

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

IN THE MATTER OF A BAIL APPLICATION

NEGUS BENITO

Applicant

V

THE STATE

Respondent

Before the Hon. Mr Justice Rajiv Persad.

Appearances:

Ms. Avion Gill for the State.

Mr. Wayne Sturge for the Applicant.

REASONS

The applicant in this matter was charged with a number of serious offences including rape, robbery and buggery, all arising out of an incident in 2005. The applicant was initially admitted to bail and continued to be on bail during the course of his preliminary inquiry into his matter which culminated in March 2009.

At the end of the preliminary inquiry it appears from the information provided to this court that a complaint was made to the magistrate that suggested that the father of the applicant had a conversation with one of the virtual complainants in the matter before the court. As a

consequence of this complaint the magistrate revoked the applicant's bail.

As part of the routine procedure relating to all applications for bail in the High Court the Court is provided with a document in relation to each application listed before it. This document is prepared by the police to assist the State Prosecutor and the Court in its determination of whether or not to grant bail. This document usually includes information as to the charge for which the applicant is seeking bail, a summary of the allegations being made against the applicant, a chronological history of the matter in the particular court as well as criminal records of any convictions or pending matters against the applicant.

In the particular application before this court the summary provided to the court outlined the following information in relation to the circumstances that led to the learned magistrate revoking the applicant's bail at the time she decided to commit him for trial:-

On 09/03/09 after several adjournments the applicants re-appeared at the Arima Magistrate Court and was committed to stand trial at the Port of Spain Assizes and based on evidence led he was also committed on additional charges at (5) and (6). Bail was REFUSED as it was reported that around 7:15 a.m. on 09/03/09 the father of the applicant approached the Virtual Complainant and asked that she drop the matters. Around 7:30 a.m. the said day, he then drove by in vehicle PBS 3878 and pointed in the direction of the Virtual Complainant and made several gestures to her.

On 03/04/09 an application for bail on behalf of this applicant was REFUSED by Justice RAMPERSAD at the Port of Spain High Court.

When this application first came up before the High Court on the 13th November 2009 Counsel for the applicant indicated that he would be seeking a short adjournment to allow him to file an affidavit from the father of the applicant in relation to the allegation of interference.

The court before determining whether to grant the adjournment inquired from the prosecution as to what their position was in relation to the application for bail. At that point counsel appearing for the State indicated that it was their intention to object to the application on two grounds, the first was that the court should not entertain the application since a similar application had been made some eight months earlier in April 2009 before Mr. Justice Rampersad and on that occasion the court having considered the application refused the application for bail.

It was against that background that the State contended that there had been no change in circumstances to warrant this court considering this new application for bail.

The second objection upon which the State was relying was the fact that there were substantial grounds to believe that if granted bail the applicant would interfere with witnesses.

The court having a better sense of the competing positions then invited both sides to put before the court any material upon which they wished to rely in support of their respective cases.

To facilitate this the court directed that the State file and serve any material in support of their objection by 20th November 2009 the Applicant would then reply thereafter and the matter was adjourned to the 27th November 2009.

On the next adjourned date no material was filed on behalf of the State, a further adjournment was granted to allow the parties to put before the court material which would assist the court in exercising its discretion. The matter was once again adjourned to December 4th 2009.

On that date the counsel for the applicant had filed an affidavit of Mr Patrick Gonzalves the father of the applicant. Nothing was filed by the State, the court upon inquiring as to why no material had been put before the court was told that the Virtual Complainant was unable up to that point to put anything before the court, no application for further time having been made the court proceeded to deal with the application.

In considering this application this court had to determine two issues:-

1. Whether there was a sufficient change in circumstances to warrant the court entertaining this application for bail. If yes
2. Whether there are substantial grounds to believe that if admitted to bail the Applicant would interfere with witnesses.

Objection 1 - Change of Circumstances

As a general rule, an unsuccessful bail application in the Crown Court cannot be renewed in that Court unless there as been a change in the circumstances relative to the application for bail or, circumstances exist which were not previously brought to the attention of the court.

