

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: ANUHCV 2021/0299

In the matter of section 7 of the Constitution of Antigua and Barbuda

And

In the matter of CPR 58

BETWEEN:

PATRICK MATTHEWS

Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Appearances:

Dr. David Dorsett, Counsel for the Applicant

Mrs. Shannon Jones-Gittens, Counsel for the Respondent

2021: August 11th, 25th

DECISION

Background

- [1] **WILLIAMS J.:** The Applicant, Dr. Patrick Matthews, a physiotherapist of Crabbs Peninsular, Antigua and Barbuda, was convicted on 27th July, 2021 of two offences contrary to the **Medical Practitioners Act 2009** following a trial by a judge sitting alone without a jury. The Learned Trial Judge adjourned the Applicant's matter to 28th September, 2021 for sentencing. The Learned Judge remanded Dr. Matthews to prison pending sentencing. The present application is for Dr. Matthews to be released on bail in the interim.
- [2] The offences for which Dr. Matthews was convicted are: practicing medicine as a general practitioner, and recovering fees for practicing medicine when not registered or holding a valid licence. The offences are contrary to sections 12 (a) and 12 (c) of the **Medical Practitioners Act 2009**. The maximum penalty the law provides for those offences are: a fine of \$25,000.00, or imprisonment for three years, or both fine and imprisonment.

- [3] A Fixed Date Claim Form on behalf of Dr. Matthews was submitted and filed on 30th July, 2021. The Claim Form was supported by an Affidavit, sworn to by Ms. Jacqueline Matthews-Lapierre Armande of Royal Gardens, Antigua. She is the Applicant's sister. Exhibited with that Affidavit was a medical report from Dr. Alfonso Jerry Simon dated 29th July, 2021. The reliefs sought by the Applicant are:

“(1) To be released on bail on the same terms as previously granted and ordered.

(2) Any such further or other relief pursuant to section 20 of the Eastern Caribbean Supreme Court Act.”

- [4] The Applicant's Counsel, Dr. David Dorsett, advanced three grounds in support of the petition for bail:

- 1) In view of the penalties provided for offences under section 12 of the **Medical Practitioners Act 2009**, an immediate custodial sentence is unlikely;
- 2) The Applicant's health condition was fragile and deteriorating, and the prison facilities are not conducive to his (the Applicant's) good health and the securing of his constitutional right not to be subjected to inhumane treatment;
- 3) An appeal against conviction with strong grounds will be filed at the earliest possible opportunity.

Likely Sentence

- [5] Dr. Dorsett advanced reasons as to why he thought that a custodial sentence was unlikely to be visited upon the Applicant. Among the factors Dr. Dorsett identified were:

- 1) the fact that the legislature provided for a financial penalty as an alternative to a custodial sentence; and
- 2) the general principles of sentencing favoured the Applicant.

- [6] There are established principles of sentencing: Retribution; Deterrence; Prevention; and Rehabilitation. Among the factors that a sentencer would have to consider are that:

- Dr. Matthews was a first time offender – he had an unblemished record with no previous convictions;
- There is nothing to suggest that there was any need for deterrence – whether specific or general – particularly since there is no indication of a prevalence of this type of offence; or
- There is a need to prevent the Applicant from re-offending; or

- That the Applicant was in need of rehabilitation; and
- Whether any useful purpose will be served by sending Dr. Matthews to jail.

- [7] There are published **Sentencing Guidelines** for Member States of the Eastern Caribbean Supreme Court for a number of offences; however, no **Guidelines** have as yet been published for any offence contrary to the **Medical Practitioners Act**. The broad methodology utilised in the **Sentencing Guidelines** is well known. It begins with establishing a notional starting point for the sentence by considering the seriousness of the offence and the category or consequences of the offence. Then adjustments made following an evaluation of the aggravating and mitigating factors affecting the offender. (In appropriate cases, there are discounts for an early guilty plea. This would not apply in this case as the Applicant was convicted following a full trial, so the issue of any discount for an early guilty plea does not arise) and there are further adjustment as well for any time the offender may have spent in custody. Finally, an appropriate sentence is imposed.
- [8] Dr. Dorsett submitted that it should be borne in mind that “imprisonment should be seen as a last, rather than a first resort, particularly for a first time offender.” Counsel also submitted that “offences that offer the payment of a fine are generally speaking to be viewed as less serious than offences which do not carry an option of a fine.”
- [9] Any consideration as to what penalty the Learned Judge is likely to impose is entirely speculative at best at this stage. The fact is: the Applicant was remanded by the Judge, who has a range of sentencing options available when the matter comes up on 28th September, 2021 including deeming the time spent on remand awaiting sentence as being sufficient (in other words ‘time served’); to imposing a fine; and ultimately a term of imprisonment which would take into consideration the time the Applicant spent at the prison since conviction.
- [10] When the Applicant’s case comes up for sentencing, the Learned Judge ought to have the Probation Report which the Applicant’s counsel requested, to assist the Court in arriving at what is the most appropriate sentence.

