BAIL

The Theory and Practice of Applications for Bail

Patrick A. Brooks
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The Sunday Observer of 8 September 2013 reported that six men appeared before the Resident Magistrate's Court, in the previous week, charged with in connection with a stolen motor car. It is alleged that while in the process of scrapping the car, they were apprehended by the police. Although that was neither the focus nor the intent of the reporter, the report reveals that while there has been a positive shift in the approach to bail, in some ways, in others it is business as usual.

The positive shift, I find, is that the investigating officer was present in court for the bail application and was able to support his opposition to bail on a plausible basis, that is that the men were likely to interfere with the investigation and that two of them were connected to known car thieves. In times past, the investigator may or may not have been present at the hearing and most likely would not be able to assist the prosecutor with anything but vague reasons for objecting to bail, if he had any at all to support his objection.

What was not unusual, is that defence counsel, in support of one of the applications was able to state that there was no previous conviction, but unfortunately did not have sufficient information to make an application for another of the accused. To be fair to counsel, that was the first appearance in court for the accused in that matter. What was also not unusual is that it does not appear that any reason was given by the resident magistrate when the application for bail was refused, certainly none was reported.

I contrast that newspaper report, fully recognising the difference in context and approach, with a law report of a bail application in the High Court in New Zealand. In **Hubbard v Police** [1986] 2 NZLR 738, the learned judge, in analysing applications for bail on behalf of four accused charged with a number of sexual offences including rape, addressed a number of matters of which, a person familiar with our Bail Act, would readily appreciate the relevance. The learned judge addressed the following:

a. the presumption of innocence;
b. the allegations against the accused;
c. the likelihood of the accused answering to his bail; and

d. the public interest.

In considering the likelihood of the accused answering to his bail, the learned judge considered:

a. the nature and seriousness of the offences charged;
b. the strength of the evidence and the probability of conviction;
c. the seriousness of the punishment for the relevant offences; and
d. the character and past conduct of the accused.

Although it was also an early stage in the proceedings, the learned judge considered the public interest by assessing:

a. the length of time before trial was likely to take place;
b. whether there was a risk of interference with the witness;
c. whether there was a risk of the accused offending while on bail; and
d. the possibility of prejudice to the preparation of the defence.

In addition to all the above, the learned judge also considered the social context of the offence, in that it was said to have been committed as part of a gang rape.

After considering all those matters, he stressed their previous convictions and bad character in order to refuse bail to three of the accused. He said that these led him to the conclusion that there was a real risk of them re-offending and interfering with the witness if they were granted bail. For those reasons he also found that they would hold bail conditions in disrespect and there was a risk that they would not answer to their bail. He addressed the matter of preparation of the defence by stating that he would be prepared to allow funding under their legislation for counsel to travel to the penal institution to confer with the accused.

For the fourth accused, the learned judge found that as he had no previous conviction for serious offences, the risks identified in respect of the other accused did not apply to him. The learned judge did, however, impose weekly reporting and residential conditions.

Those points referred to by the learned judge bring together the theory and practice of applications for bail, on which this paper wishes to focus. It is proposed to examine

some of the principles concerning the entitlement to bail and thereafter to consider their application in everyday practice.

Nothing included in this paper, excepts where it quotes from judgments of the Court of Appeal, purports to represent the view of any member of the Court of Appeal and is the personal view of the writer, **as presently advised**. Experience has taught that with the development of the case-law, the opinions of judicial officers may change.

The Theory

The approach to be utilised in this paper is not original. It draws heavily from the judgments of their Lordships sitting in the Privy Council on appeals from Mauritius as well as from judgments from our own Supreme Court and Court of Appeal. Any shortcomings in the paper are, of course, solely the responsibility of the author.

The right to bail

The Constitutional basis

A convenient starting point for considering the principle of entitlement to bail is the Jamaican Constitution. The principles of the liberty of the subject and the presumption of innocence are common law principles, but they form part of the underpinnings of civil rights in our Constitution and our legal system and affect the issue of the right to bail. The principles not only became enshrined in Chapter III of the Constitution of newly independent Jamaica in 1962, but have been retained and enhanced in the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (hereinafter called "the Charter"), which replaced Chapter III.