A useful summary of the law on this area is to be found in **Corre and Wolchover Bail in Criminal Proceedings 3rd Edition.**

The practice of making weekly bail applications provoked the extra-curial declaration by Ackner J (as he then was) that it would be proper, in the interests of both 'comity and common sense', for a bench to honour the bail decision originally made unless circumstances had changed (see *The Magistrate*, March 1980). Inspired by this comment, the justices of Nottingham agreed in March 1980 that they would apply a new policy to repeated bail applications. They decided that, on and after the third successive application, if previous

applications had been refused, they would refuse to consider bail unless the defendant could show 'new circumstances'. The policy of allowing two bites at the cherry was devised to deal with the fact that bail applications made on the first appearance of a defendant in custody are usually based on instructions taken at short notice at the police station or at court, with little or no opportunity for the defence legal representative to make full inquiries (for further consideration see para. 5.5.4 below).

A challenge to the policy was mounted in *R v Nottingham Justices, ex parte Davies* [1980] 2 All ER 775. Charged with rape, Davies had made two applications for bail in successive weeks and was refused leave to make a third application because there had been no change of circumstances. He applied for judicial review by way of an order of *mandamus* directing the justices to hear the full facts supporting the application and to determine the application. Although Davies was the nominal applicant, the case was in effect brought by a group of Nottingham solicitors seeking guidance on renewed applications for bail.

The Divisional Court accepted that the fact that a bench of the same or a different constitution had refused to grant bail on one or more previous remand hearings did not absolve the bench on a subsequent occasion from considering whether the accused was entitled to bail, whether or not an application were made. However, the court held, this did not mean that the justices should ignore their own previous decision or a previous decision of their colleagues. On those previous occasions, the court would have been under an obligation to grant bail unless satisfied that such exception had been made out. That 'satisfaction' was not a personal intellectual conclusion by each justice. It was a finding by the court that such circumstances then existed and was to be treated like every other finding of the court. It was *res judicata* or analogous thereto and stood as a finding unless and until overturned on appeal. Appeal was not to the same court, whether or not of the same constitution, on a later occasion, but to the judge in chambers. It followed that on the next occasion when bail was considered the court should treat, as an essential fact, that at the time when the matter of bail was last considered, such circumstances did indeed exist.

Strictly speaking, the court held, the justices were bound to investigate only whether that situation had changed since the last remand in custody. There was always a possibility of such a change because of the lapse of time. For

example, the ability to interfere with witnesses might have diminished as policy inquiries had progressed and statements had been taken. Again, it was well established as a proper exercise of judicial discretion that when the prosecution were unreasonably delaying the case that accused should no longer be held in custody. However, in the view of the court there was one qualification to the general rule that there must be a change of circumstances. **The question which the justices ought to ask was slightly wider than whether there had been a change. The question which had to be asked was whether there were any new considerations which were not before the court when the accused was last remanded in custody. In the first edition of the present work Corre argued that 'new considerations' was a less stringent and more easily identifiable test. It meant that the court might consider matters which, although they existed, were not before the court on the previous occasion. A strictly observed change in circumstances rule would have meant that the court would not consider material which previously existed even though it was not known to the applicant and therefore not put before the court.**

The decision was amplified in *Re Moles* [1981] Crim LR 170, in which it was held that magistrates were bound to investigate all alleged circumstances and where they refused to do so a court with appropriate jurisdiction could set aside the subsequent decision.

The principles in **Nottingham Justices ex parte Davies 1980 2 All ER 775** has been held to apply to the Crown Court in **ex parte Malik 1981 72 Cr App R 146** and was cited by Madam Justice Charles in the **Bail Application of Barry Alphonse.**

Having regard to the principles outlined above it is clear that the court in considering objections of this nature has to address its mind to the following questions:-

- (a) Has there as been any change in the circumstances since the last application for bail or

- (b) Are there any circumstances that exist which were not previously brought to the attention of the court

State Counsel contended that the court should be slow to exercise its discretion in relation to the grant of bail since the High Court had already considered a full application in April 2009 and on that occasion the Bail Court refused the application for Bail. State Counsel also contended that in the intervening period there was nothing to constitute a change in circumstances.

Mr Sturge on behalf of the Applicant submitted that some 8 months had now elapsed since the last application, further the Applicant had not received any indictment to date. He also relied on certain material referred to in the Court of Appeal decision of **Seeromanie Maharaj Narayansingh Civ App 33/2007 at paragraphs 32-33** where evidence before the Court of Appeal related to the average time for the filing of an indictment. Counsel for the Applicant before me argued that the applicant could spend a prolonged period in custody before being served with an indictment much less securing a date for trial. He also relied upon the passage of time as a basis in itself to constitute a change in circumstances.

Counsel for the Applicant also relied on the fact that since the last application in the High Court for bail he was able to secure affidavit evidence that were highly relevant to the Prosecution's objection to bail and which was not available to the Court on the last application in April 2009.