Health Circumstances

- [11] The Applicant’s sister in her Affidavit described Dr. Matthews’ health condition as “fragile”. He is a 56 year old man, 5’ 11” tall and weighing 120 pounds. Ms. Matthews-Lapierre Armande said that the Applicant suffers from serious medical conditions. She exhibited a two-page medical report prepared by Dr. Alfonso Terry Simon.
- [12] Dr. Simon’s report indicates that he has been treating the Applicant during the past 12 years for several chronic issues. Some of the health issues impacting on the Applicant’s health are:
- 1) Irritable Bowel Syndrome – which causes gastro intestinal disturbances, including abdominal pain, diarrhea and at times constipation, a lack of appetite, significant weight loss, insomnia and chronic fatigue.

- 2) Vulnerability to respiratory, skin, gastro intestinal and other infections – consequences of his current nutritional status which is weakening his immune system.
- 3) Psychological stress – due to the symptoms of his conditions.
- 4) Multiple food allergies and dietary needs. His diet needs to be carefully planned to reduce gastrointestinal disturbances and reduce the effect of allergies, as well as avoiding overly refined carbohydrates, foods fried in hydrogenated or partially hydrogenated oils, most wheat-based bread and pasta.
- 5) Residual effects of a motor vehicle accident.

[13] Ms. Matthews-Lapierre Armande at paragraph [6] of her Affidavit stated:

“Conditions at Her Majesty’s Prisons are notoriously harsh and austere. I am fearful that by being kept on remand my brother’s right not to be subject to inhumane treatment may be contravened.”

[14] Dr. Dorsett reiterated that the Applicant’s continued incarceration is likely to be detrimental and in the circumstances of this case, would amount to cruel and inhumane treatment.

[15] **The Antigua and Barbuda Constitution Order 1981**, Cap 23 of the Laws of Antigua and Barbuda Revised Edition 1992 states at section 7:

“(1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Antigua on the 31st October 1981.”

[16] Dr. Dorsett noted that section 7 (1) of **The Antigua and Barbuda Constitution Order 1981** was modelled after article 3 of the **European Convention of Human Rights**. He cited the case of **Mouisel v France** ECHR 2012 in support of his submission that: “The State must ensure that the Applicant is detained in conditions that are compatible with respect for his human dignity.”

[17] The substance of the submission is not that imprisonment in and of itself is cruel and inhumane; but rather, “in the circumstances” of the Applicant’s case, Dr. Dorsett was of the view that it could.

[18] The circumstances of this case are multifaceted. Looked at from the Applicant’s perspective, they include his physical and mental health, his nutritional requirements, his age, his previously unblemished record and his belief that a non-custodial sentence is appropriate. The Applicant’s counsel while pointing to the extremely harsh conditions at Her Majesty’s Prisons refrained from mentioning the sharp contrast at Her Majesty’s Prison to those the Applicant would be familiar with

at Crabbs Peninsular and the impact that this conviction will inevitably have on his professional standing.

Prospective Grounds of Appeal

- [19] Dr. Dorsett submitted that the intended appeal against conviction is likely to succeed. He stated that a number of things went wrong during the trial which the Applicant intended to canvass on appeal.
- [20] Noting that a defendant has a right to a fair trial, Dr. Dorsett stated that a jury ought to be properly directed and all defences properly put. He also felt that there was a wrongful rejection of the 'no case' submission.
- [21] There were also grounds relating to aspects of the charge, such as what is meant by the word "practice" which refers to doing something repeatedly as a habitual or continuous course of conduct. As far as the charge regarding recovery of fees was concerned, Dr. Dorsett said they intended to raise the following question for the Appellate Court's consideration: if money is paid to a company whether that could amount to payment to a shareholder of the company?

