

Kay Stalpef

IN THE SUPREME COURT OF BELIZE, A.D. 2009

CLAIM NO. 156

Bail

IN THE MATTER OF OMAR URBINA, the Petitioner  
[post-shelton Tillett]  
AND + Jimenez

IN THE MATTER OF a person charged with an offence under Section 107 of the Criminal Code and section 45(e) of the Criminal Code Act, Chapter 101 of the Laws of Belize Revised Edition, 2000 read along with the Crime Control and Criminal Justice Act No. 25 of 2003, chapter 102 of the Laws of Belize Revised Edition 2000.

AND

IN THE MATTER OF Section 16(3) of the Crime Control and Criminal Justice Act Chapter 102 of the Laws of Belize, 2000 as amended by Act No. 25 of 2003.

Mr. Kevin Arthurs for the Petitioner  
Ms. Cheryl-Lynn Branker-Taitt for the Respondent

LEGALL J.:

The petitioner was charged for two offences of aggravated assault with the use of a firearm contrary to section 45(e) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize. It is alleged that the offences were committed on 18<sup>th</sup> February 2009 at about 9:15 p.m. on Alexander Mencias and Janine Perriott at Orange Walk Town in the Orange Walk District. The Petitioner was taken to the Orange Walk Magistrate's Court on 20<sup>th</sup> February 2009, and the magistrate refused bail acting in accordance with section 16(1) of the Crime

Control and Criminal Justice Act, Chapter 102 (the Act). Section 16(1) states as follows:

**“Notwithstanding any other law or rule of practice to the contrary no magistrate, justice of the peace or a police officer shall admit to bail any person charged with any of the offences set out in subsection (2) below.”**

Aggravated assault with the use of a firearm is one of the offences set out in subsection (2).

Under the provisions of section 16(3) of the Act, where bail is refused by the magistrate, the person charged for such an offence may apply to the Supreme Court for bail, and to use the words of section 16(3), “the Supreme Court <sup>in the courts</sup> ~~may~~ <sup>discretion</sup> for special reasons to be recorded in writing, subject to subsection 4, grant bail to such a person other than for the offence of murder.’ Subsection (4) lays down procedural steps such as giving the DPP seven days prior notice of the hearing of the application for bail and making it a condition of bail that the accused person must report to the nearest police station every week.

Subsection (3) is very important. It states that in considering the application for bail, the Supreme Court must pay due regard to the following factors:

**“(a) ..... the prevalence of the crime with which the accused person is charged, (b) the possibility of the accused person being a danger to the public or committing other offences or interfering with**

witnesses while on bail, (c) the public interest involved in assisting the security services to combat crime and violence, and (d) all other relevant factors and circumstances.”

~~At every~~  
~~consider bail~~  
~~if special~~  
~~reasons~~  
So under section 16(3) if there are special reasons, the Supreme Court may grant bail, but in considering bail the court must pay due regard to (a), (b), (c) and (d) above.

It is indeed regrettable that Parliament did not provide a definition of the ambiguous phrase “special reasons”. As it happens on so numerous occasions, it is left to the courts to judicially define the phrase. Assistance, it may be argued, to judicially define the phrase came from two English cases and one Guyanese case namely, *Whittall v. Kirby* 1946 2 A.E.R. 552, *R v. Wickins* 1958 42 C.A.R. 286 and *Knights v. Cruz* 1996 54 W.I.R. 257. In all these cases above, the courts were called upon to judicially define “special reasons” in circumstances where the defendant pleaded guilty. The courts were required by statute to impose a lesser punishment, after conviction, if there were “special reasons”. It was in the context of punishment, that the courts in the above cases defined special reasons as follows:

*post bail*  
*defendant*  
*added*  
*Wickins*

*not same as pre bail*

“A “special reason” ..... is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as

distinguished from the offence is not a “special reason within the exception.” *See Kennard CJ in Cruz and Goddard CJ in Kirby.*

None of these cases, dealt with a pre-trial application for bail where the accused person is presumed innocent. They were defining special reasons in the context of mitigating or extenuating circumstances for the purpose of imposing punishment on a person convicted of a criminal offence.

But in the case of the *Re: Jimenez* 2004 Belize Law Report, at 248, at first instance, the Court followed the definition of special reasons given in the cases above on an application for bail, and refused the application. The court as we have seen held that a special reason was one which was special to the facts which constituted the offence, and not one which was special to the offender as distinguished from the offence.