There is no doubt that the passage of time is a sufficient basis to constitute a change in circumstance. In this regard the editors of **Emmins on Criminal Procedure** note as follows:-

In some cases the passage of time may constitute the necessary change and 'it is well established that it is a proper exercise of judicial discretion to decide that the prosecution has unreasonably delayed in the preparation of its case and that, on that account, the accused should no longer be remanded in custody.

Having regard to the submissions by counsel it is the court's view that the passage of time is a sufficient basis in the circumstances of this case for the court to move on to consider the merits of this application, in any event the fact that there is material before the court that was not available to the previous court is yet another basis for this court to consider the application at this stage.

Objection 2 - Interference with Witnesses

This court has to determine whether it should exercise its discretion and grant bail in this case.

On one side the State contends that the court should not grant bail having regard to the fact that there are sufficient grounds to believe that if admitted to bail the Applicant would interfere with witnesses.

In raising this objection the prosecution relied upon two matters, the first was the information outlined in the summary provided to the court to the effect that:-

Bail was REFUSED as it was reported that around 7:15 a.m. on 09/03/09 the father of the applicant approached the Virtual Complainant and asked that she drop the matters. Around 7:30 a.m. the said day, he then drove by in vehicle PBS 3878 and pointed in the direction of the Virtual Complainant and made several gestures to her

Secondly Counsel appearing for the State indicated to the Court from the bar table that she was informed by the complainant that the virtual

complainant told him that the father of the applicant approached her and threatened to kill her if she gave evidence.

On behalf of the Applicant Counsel contended as follows:-

1. That the Applicant did not threaten the Virtual Complainant nor was he aware that his father had communicated with the virtual complainant.
2. That the Affidavit evidence filed in support of the Applicant by the Applicant's father essentially established that the Applicant had nothing to with the allegations made by one of the virtual complainants.
3. That the Applicant was on bail for the period between arrest and committal and during that period there was no complaint against him notwithstanding the fact that he lived 2 houses away from the virtual complainants in the matter.
4. That the Applicant had no pending matters nor convictions outside of the matters for which he was seeking bail.
5. That having regard to the quality of evidence before the court in relation to the substantial ground that the Applicant is likely to interfere with witnesses (1) there is no material to suggest that the applicant did in any way interfere with the witnesses nor is he likely to do same and (2) that the material put before the court is of such poor quality that it does not reach the threshold of amounting to substantial grounds that the Applicant will interfere with witnesses.

The Law relating to the grant of Bail

In the **Bail Application of Barry Alphonso** before Madam Justice Joan Charles the court summarized the general principles relating to the grant of bail as follows :-

Under Section 6(2) (a) (ii) and (iii) of the Bail Act 1994 a Court may in its discretion deny bail where it is “satisfied that there are substantial grounds for believing that the Defendant if released on bail or interfere with witnesses or otherwise obstruct the course of justice”.

In ***R v Slough Justices, ex parte Duncan*** (1982) 75 Cr. App. Rep 384 at p. 388 Omrod L.J opined.

“ Before the discretion to refuse bail arises the Court has to be satisfied that there are substantial grounds for believing that one of the events described ... will happen. It is the existence of substantial grounds for the belief, not the belief itself which is the crucial factor”.

The onus rests on the prosecution to satisfy this Court on a balance of probabilities of the existence of substantial grounds for the aforementioned belief. This is the standard applicable for all bail applications. ***R v Governor of Canterbury Prisons ex parte Craig*** (1991) 1Q13195.

Procedural Issues to be considered

In **Re Moles [1981] Crim LR 170** the Divisional Court stated that strict rules of evidence were inherently inappropriate in a court concerned to decide whether there were substantial grounds for objecting to bail under the Bail Act 1976.

And in **R v Mansfield Justices, Ex p Sharkey [1985] QB 613, 626,** Lord Lane CJ stated:

"It is conceded that there is no requirement for formal evidence to be given: see *In re Moles* [1981] Crim LR 170. It was for example sufficient for the facts to be related to the justices at secondhand by a police officer."

These two authorities were considered in **Regina (DPP) v Havering Magistrates' Court & Regina (McKeown) v Wirral Borough Magistrates' Court 2001 1WLR 801** where the court noted as follows:-

What undoubtedly is necessary is that the justice, when forming his opinion, takes proper account of the quality of the material upon which he is asked to adjudicate. This material is likely to range from mere assertion at the one end of the spectrum which is unlikely to have any probative effect, to documentary proof at the other end of the spectrum. The procedural task of the justice is to ensure that the defendant has a full and fair opportunity to comment on and answer that material.