Crown's Response

- [22] The Crown did not file any Affidavit in response, challenging any of the grounds advanced by the Applicant.
- [23] Mrs. Jones-Gittens on behalf of the Respondent questioned what authority the Court has to review a person's bail in circumstances where that person has been convicted and remanded - the trial judge having exercised the discretion not to grant bail. That submission ignored the factual background in this matter, where the bail application was filed, but the Trial Judge is on leave and out of the country and would not be back for some time. The bail application was accordingly assigned to be heard. The hearing of the application therefore ought not to be construed as being in the nature of an appeal in any way. Rather, the wheels of justice entitles the citizens of the country to have access to the Courts and to have their matters adjudicated upon in a timely manner.
- [24] In response to the submissions from the Applicant's counsel regarding the **Bail Act**, Mrs. Jones-Gittens noted that the **Bail Act** itself states how and when it shall come into operation and that to date, no proclamation regarding the commencement of the **Act** has been published.
- [25] The **Antigua and Barbuda Bail Act**, No: 19 of 2019, was Passed in the House of Representatives on 23rd July, 2019; Passed in the Senate on 31st July, 2019; and assented to by the Deputy Governor-General on 25th October, 2019. At section 1 (2) it states: "This Act comes into operation of a date which the Minister may appoint by notice published in the Gazette." ['Minister' means the Minister with responsibility for Legal Affairs]. The Minister has not yet appointed any date.
- [26] Crown Counsel Mrs. Jones-Gittens noted that a trial judge has the power to remand a convicted person pending sentence. The Trial Judge in the Applicant's case did not allow the Applicant to remain on bail. Mrs. Jones-Gittens said that the fact of the conviction was sufficient and represented

a change of circumstances. The Applicant, Mrs. Jones-Gittens said, could only access bail pending appeal and the Crown's view is that only a judge of the Court of Appeal could grant bail pending appeal.

- [27] The **Eastern Caribbean Supreme Court Act**, Cap. 143 of the Laws of Antigua and Barbuda Revised Edition 1992 provides at section 56 (e):

"The powers of the Court of Appeal under this Act – to admit an appellant to bail, may be exercised by any judge of the Court of Appeal in the same manner as they may be exercised by the Court of Appeal... but, if the judge refuse an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court as duly constituted for the hearing and determination of appeals under this Act."

- [28] No issue could have arisen as to whether a High Court judge could grant bail pending appeal if the **Bail Act 2019** had entered into force. At section 10 of that **Act**, the 'Powers of the High Court regarding bail' are listed:

"The High Court may exercise the following powers regarding bail:

- a. ...
- b. ...
- c. grant bail to a person who has been convicted of an offence if that person can demonstrate to the court why bail should be granted;
- d."

Was There a Prior Bail Application?

- [29] The Applicant and Respondent have differing views as to what transpired after the Learned Trial Judge delivered the verdict. Counsel for the Crown, Mrs. Shannon Jones-Gittens was of the view that the Applicant made an application for bail pending sentence, which the Judge refused. The Claimant's counsel is of the view that "an inquiry" was made as to whether or not the Applicant's bail could continue until September. According to Dr. Dorsett, the Judge said "no" but gave no reasons for saying so.
- [30] Dr. Dorsett submitted that what happened after the pronouncement of the verdict cannot be seen as a proper judicial consideration. No grounds were advanced for consideration by the Judge and no reasons given for not admitting the Applicant to bail. Dr. Dorsett however felt that given the fact that the Applicant observed all his obligations while on bail prior to the trial, then there was a basis upon which the Judge could have exercised judicial discretion to have those conditions continue.

Bail Post-Conviction

- [31] There is no dispute that the Applicant following his arrest and charge, dutifully observed his conditions of bail. However, prior to conviction, there is no longer a 'right to bail.'

[32] Although a **Bail Act** was enacted in Antigua and Barbuda, it has not yet entered into force, since the commencement date has not as yet been proclaimed by the Minister. Bail considerations are governed by **The Antigua and Barbuda Constitution Order** and the common law.

[33] In **Sinanan and others v The State** (1992) [No 2] 44 WIR 359, a case arising out of Trinidad and Tobago where murder convicts petitioned for bail pending appeal, Bernard CJ distilled the difference between an accused person seeking bail, and a convicted person seeking bail. Chief Justice reviewed a number of English Authorities. He said:

“What was being emphasized was that normally bail would not be granted to an appellant or to a prospective one after his conviction by a jury; that [it] is not to be lightly allowed; and so an applicant had to show that, in his case, there were special circumstances which made it the just thing to do to put him on bail pending the hearing of his appeal.

“...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 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.”