At least three sections of the Charter demonstrate the retention of those principles. The first is section 13, in which the right to liberty, freedom of the person and due process, are guaranteed, along with other rights and freedoms expected in a "free and democratic society". The second is 14(1), which sets out the right to liberty and freedom of the person. It states, in part:

> "No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances-
> …"

The third, section 16(5), speaks to the presumption of innocence. It states:

> "Every person charged with a criminal offence shall be presumed innocent until he is proven guilty or has pleaded guilty."

In addition to those sections, section 14(3) of the Charter, as did Chapter III, stipulates that even before a person accused is brought before a court he is entitled to be:

> "...released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other stage of the proceedings"

Whereas Chapter III did not specifically mention the phenomenon of bail, section 15(3) of Chapter III, in speaking of the right of a person to be "released either unconditionally or upon reasonable conditions", did imply a right to bail. The Charter has gone further and had expressly stipulated the right to bail. It also places an onus on the party seeking to deprive a citizen of his right to liberty, to show sufficient cause for keeping him in custody. Section 14(4) of the Charter states:

> "Any person awaiting trial and detained in custody **shall be entitled to bail on reasonable conditions** unless sufficient cause is shown for keeping him in custody." (Emphasis supplied)

Based on these Constitutional provisions the subject is entitled, as part of his general Constitutional rights, to personal liberty, the right to freedom of movement and the right to bail. In **Adrian Nation and Another v The Director of Public Prosecutions and Another** Claim Nos 2010 HCV 5201 and 5202 (delivered 15 July 2011), it was said at paragraph 97, that these rights must be considered the norm to be presumed and enforced. It must be borne in mind, however, that these rights are not absolute, but are subject to conditions. Accordingly, they may be, but should only be, derogated from, for cogent reasons.

The statutory basis

Although the Bail Act preceded the promulgation of the Charter, it should now be considered as being clothed with the authority of those Constitutional provisions. Section 3 of the Act re-states, from our present perspective, the entitlement to bail. It states:

> "(1) Subject to the provisions of this Act, every person who is charged with an offence **shall be entitled to be granted bail** by a Court, a Justice of the Peace or a police officer, as the case may require.
>
> (2) A person who is charged with an offence shall not be held in custody for longer than twenty-four hours without the question of bail being considered.
>
> (3) Subject to section 4(4), bail shall be granted to a defendant who is charged with an offence which is not punishable with imprisonment.
>
> (4) A person charged with murder, treason or treason felony may be granted bail only by a Resident Magistrate or a Judge.
>
> (5) Nothing in this Act shall preclude an application for bail on each occasion that a defendant appears before a Court in relation to the relevant offence." (Emphasis supplied)

The section not only re-states the entitlement to bail but creates standards by which recognition and enforcement of the subject's right to liberty may be judged. The police may only properly detain the subject for twenty-four hours without the question of bail being considered. If they wish to detain the person for a period in excess of that period, they have to justify that detention.

Against the right of the individual to remain at large until or unless he is convicted, is to be balanced the interest of the public. That interest is concerned with ensuring that the course of justice is not thwarted, hampered or perverted, and that the individual charged with an offence does not commit offences while on bail. This other side of the balance is addressed by section 4 of the Act.

Section 4 stipulates the circumstances in which bail may be denied a person who is charged with an offence that is punishable with imprisonment. It reinforces the Constitutional provision that the onus to show why bail should be denied, rests on those who wish to deprive that accused person of his liberty. Section 4(1) states, in part:

> "4. – (1) Where the offence or one of the offences in relation to which the defendant is charged or convicted is punishable with imprisonment, **bail may be denied** to that defendant in the following circumstances-
>
> (a) the Court, a Justice of the Peace or police officer is satisfied that there are **substantial** grounds for believing that the defendant, if released on bail would-
>
> (i) fail to surrender to custody;
>
> (ii) commit an offence while on bail; or
>
> (iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
>
> (b) …" (Emphasis supplied)

The rest of the subsection speaks to other circumstances in which bail may be denied. The section does not stipulate that if an undesirable situation does exist or has the potential of occurring, that bail "must" be denied. Instead it uses the word "may". It would seem that the section contemplates that bail may still be granted if conditions can be imposed which would prevent the occurrence of such a situation or at least minimise an unwelcome impact of such a situation. Section 6 sets out some of the conditions which may be imposed.