If that material includes evidence from a witness who gives oral testimony clearly the defendant must be given an opportunity to cross-examine. Likewise, if he wishes to give oral evidence he should be entitled to.

The ultimate obligation of the justice is to evaluate that material in the light of the serious potential consequences to the defendant, having regard to the matters to which I have referred, and the particular nature of the material, that is to say taking into account, if hearsay is relied upon by either side, the fact that it is hearsay and has not been the subject of cross-examination, and form an honest and rational opinion.

Having regard to the matters raised in the case law the following principles can be extracted

- (a) That strict rules of evidence were inherently inappropriate in assisting a court in determining whether there were substantial grounds to object to bail under the Bail Act 1994 ¹
- (b) In the normal course of things there is no requirement for formal evidence to be given and it was sufficient for the facts to be related to the court at secondhand by a police officer." ²
- (c) The procedural task of the justice is to ensure that the defendant has a full and fair opportunity to comment on and answer that material.
- (d) If that material relied upon includes evidence from a witness who gives oral testimony clearly the defendant must be given an opportunity to cross-examine. Likewise, if he wishes to give oral evidence he should be entitled to.
- (e) It goes without saying that in the more complicated applications particularly where the Prosecution wishes to rely on objections under Section 6 of the Bail Act there should be disclosure to the Applicant or his Counsel of the material provided to the Court in support of their objections. This would include in the High Court, a copy of the Summary prepared by the Bail Officer which is provided to the Court. This would include the Nature of the Charge, Overview of Facts, Court History Criminal Record of Pending Matters and Convictions if applicable. It seems to this Court part and parcel of the process would require that where the State relies upon material gathered to object to the grant of

¹ *In re Moles* [1981] Crim LR 170

² *R v Mansfield Justices, Ex p Sharkey* [1985] QB 613, 626, Lord Lane CJ

- bail it should make this information available to the Applicant or his counsel so that proper instructions may be had to assist the Court.
- (f) What is necessary is that the Court, when forming its opinion, takes proper account of the quality of the material upon which the Court is asked to adjudicate.
 - (g) The ultimate obligation of the Court is to evaluate that material in light of the serious potential consequences to the defendant, having regard to the particular nature of the material, that is to say taking into account, if hearsay is relied upon by either side, the fact that it is hearsay and has not been the subject of cross-examination, and form an honest and rational opinion.

Conclusion

The Court considered the material before it, in particular the affidavit of the Applicant's father, in which it is unchallenged that the allegations of interference relate to the father of the Applicant and not the Applicant himself. It should be noted that no material whatsoever has been suggested to this court that the Applicant was aware or involved in any way with what transpired at the Magistrate Court on the 3rd of March 2009.

At highest the Applicant's father denies making threats, but acknowledges speaking to one of the virtual complainants, the allegations as relied upon by the prosecution seem to suggest that the magistrate was told that the father of the accused approached the virtual complainant and asked that she drop the matters. Further it was alleged that around 7:30 a.m. the said day, he the father then drove by in vehicle

PBS 3878 and pointed in the direction of the virtual complainant and made several gestures to her. It was interesting to note that from the bar table State Counsel indicated to this Court that she was informed by the complainant that the virtual complainant told him that the father of the applicant approached her and threatened to kill her if she gave evidence. This seems to be different from the allegation made to the magistrate. It is unclear whether any investigation was ever conducted into these allegations or whether any statements were ever taken from the virtual complainants.

At the end of the day there being no material to suggest that this Applicant was involved with the interference with the virtual complainant coupled with the fact that the Applicant has no previous convictions and or pending matters. It seems to the Court oppressive to continue to deprive the applicant of bail in the circumstances of this case where the Applicant can spend a considerable period of time awaiting the filing of an indictment and a trial date in the High Court. In the circumstances the Court is minded to grant bail in the following terms. Bail with a surety in the sum of 100,000 to be approved by the Registrar of the Supreme Court. The court will also direct that the Applicant is not to communicate or cause anyone to communicate with the Virtual Complainants in this matter. The Applicant will also report to the Valencia Police Station every Monday Wednesday and Saturday between the hours of 6am to 8pm.

Dated the 11th day of December 2009

Rajiv Persad
Judge