result in the sentence being served before the appeal is heard if bail is not granted...The whole sentence...is not likely to be served before the appeal is disposed of”* (emphasis added).

[17] In the case of **Michael Alexander v The Queen**², the learned Justice of Appeal Byron, as he then was, confirmed the statutory power found in the **Eastern Caribbean Supreme Court (St. Lucia) Act 1969** at s. 41(2), to grant bail pending appeal. This was a power to be used only in exceptional circumstances. Interestingly, the court noted that the issue of good character exists in every case where one has a first conviction and further, almost every appellant who was on bail pending trial has observed the conditions of bail. Nothing unique or exceptional was therefore to be found there. The court continued, at **para 12**, to indicate that there were two types of circumstances to be regarded as being exceptional. *“One is where there is a risk that the sentence would be served, fully or substantially before the appeal is heard, and the other is high probability that the appeal will be successful”* (emphasis added).

[18] There can be no doubt that while a right to appeal exists in the criminal justice system, there must be a meaningful opportunity for an individual to exercise that

¹ HCRAP 2008/022

² [1994] ECSCJ No. 39

right. Justice of Appeal Arbour, as she then was, confirmed in the case of **R. v Farinacci (L.W.) et al**³ that while public confidence in the administration of justice requires that judgments be enforced, it also requires that judgments be reviewed, and that any errors be corrected. This was described as the competing interests of enforceability and reviewability. At **para 44**, the court noted that:

There may have been a time when appellate delays were so short that bail pending appeal could safely be denied, save in exceptional circumstances, without rendering the appeal illusory. Such is no longer the case... Judges are often required to balance two competing principles of justice: reviewability and enforceability. Ideally, judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal to be decided and the possibility of irreparable and unjustified harm being done in the interval. This is largely what the public interest requires be considered in the determination of entitlement to bail pending appeal.

- [19] Following on from the **Farinacci** decision, the Supreme Court of Canada, in the case of **R. v Oland**,⁴ at **para 48**, indicated that, in balancing the tension between enforceability and reviewability, judges should be mindful of the anticipated delay in deciding an appeal, relative to the length of the sentence. *“Where it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided, bail takes on greater significance if the reviewability interest is to remain meaningful.”*

Analysis

- [20] The court has considered all the material filed and the submissions of counsel. The facts in this case are very serious, involving as they do, a vicious attack on the

³ (1993) 67 OAC 197 (C.A.)

⁴ 2017 SCC 17, [2017] 1 S.C.R. 250

complainant, which resulted in serious injury. A seven-year sentence was imposed and is now running.

- [21] The right to bail generally, is found at **s. 4** of the **Bail Act**, while the specific right to bail pending appeal is found at **s. 22**. The only other section in the **Bail Act** that refers to bail after conviction is found at **s. 6**. **Section 6(1)** lists grounds the court may use to refuse bail. **Section 6(2)** lists factors the court shall consider in exercising its discretion under **subsection (1)**. Unlike **s. 4**, nothing in either **s. 6** or **s. 22**, indicates which party has the onus in an application for bail pending appeal. Without such a legislative basis, the court returns to the common law, as confirmed in the cases of **Bedminister, Alexander**, and others, where the onus lies with the applicant to show exceptional circumstances. This finding is reinforced by the loss of the presumption of innocence once the conviction is registered.
- [22] Exceptional circumstances are set out in cases such as **Bedminister** and **Alexander**, and come down to the probability of success in the appeal, and the length of time it will take to hear the appeal. Is there a *pima facie* case made out for the appeal that raises a substantial question, and is not frivolous? Is it likely that the sentence will be fully or substantially served before the appeal is heard? If the answer is yes to either or both questions, then exceptional circumstances have been shown.
- [23] The use of the exceptional circumstances test, even in the face of legislation such as the **Bail Act**, is appropriate, because nothing specific to appeals is referred to in the bail considerations under **s. 6**. Considerations such as the merits of the appeal and the length of time the appeal process will take, are relevant and appropriate considerations for applications for bail pending appeal. Nothing like that is found at **s. 6**. Consideration of the merits of the appeal and the length of time it will take to complete the appeal, are further justified when one considers the principles of enforceability and reviewability, as described in the **Farinacci** and

Oland cases. The need to respect the general rule of immediate enforceability of judgments is maintained by requiring a meritorious appeal, but it is balanced by the acknowledgement that the justice system is not infallible and must allow for a timely review of its decisions. In other words, in order to allow for meaningful review prior to enforcement where inordinate delay is likely, and therefore exceptional, bail pending appeal should be granted.

[24] That is not to say that the bail considerations found at **s. 6** are not relevant, they are. Once exceptional circumstances are found to exist, factors for consideration as to whether bail remains appropriate, are to be reviewed. If bail is still found to be justified, then appropriate release terms are set out at **s. 8**. Factors governing the use of sureties are set out at **s. 10**.

[25] After examining the case for exceptional circumstances based on the merits of the appeal, the court is not satisfied that there is a strong probability or, to put it another way, a prima facie case that the appeal will be successful. While there is some attraction to the grounds of appeal, it does not rise to the necessary level establishing an exceptional circumstance for the purpose of this application. However, grounds of appeal are usually established through the court record, and this case is no different. As counsel for the applicant submitted, the delay in obtaining transcripts in this jurisdiction, places him in a very difficult position. Transcripts are required not only for the appeal proper, but also for this application. The difficulty in obtaining transcripts in a timely fashion is therefore clearly illustrated, and leads us to the second ground of exceptional circumstances.