Section 4(2) addresses the matters which the court should consider in assessing an application for bail. 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.

It would have been noticed that section 4(2) allows the prosecuting authorities to provide information on the antecedents of the defendant. Thus, information on previous convictions, other pending charges, unsavoury associations and comments made by the defendant or his known associates, may be provided to the court. This information assists in determining the risk posed to the interest of the public. The court considering an application for bail, as contrasted with undertaking a trial, is entitled to consider this material.

Section 4(2)(a) speaks to the nature and seriousness of the offence. As part of a wide ranging and informative judgment on the right to bail, the Privy Council in, **Hurnam v The State** PCA No 53/2004 (delivered 15 December 2005), decided that the seriousness of the offence, by itself, is not a basis to refuse bail. Their Lordships said at paragraph [15]:

> "The seriousness of the offence and the severity of the penalty likely to be imposed on conviction may well…provide grounds for refusing bail, but they do not do so of themselves, without more: they are factors relevant to the judgment whether, in all the circumstances, it is necessary to deprive the applicant of his liberty."

The point that their Lordships emphasised is that "bail is not to be withheld merely as a punishment" (**Hurnam** at paragraph [5]).

The issue of imposing conditions was mentioned earlier. Section 5 of the Act makes it clear that conditions are not to be imposed as a matter of course but the necessity should be justified, either to ensure the protection of the interests of the public or to facilitate enquiries and reports in respect of the accused's mental or physical condition.

The Practice

It would have been noticed that the points referred to in the **Hubbard** case, mentioned in the introduction to this paper, touched on a significant number of the principles set out in our constitutional and legislative framework on the question of bail.

The application at first instance

The bulk of applications for bail in this country are made in the Resident Magistrates' and Gun Courts. Regardless of where they are done, the need for preparation by all the legal professionals involved is vitally important.

The main points to be drawn from the theory, when the application for bail is being presented, opposed and adjudicated upon respectively, were summarised in paragraph 21 of **Huey Gowdie v R** [2012] JMCA Crim 56. They are:

1. It is an international principle "that the right to personal liberty, although not absolute…is nonetheless a right which is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention…" (**Hurnam** – paragraph [16]).

2. The court should "begin with the high constitutional norm of liberty and therefore lean in favour of granting bail (i.e. restoring the constitutional norm)" ([**Stephens v The Director of Public Prosecutions** 2006 HCV 05020 (delivered 23 January 2007)] – paragraph [25]).

3. It should then consider the allegations against the accused. It should not "undertake an over-elaborate dissection of the evidence" (**Hurnam** – paragraph [25]).

4. It should then "consider whether there are grounds for refusing bail" (**Stephens** – paragraph [25]). The grounds to be considered include:

> "(i) the risk of the Defendant absconding bail,
>
> (ii) the risk of the Defendant interfering with the course of justice,
>
> (iii) preventing crime,
>
> (iv) preserving public order, and
>
> (v) the necessity of detention to protect the Defendant." ([**Thelston Brooks v The Attorney General and Another** Claim No AXA HCR 2006/0089 (a decision of the Eastern Caribbean Supreme Court in the High Court of Justice in the territory of Anguilla (delivered on 15 January 2007)) – paragraph [19])

In this context, the court may receive information which would not normally be receivable at a trial, including hearsay evidence. This information could concern previous convictions and unsavoury associations or practices of the

accused person (see section 4(2) of the Act). **In re Moles** [1981] Crim. L.R. 170 is authority for stating that the "strict rules of evidence were inherently inappropriate in a court concerned to decide whether there were substantial grounds for believing something, such as a court considering an application [for bail]".

Further guidance in this area may be gleaned from the judgment of Chilwell J in **Hubbard v Police** [1986] 2 NZLR 738. The learned judge said at page 739:

> "There are two main tests involving factual questions which have to be considered by the Court in determining whether to grant or refuse bail. They are, first the probability or otherwise of the defendant answering to his bail and attending at his trial, and, secondly, the public interest.
>
> So far as the first factor is concerned, the criteria to be considered include:
>
> (i) The nature of the offence with which the person is charged, and whether it is a grave or less serious one of its kind.
> (ii) The strength of the evidence; that is, the probability of conviction or otherwise.
> (iii) The seriousness of the punishment to which the person is liable; and the severity of the punishment that is likely to be imposed.
> (iv) The character and past conduct or behaviour of the defendant.
> (v) Any other special matter that is relevant in the particular circumstances to the question of the likelihood of the accused appearing or not appearing.
>
> Public interest criteria include:
>
> (i) How speedy or how delayed is the trial of the defendant likely to be?
> (ii) Whether there is a risk of the defendant tampering with witnesses.