Though section 16(3) of the Act, referred to above, states that the court must pay due regard in considering bail to, inter alia, the possibility of the accused person being a danger to the public and to other relevant factors and circumstances, matters which, it seems to me, would include issues special to the offender, still the court in the *Jimenez* was not persuaded by this section before adopting the definition of special reasons given by the cases referred to above.

With the greatest respect, in bail applications <sup>(i.e. not after conviction while awaiting appeal)</sup> before conviction, the term “special reasons” should not, in my opinion, be limited to the facts which constitute the offence; but the court should consider “relevant factors and circumstances” as section 16(3) of the Act states, a phrase which certainly

would cover "matters special to the offender." Therefore in my opinion under section 16(3) of the Act, the court in considering special reasons for bail, should also consider such matters as: is there strong independent evidence that the accused would attend this trial; is there strong evidence to support his alibi; would he, if released on bail, be a danger to the public; and would he be tried within a reasonable time? And there may be other matters to be considered.

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\* In Re: Jimenez the court held that "the alibi defence does not provide a special reason for granting bail" and "the length of time that the petitioner will have to wait before he is tried is not a special reason either." But in coming to these conclusions the court did not specifically examine section 5(5) of the Constitution nor was the court persuaded by the wide ambit of paragraphs (a), (b), (c) and (d) of section 16(3) quoted above.

Certainly section 5(5) of the Constitution which states, inter alia, that if a person detained is not tried within a reasonable time, he is entitled to bail, ought to be considered as a special reason. In my opinion section 5(5) of the Constitution ought to be interpreted widely, so that if this court is of the view that the person detained would not be tried within a reasonable time, the entitlement to bail arises. The Constitution is the supreme law, and if it states circumstances which entitle a person to bail, special reasons ought be interpreted to include section 5(5) of the Constitution.

The case for the petitioner is contained in his petition and a supporting affidavit by him. In his petition he swore that he was charged for the two offences; that he appeared before the magistrate and was refused bail; that he is innocent of the charges, not a flight risk and that he would not interfere with witnesses. He

also swore that his trial may not take place for several months. In his affidavit in support of the petition he makes the point that he was previously maliciously prosecuted by the alleged victim, but the case was dismissed. He states that the present allegation is malicious.

The DPP appeared and objected to bail on the ground that no special reasons were presented for the granting of bail. In one affidavit to support the objection, the alleged victim, Alexander Mencias, disputed the claim by the petitioner that the previous prosecution was malicious. The victim swore that the petitioner by agreement paid \$5300.00 to settle the matters. He continued:

- “10. After having signed the agreement I stopped going to court and was eventually informed that the matter was dismissed for want of prosecution.
11. Notwithstanding the agreement that we signed, about six months later Urbina began harassing me whenever he saw me, by insulting me and taunting me.
12. I am concerned for my safety and fear that, given the fact that he has shot me once before and has recently fired several shots at me at my home, that my life will be in danger if he is admitted to bail.”

Police Corporal Jeffrey Williams also swore to an affidavit in which he stated -

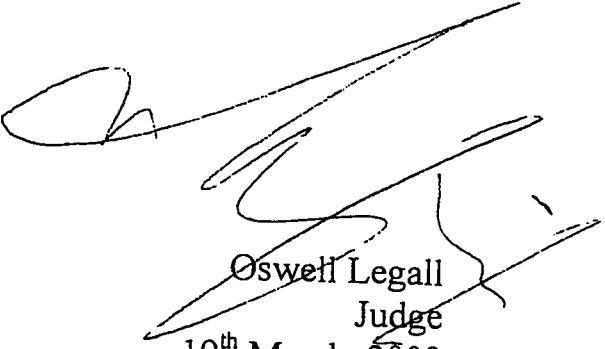
- “9. I am also aware that there was a previous matter involving Omar Urbina and Alexander Mencias, as I had assisted in the investigation of that matter by recording a statement under caution

from Urbina on the 29<sup>th</sup> of October 2006. a copy of this statement is now shown to me, exhibited hereto and marked JW1.

10. In this statement Urbina admits to having shot Mencias in his face with a pellet gun. He was subsequently charged with Attempted Murder and other offences.”

The present allegation is another shooting incident involving the said parties. Looking at the petition and affidavits in this matter, there is anger in the relationship between the petitioner and the alleged victim with the victim allegedly suffering violence with the use of a firearm.

I have to consider the possibility of further violence or interference with the alleged victim who is a witness, as well as the statutory provisions which require the summary trial of the petitioner within three months, failure of which the magistrate is authorized to grant bail. (See section 16(5)(6) of the Act). I cannot find special reasons to grant bail in this matter and I therefore refuse bail.



Oswald Legall  
Judge  
19<sup>th</sup> March, 2009