[34] In **Commonwealth Caribbean Criminal Practice and Procedure**, (Fifth Edition, Dana S. Seetahal with updates by Roger Ramlogan) the following is said at page 68:

“‘Bail’ granted on appeal does not strictly conform to the usual definition of bail, which relates to pre-trial release. The defendant in such circumstances would have been convicted of the offence and would now be applying for bail pending the hearing of his appeal. The fact that he has been found guilty by a competent tribunal means that the defendant has lost his constitutional right, so to speak, to bail that attaches to a person arrested and ‘charged’ with an offence.”

[35] After referring to the decision in **Sinanan et al v The State**, Seetahal and Ramlogan go on to highlight the key findings of that judgment:

“The court confirmed that in keeping with the common law, there was no inherent jurisdiction in the court to grant bail to a person who had been convicted.... They emphasized the constitutional right to bail... was restricted to persons who had been arrested but not yet tried for an offence. Finally, the court reiterated that the granting of bail to persons who have been convicted by a jury is a facility that is sparingly and only in very ‘exceptional circumstances’ to be used.”

[36] There are two points worth repeating that contrast (i) bail for an accused person and (ii) a convicted person applying for bail:

- 1) Prior to conviction, it is the State and those objecting to bail who must satisfy the Court that the Applicant ought not to be granted bail. This is grounded in the presumption of innocence and the Applicant’s right to personal liberty.

- 2) Post-conviction, the onus shifts to the Applicant to show why bail ought to be granted pending the determination of the appeal and in order to do so, the Applicant must demonstrate exceptional circumstances.

Time for Appealing

- [37] The Applicant was convicted on 27th July, 2021. He is to be sentenced on 28th September, 2021. It is accepted by the Counsel for the Applicant that the time for appealing has not yet arisen in this case, since it is only at the completion of the matter that an appeal can be properly lodged. It is only after the sentence is imposed following the hearing of 28th September, 2021 that the time for appealing arises.
- [38] However, given the fact that the matter was adjourned for sentencing and the matter therefore is incomplete, the issue of bail would no doubt be a matter for consideration by the Judge. The issue of 'Continuous bail' is addressed in the **Criminal Procedure Act** Cap. 117 of the Laws of Antigua and Barbuda Revised Edition 1992, at section 77:

“Where, on any adjournment of a criminal proceeding, either in the Supreme court or before a Magistrate, the accused is admitted to bail the recognizance may be conditioned for his appearance at every time and place to which the proceeding may be, from time to time, adjourned.

“Provided that nothing in this section contained shall prejudice the power of the Court or Magistrate, at any subsequent adjournment of the proceeding, to refuse to admit the accused to bail, or, as a condition of such person being admitted to bail, to require him to enter into another recognizance as the Court or Magistrate may direct.”

- [39] The Trial Judge on 27th July, 2021 had several options available: to allow the old bail to continue; require new conditions; or refuse to admit the Applicant to bail. As stated earlier, the Learned Judge opted to not admit the Applicant to bail.

Conclusion

- [40] This application for bail falls into a most unusual category. It is not an application for bail pending appeal, but rather for the Applicant to remain at large pending sentence.
- [41] There have been numerous instances where persons post-conviction have been allowed by a trial judge to remain at large. It would seem that it is entirely up to the discretion of the particular judge to determine whether or not a convicted person would be immediately incarcerated following a guilty verdict or whether the convicted person would remain free prior to sentencing at some future date.
- [42] Certainly, in circumstances where a sentencer is contemplating a non-custodial penalty, or a fine only, there is wisdom in permitting the Defendant to remain at large. On the other hand, if the sentencer considers that a custodial term is inevitable, or that a very brief 'short, sharp, shock' is

required, then the Defendant may well be remanded. The decision falls squarely into the judicial discretion.

- [43] The fact of the Applicant's conviction changed his previous entitlement to bail as of right but the Trial Judge was empowered to admit the Applicant's bail to continue until sentencing.
- [44] A judge of concurrent jurisdiction in my view cannot overturn the decision of the Trial Judge not to allow a convicted person to remain at large pending sentencing. Even if that other Judge in the circumstances may have considered it reasonable to let the convicted person remain at large pending sentencing, the original decision to remand the convicted person must stand. It is not so much whether there are good or solid reasons for permitting the convicted person to remain at large, but the change of status, to one who is now proved to be guilty of an offence, not only extinguishes the presumption of innocence which previously existed, but carries the burden of the consequences of the penalty – which includes incarceration (pending sentence).
- [45] In the circumstances, the Applicant's application for bail is denied.
- [46] This written decision is provided in keeping with the request made by counsel for the Applicant following the decision at the hearing of the application on the 11th August, 2021 to have the reasons put in writing.

COLIN WILLIAMS
High Court Judge

By the Court

Registrar