(iii) Whether there is a risk that the defendant may re-offend while on bail.
(iv) The possibility of prejudice to the defence in the preparation of the defence.
(v) Any other special matter that is relevant in the particular circumstances to the public interest."

5. The court should then consider, as is required by section 4(1)(a) of the Act, "whether the grounds for refusing bail are substantial" (**Stephens** – paragraph [25]).

6. Thereafter, if it finds that there are substantial grounds for refusing bail, the court would "consider whether imposing conditions can adequately manage the risks that may arise and how effective those conditions [would] be" (**Stephens** – paragraph [25])

7. If a Resident Magistrate hears and refuses an application for bail, or imposes conditions for the grant of bail, the Resident Magistrate must, if the accused person is not represented by counsel, inform the accused person of his right to appeal. The Resident Magistrate should also give reasons in writing for the decision. (Sections 8 and 9 of the Act)

8. An appeal to a judge of the Supreme Court is subject to the provisions of the CPR. The Director of Public Prosecutions, who is to be served with the notice of the appeal (pursuant to rule 58.2 (5), must be given adequate time in order to prepare a response. If sufficient notice has not been given, counsel appearing for the Director may wish to apply for an adjournment in order to obtain proper instructions in order to consider a response to the appeal.

9. All the material which was placed before the Resident Magistrate should be placed before the judge of the Supreme Court hearing the appeal.

It was said in **Gowdie**, and bears repeating, that the proper approach to these applications will require more time than has been traditionally been consumed by these applications. Counsel for the applicant, in preparing for the application, should have taken the time to take instructions on, and consider, at least the following:

a. the accused's age, address and occupation;
b. with whom does the accused live;
c. whether it is feasible for him to reside elsewhere (in the event that the offence involves another member of the same community in which the accused lives)
d. whether the accused has any previous convictions, and if so, whether they have any impact on the application in the instant case;
e. the logistics of securing instructions in preparation for the trial;
f. the conditions to which the accused is willing to submit;
g. who would be available to stand surety for the accused and the circumstances of that person; and
h. the accused's response to the charge or charges;

Armed with at least this information defence counsel should be able, not only to advance the application on behalf of the accused, but meet and repel any reasonably foreseeable objection by the prosecutor.

On the other hand, counsel for the prosecution should require, in advance, from the investigating officer, at least the following:

a. an outline of the allegations;
b. the status of the witnesses and whether they or any of them are vulnerable;
c. the status of the investigation and whether it may be compromised by any interference;
d. whether the accused has any relevant previous convictions or known connections which may indicate a risk to the witnesses or to the investigation;

e. whether any indication exists that the accused is likely to abscond;
f. whether any indications exist that the accused is likely to commit offences while on bail;
g. whether any indications exist concerning a threat to the safety of the accused;
h. the proximity of the witnesses to the accused's usual place of abode or employment;
i. whether any reporting, residential or curfew conditions or travel restrictions would prove effective or ineffective;
j. whether the accused is on bail for any other offences; and
k. whether the accused has in the past failed to answer to his bail.

Considering the entitlement to bail, counsel for the prosecution must, as far as possible be ready to answer the application and be able to justify any negative assertions made against the accused. For this reason, vague allegations by the investigator must be tested and probed in order to secure specifics. It must be borne in mind, not only that the strict rules of evidence do not apply but that the standard of proof is, it seems, not the criminal standard of beyond a reasonable doubt but the civil standard of a balance of probabilities (see paragraph 31 of **Brooks v The Attorney General**).

If it is that there has not been sufficient time to secure the relevant information then, depending on the nature of the offence charged, it may be best to ask for a short adjournment, for later in the day or to the following day, in order for the investigator to secure the relevant information.

For its part, the court considering the application must bear in mind the principles set out above to determine whether the prosecution has shown substantial grounds for believing that the provisions in section 4(1) and section 4(2) have been met.