[26] The authorities are clear. The fact that the appeal process will be protracted, and the risk that the sentence will be served, either substantially or fully, before the appeal is heard, constitutes exceptional circumstances for the purposes of applications for bail pending appeal. Based on the material presented, the court is satisfied that the applicant has demonstrated that such a delay in dealing with the appeal is likely in this case. A history of delay is obvious when one examines the

notices of appeal filed in this court. Several cases are currently outstanding before the Court of Appeal which have been in the system for seven years or more, which was the sentence in the applicant's case. It is equally clear that the preparation and presentation of transcripts is a contributing factor in that delay. If bail is not granted to the applicant, there is a strong possibility that he will have served his entire sentence before his case is heard. Indeed, that has happened to other appellants in this jurisdiction. All of that satisfies the exceptional circumstances requirement.

[27] Affidavit evidence was filed to confirm a plan of release. The plan has the attraction of surety supervision. The applicant can return to his residence with his mother. He has a profession that can generate an income. His mother can resume her position as surety, a role that she has held throughout this case, without breaches occurring. Not only has the applicant's mother, Anne Marie George, acted as surety before in this case, material filed confirms that she has employment, assets, and real property that would satisfy any bond imposed. In light of the very serious facts of the case and the fact that the applicant has been convicted of the offence that he is appealing, a plan of bail with the assistance of a surety is essential. The use of sureties in the bail process is outlined at **s. 10** of the **Bail Act**, and the court has considered that carefully. If found to be acceptable, a surety has a significant role to play in the bail process. It is a serious commitment that assists in the supervision of the applicant and seeks to ensure compliance with bail conditions.

[28] A judicial interim release application requires the Court to be confident that, amongst other things, the applicant will not flee the jurisdiction and fail to attend court. After reviewing all the material filed, and upon hearing the submissions of counsel, the court has no concerns in that regard. The applicant is a citizen of the Commonwealth of Dominica, he has resided here all his life. He has family, a trade, and a residence here. Even with the serious sentence that the applicant faces, the court does not find the applicant to be a flight risk, owing to the close connections that he has to this community. Although counsel for the respondent

strongly urged the court to consider the risk of flight after conviction as a basis to deny bail, the court must go further, pursuant to **s. 6(1)** of the **Bail Act**.

[29] Turning to the other enumerated grounds, the court must consider whether there is a substantial likelihood that the applicant, if released, would commit further offences. He has no criminal record, save for the offence which he was convicted of, and which he now appeals. Nothing else was presented in that regard. There is no concern relating to witness interference or perverting the course of justice generally, if released, since the trial has been completed. Nothing was presented to show that there is a need to detain the applicant for his own protection, the protection of the community or the preservation of public order. The applicant has no convictions for failing to comply with conditions of release in the past, and he has a residence available to him if released. An ongoing bail plan has been put forward. A surety that has acted in the past, is again presented. Cash money and property are available through that surety.

[30] If public confidence in the administration of justice is to be maintained, an application for bail pending appeal, with these facts, must be accepted. If the review process of judgments is to be meaningful, then in the face of such delays as are evident here, bail pending appeal must be granted. The court is satisfied that any concerns surrounding the release of the applicant can be alleviated with strict terms of bail and the use of a surety.

[31] For all of these reasons, the applicant has shown cause why he should be released on bail pending appeal, and this application is hereby granted. The applicant is therefore released on a recognizance of bail. Bail is set in the amount of \$100,000.00 bond, with no cash component. There shall be one suitable surety. The applicant shall be bound by the following conditions:

- (a) The applicant shall report to and sign in at the Vielle Case Police Station every Monday, Wednesday, Friday, and Saturday, between the hours of 6:00 AM and 6:00 PM, commencing immediately upon his release from custody.

- (b) The applicant shall reside with his mother, Anne Marie George, at Vielle Case, Dominica
- (c) The applicant shall not contact or communicate in any way, either directly or indirectly by any physical, electronic, or other means, with the complainant, Kevin George.
- (d) The applicant shall not be within 100 feet of the complainant, Kevin George, nor any place where the complainant lives, works, or goes to school.
- (e) The applicant shall not possess any weapon, firearm, pellet gun, flare gun, imitation firearm, prohibited weapon, restricted weapon, bladed weapon, ammunition or explosive substance, or anything designed or intended to be used to cause death or injury.
- (f) The applicant shall not possess or apply for any licence, authorization, or registration certificate for any such weapon referred to above.
- (g) The applicant shall remain within the Commonwealth of Dominica.
- (h) The applicant shall deposit his passport and any other travel permits or documents with the High Court Registry Office immediately upon his release from custody.
- (i) The applicant shall not apply for a passport or any other travel permits or documents while this case remains outstanding.
- (j) The applicant shall keep the peace and be of good behaviour.
- (k) The applicant shall surrender himself into custody at the State Prison, Stock Farm, between the hours of 09:00 am and 12:00 pm, on the day before the date scheduled for the hearing of his appeal.
- (l) A breach of any of the terms of this recognizance of bail shall result in the immediate revocation of bail, and the associated bond shall be subject to estreatment proceedings.

Richard G. Floyd
High Court Judge

By the Court

Registrar