

**JAMAICA**

**IN THE COURT OF APPEAL**

**BAIL APPLICATION NO 1/2013**

**DEREEK HAMILTON v R**

**Floyd Green instructed by Y. A. Henry Morgan for the applicant**

**Miss Melony Domville for the Crown**

**25 June 2013**

**IN CHAMBERS**

**ORAL JUDGMENT**

**BROOKS JA**

[1] On 30 May 2013, Mrs Dereek Hamilton was sentenced to serve nine months imprisonment at hard labour. This was after she had been convicted for the offence of unlawful wounding in the Resident Magistrate's Court for the parish of Saint Elizabeth, which was, at the time, being held at Balaclava in that parish.

[2] Mrs Hamilton has filed an appeal against the sentence and cited six grounds on which she intends to rely, in arguing her appeal. She, however, seeks to be granted bail pending the hearing of her appeal. Her application to this court for that relief has been referred to be heard by a single judge in chambers.

## The law

[3] The issues to be assessed in an application for bail pending appeal were carefully considered by Phillips JA in **Seian Forbes and Tamoy Meggie v R** [2012] JMCA App

20. The learned judge of appeal, in her usual comprehensive style, pointed out that:

- a. this court has no inherent jurisdiction to grant bail to a convicted person;
- b. the statutory authority for the court to grant bail resides in section 13(1) of the Bail Act and section 31(2) of the Judicature (Appellate Jurisdiction) Act;
- c. there is no entitlement to bail after conviction, as in the case of bail pending trial, this is because the presumption of innocence no longer exists;
- d. the grant of bail pending the hearing of an appeal resides in the discretion of the court, but that that discretion will only be exercised in the applicant's favour in "exceptional circumstances";
- e. in considering whether exceptional circumstances exist, the court must, among other things, look at the likelihood of success on appeal;
- f. applications in appeals from the Resident Magistrates' Courts are treated differently from appeals from the Circuit Court, primarily because of the difference in the

length of sentences and the fact that, in Jamaica, there is no statutory requirement that time spent awaiting the outcome of the appeal should be counted in the sentence that is handed down at the end of the appellate process; and

- g. where the sentence is a relatively short one and the likelihood of the appeal being heard within a short time is small, this may be considered “exceptional circumstances”, as justice may not appear to have been done if the appeal is successful, but the appellant has served most or a very substantial part of the sentence.

[4] Phillips JA relied on a number of cases in her judgment, including **R v Marsh** (1965) 9 JLR 217, **R v Tomlinson and Riley** (1970) 12 JLR 220 and **The State v Lynette Scantlebury** (1976) 27 WIR 103. Those cases examined and enunciated the majority of the principles set out above.

[5] This court’s jurisdiction to grant bail pending appeal may be exercised by a single judge of the court. Section 13 of the Bail Act states:

**“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.**

(2) A person whose application is refused by a Resident Magistrate may appeal against such refusal to the Court of Appeal." (Emphasis supplied)

[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. The matters raised by section 4(2) of the Bail Act will assist to guide that consideration. 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."

[7] The final matter of law to be identified, is that rule 3.21 of the Court of Appeal Rules 2002 (CAR), requires the court to impose certain obligations on an applicant where the court exercises its discretion to grant bail to that applicant. The relevant portion of the rule states:

- "3.21 (1) Where the court admits an appellant to bail pending the determination of his or her appeal, the court –
- (a) must direct the amounts in which the appellant and any sureties are to be bound by undertakings in forms B11 and B12; and
  - (b) may direct before whom the undertakings of the appellant and his or her surety or sureties (if any) are to be taken."

Although the forms mentioned in the rule speak to the jurisdiction of the Circuit Court, the forms may, undoubtedly, be tailored to suit the circumstances where the court at first instance is the Resident Magistrates' Court.

[8] Having considered the relevant law, the circumstances of the instant case may now be examined in the context of the law.

### **The instant case**

[9] In considering any application for bail the nature and seriousness of the offence is always relevant as it may affect the likelihood of the applicant appearing at court for his trial or appeal as the case may be. In the instant case, Mrs Hamilton was convicted

of chopping her brother on the heel with a machete. His injuries were said to have been serious and the effects likely to be permanent, as his Achilles tendon was severed.

[10] In the case of an appeal, as mentioned above, the length of the sentence is also important. It should be noted that in her well researched and reasoned submissions in respect of the application, Ms Domville for the Crown has informed the court that inquiries conducted by the Crown have confirmed that the registrar of this court has not yet received the notes of the proceedings in the court below, and that those notes are not yet available from that court.

[11] It is also unlikely, having regard to this court's list that this appeal would be heard during this term.

[12] Having regard to those matters and the fact that normally, a convicted person would serve only two-third of the sentence imposed, it would, indeed, be an injustice if the appeal were to be successful with the applicant being in custody during that time. I find that exceptional circumstances do exist in this case to allow for the grant of bail to Mrs Hamilton, the applicant.

[13] In her affidavit in support of her application for bail, Mrs Hamilton deposed that she had appeared before the Resident Magistrates' Court in response to a summons and that she had faithfully attended court on each occasion that her case was listed before the court. The Crown has not filed any affidavit which contests any of the assertions made by Mrs Hamilton. Based on the evidence before me, I am prepared to

find that Mrs Hamilton will pursue her appeal, will attend at the hearing of the appeal and will pose no threat to the proper administration of justice pending the outcome of her appeal.

[14] I find, in those circumstances, that she has satisfied the requirements of section 13(1) of the Bail Act. She, no doubt, on each occasion that she appeared before the court, would have been bound over to appear on the next occasion until the date of her conviction. Although she was not strictly speaking on bail, as section 13(1) stipulates, the practical result of her situation was identical to the requirement of the section.

[15] It only remains to satisfy the requirements of rule 3.21 of the CAR. Mrs Hamilton states that she is 42 years old and a farmer. She is married and has six children by her husband. Their ages range from 18 to four years. She has not given any evidence concerning her level of income but I am prepared to impose an amount for the bond based on the circumstances that she has identified. I stipulate that she must enter into a bond in the sum of \$100,000.00 to perform those requirements.

### **Conclusion**

[16] In the circumstances, I generally agree with the submission by Miss Domville, when she states in her written submissions:

“The sentence is a [relatively] short one and it appears that the appeal cannot be brought on in good time, and there is a danger that the applicant will have served most of her sentence before her appeal is heard. In the circumstances this amounts to an exceptional circumstance for the Court of Appeal to depart from the principle and grant bail.”

I have inserted the word "relatively" in order to fit the extract to the context of the law outlined above. I make no judgment as to whether the length of this sentence is appropriate in respect of the offence for which Mrs Hamilton has been convicted. That is a matter for determination on appeal.

[17] I therefore grant Mrs Hamilton's application for bail pending the determination of her appeal or further order of the court. Bail is granted in the sum of \$100,000.00 with one or two sureties with the following conditions:

- a. The applicant and each of her 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 clerk of courts for the parish of Saint Elizabeth.
- c. The applicant shall surrender to the said clerk of courts all travel documents in her possession and shall not leave the island before the determination of her appeal.