The bulk of the cases will be concerned with section 4(1), that is, the risk of the accused absconding, committing an offence while on bail, or interfering with witnesses or the investigation. Occasionally, however, there are certain cases when bail may be

denied, even if there is no risk associated with section 4(1) provisions. Section 4(3) and section 4(4) provide examples of such situations. One of those, is if the accused is likely to come to harm, either self-inflicted or from inflicted by others, if he were released on bail.

We have had examples of these in recent times. Although not cases which fell within subsection (3), there is a case, currently before the court where, if the accused woman, charged with decapitating a small child, were granted bail, there would have been a great risk of her being harmed by members of her community in the initial days after the incident. Similarly, a man who, it is alleged, shot himself twice in the head, after, it is alleged, shooting his girlfriend, would be at risk of harming himself, certainly in the initial days after the incident. Those factors therefore are examples of circumstances for justifying refusal despite section 3.

Having weighed the matter, the court must be prepared to give a brief insight into its decision either to grant or refuse bail and in the case of the former, to state the reason for imposing conditions if that is the case. It need not be an extensive reasoning as in a judgment but should be written down in the judicial officer's notebook and be sufficient to allow, in the case of a Resident Magistrate, delivery to the accused who wishes to appeal against the decision. The question of an appeal will be discussed in more detail below.

In **Hubbard**, the learned judge indicated that he would leave his notes of the application on the file, "so that if this matter requires future consideration the outline of the facts, as recorded, will be available". That approach is commendable and judicial officers in our courts may well consider it for emulation. Such a course, it is submitted, is likely to result in shorter subsequent applications where, in the initial application, bail is refused or the accused is unable, for one reason or another, to take up his bail and an application has to be made for the conditions to be mitigated.

Although section 3(5) of the Act states that nothing in the Act "shall preclude an application for bail on each occasion that a defendant appears before a Court in relation to the relevant offence", practicality, the efficient use of the court's time and the decided cases, suggest that fresh applications should not be made unless there is new material to be placed before the court. In **R v Slough Justices *Ex parte* Duncan and Another** (1982) 75 Criminal Appeal Reports 384, the court made the point that if a previous tribunal finds, as a fact, that substantial grounds exist to believe that the accused will fail to surrender to custody, commit an offence while on bail or obstruct the course of justice, then the subsequent tribunal must accept that finding unless new material is available for it to reconsider the question of bail. If there is no new material bail should be refused. The starting position of any renewed application "must always be the finding of the position when the matter was last considered by the court" (per Donaldson LJ **R v Nottingham Justices *ex parte* Davies** [1980] 2 All ER 775). Notes from the earlier tribunal would assist in determining whether there is in fact new material being presented.

The judicial officer in deciding to grant bail, must consider whether or not to require a bond, the amount of the bond and whether a surety or more than one surety should be stipulated. The information provided by counsel for both sides will be helpful in assessing those matters. The nature and seriousness of the offence should be two of the primary matters to be considered. They will motivate the decision as to seriousness with which the accused and his connections will view the grant of bail, respect any conditions imposed and the need to answer to bail on each occasion. Bail in a small amount for a serious offence could well result in the accused taking the decision to abscond knowing that the penalty of forfeiture that the surety will be called to pay is affordable and will not cause distress.

On the other hand, there is no point granting bail in a sum which an accused, because of his circumstances, will not be able to take up.

Some of the conditions that a judicial officer may impose are set out in section 6 of the Act. They include:

a. the entry into a recognizance with a surety;
b. the payment of a bond as security to secure surrender to custody;
c. surrender travel documents;
d. requirements for reporting to the police pending trial;
e. imposition of curfews;
f. requiring the parent or guardian of a young person to undertake to ensure compliance by the young person;
g. residential restrictions;
h. travel restrictions; and
i. restrictions in movement

There is a logistics problem in our jurisdiction, with its limited resources, in providing a resident magistrate with the prejudicial information concerning previous convictions or unsavoury associations, for there may then be difficulty in finding a different resident magistrate to preside over a subsequent trial. No doubt the resident magistrates for each parish will have to devise a means of addressing that problem. Counsel should also be alert to remind a magistrate who heard a bail application where such information is adduced, that the risk of even unconscious influence from that information exists.

The appellate procedure

The principles which guide the procedure at first instance should also guide the court at the appellate level. It is necessary, however, to examine the process by which the application is made the subject of an appeal.

Sections 8 through 11 deal with appeals by accused from refusals to grant bail. An accused may appeal from a refusal by a Resident Magistrate either to a judge in chambers in the Supreme Court or in the Court of Appeal. Sections 8 and 9 require the Resident Magistrate to give reasons for the decision, advise the accused of his right to appeal, and give him a copy of the record of the reasons.

Part 58 of the Civil Procedure Rules provides for applications to a judge of the Supreme Court, subsequent to a refusal of bail by a Resident Magistrate. Whereas the Act speaks of the application being by way of an appeal, rule 58(1) speaks of a "review [of] a decision by a magistrate about bail". For a discussion as to whether the application is by way of appeal or by way of review, see **Stephens v The Director of Public Prosecutions** 2006 HCV 05020 (delivered 23 January 2007) and paragraph 20 of **Gowdie**.

Section 11 authorises the judge in chambers, on appeal from a resident magistrate to make any order that the resident magistrate may have made.

An accused, it would seem, would be entitled to apply for bail to a judge in Chambers after an unsuccessful application to a judge of either the High Court Division of the Gun Court or a judge of the Circuit Court. This would not be by way of appeal but by way of the inherent jurisdiction of the court to consider matters concerning the liberty of the subject. *Dicta* in **R v Crown Court at Reading** [1981] 1 All ER 249 is authority for that proposition. Although addressing an entirely different court structure, Donaldson LJ adverted to the inherent jurisdiction of the court. He said at page 253e:

> "...a judge of the High Court may, under the inherent jurisdiction, hear an application for bail after an application by the same person has been refused by a judge of the Crown Court..."

Whereas there is statutory provision for an appeal to a judge in the Court of Appeal, from a resident magistrate's refusal to grant bail, there is no such provision in the Act for an appeal from a refusal by a judge of the Supreme Court. Part 58 of the Civil Procedure Rules, as noted above, only deals with applications to a judge of the Supreme Court.

In **Dwayne Smart and Lenburgh McDonald v The Director of Public Prosecutions** Bail Appeals 1 and 2/2013, the Court of Appeal ruled on 17 May 2013 that it had no jurisdiction to consider an appeal from a refusal by a judge of the

Supreme Court to grant bail. At the time of writing this paper no written reasons had yet been delivered.

The prosecutor's right to appeal

It was ten years after the promulgation of the Act that Parliament granted a right to the Crown to appeal from a decision to grant bail to an accused person. Act 20 of 2010 inserted, in section 10 of the Act, a number of provisions setting out the procedure whereby the prosecution may appeal to a judge of the court of appeal in chambers. The appeal, it is clear, may be from a decision of either a resident magistrate or a judge of the Supreme Court. The seeming imbalance, when one considers the inability of an accused to appeal from a refusal by a judge of the Supreme Court, was considered by Sykes J in an extra-judicial presentation to a seminar of the Bar Association on 22 October 2010. The paper is entitled "The Six Acts: A Bird's Eye View Close to the Ground". It is written in the learned judge's usual thought provoking style.

Bail pending appeal

Unlike the situation prior to conviction, where the presumption of innocence places the onus on any person who wishes to deprive the subject of his liberty, once conviction occurs, the presumption is displaced and it is for the convicted person, who seeks to appeal against his conviction, to show why he should be granted bail pending the determination of his appeal.

Where there is an application for bail pending an appeal from a sentence imposed by a Court, the considerations are very different from an application pending trial. Section 4 (1) (b) of the Act specifically states that bail may be denied where an appeal is pending. The difference in approach to these applications lies, no doubt, in the fact that the presumption of innocence no longer applies. The applicant is now an offender. The point is reinforced in the case of **Sinnan and others v The State** (1992) 44 WIR 359. At page 367c Bernard CJ said:

> "A clear distinction has to be drawn between the granting of bail before conviction of an offence and the granting of bail after conviction of an indictable offence. In the case of the

former, the party is presumed to be innocent whereas in the latter case this presumption is, on the happening of this event, i.e. his conviction, no longer of any application until and unless the conviction is later quashed."

A person convicted of an offence may apply to the resident magistrate or judge before, whom he is convicted, for bail to be granted pending appeal. If bail is refused by that judicial officer, the offender may apply to a judge of the court of appeal to grant bail pending appeal. Section 13 of the 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)

It is for the convicted person to show that exceptional circumstances exist which warrant the grant of bail. These matters 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 a number of the relevant principles. These were summarised in **Dereek Hamilton v R** [2013] JMCA App 21 and were stated thus:

> "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 [section 31(3) of the Judicature (Appellate Jurisdiction) Act]; 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."

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.

Dereek Hamilton v R is authority for the proposition that, in the event that there is no risk in respect of the matters contemplated by section 4(1), a short sentence of imprisonment represents an exceptional circumstance justifying the grant of bail pending appeal. In cases of short sentences, the likelihood of the sentence having been served before the appeal is heard would mean that a successful appeal would be rendered nugatory.

Dana Seetahal in her work, *Comonwealth Caribbean Criminal Practice and Procedure*, opines at page 170, (without citing authority) that:

> "It would seem that as far as bail on summary conviction is concerned, there is apparently almost a right to be bailed if in custody when an appeal is pending, unlike conviction by a

> jury. The only necessary condition seems to be that the applicant must sign a recognisance to prosecute his appeal."

It would have been noted that Bernard CJ, in addressing the prejudice of a conviction spoke of indictable offences. Although Resident Magistrates in our jurisdiction do handle a number of indictable offences, it is perhaps fair to say that Resident Magistrates may well take the view that, if the offender will pursue the appeal and will surrender in the event of the appeal being unsuccessful, it would be appropriate, in the case of a relatively short sentence, to grant bail pending appeal. There have been cases where, by the time the appeal has been heard, a custodial sentence has already been served.

An Aside

This paper has concentrated on the consideration by a court of applications for bail. It is to be noted that the Act does permit bail to be considered and granted by police officers and justices of the peace. Those persons may not consider bail in cases where the accused is charged with murder, treason or treason felony (section 3(4)). Neither can they, normally, consider bail in cases where a person is in custody pursuant to a warrant of arrest issued by a court.

In cases of warrants, it used to be said that some police officers would make it a point of turning up on a Friday evening to execute a warrant of arrest where the accused failed to attend court to answer a summons charging the person for a traffic offence. Such situations were ripe for malicious behaviour and encouraged corruption. They may be ameliorated however, by the judicial officer, in issuing the warrant, stipulating that, upon arrest, bail may be granted to the accused to appear in court. Section 2(1) of the Act hints that a warrant may be endorsed for bail. The relevant portion states:

> "'bail in criminal proceedings' means bail which may be granted-
> …
>
> (b) in connection with an offence, to a person who is under arrest for the offence or for whose arrest **a warrant**

> **(endorsed for bail) has been issued**;… (Emphasis supplied)

Section 7(2) stipulates that the police officer who releases on bail, a person arrested on a warrant of arrest, is to make a record of his decision and deliver it to the accused if so requested. Such a record would, of course, be protection from the likelihood of like arrests before the date of the court hearing.

Conclusion

Despite the pressures placed on judicial officers to keep incarcerated, a large percentage of individuals charged with serious offences, the imperative of the Constitution and the Bail Act is that these accused persons are presumed to be innocent of the allegations made against them and are **entitled** to bail pending their trial. The application process requires careful preparation from all the legal professionals involved.

Cases such as **Hubbard** and **Brooks** demonstrate the systematic approach that is required for such applications. As it is desirable that there is significant consistency in the approach used by judicial officers, such an approach should be consistently be adopted so that attorneys at law and their clients can reasonably assess the chances of success of a proposed application for bail. The onus is on the prosecuting authorities to justify the denial of the individual's right to bail. This must be done by providing cogent reasons to the court.

The court must, after considering the application, demonstrate in its reasons that it has done so. If the court finds that any of the situations militating against the grant of bail, have been proved, then it must consider whether the imposition of conditions would eliminate, or at least minimize, the risk of the occurrence. Resident Magistrates must indicate in their reasons for decision, the bases on which they have refused bail or imposed conditions, so that, in the event of there being an appeal, the judge can properly assess the Magistrate's decision.

Patrick A. Brooks

Judge of Appeal

September, 2013

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