

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

IN THE MATTER OF AN APPLICATION FOR THE COURT TO APPROVE
ASHA SALICKRAM AS A SURETY

H.C. Cr. No B069/10

THE STATE

V

MERVYN LEZAMA

Before the Hon. Mr Justice Rajiv Persad.

Appearances:

Ms Jyanti Lutchmidial for the State.

Mr. Ramesh Deena for the Applicant.

Introduction:

This application relates to a Mr Mervyn Lezama who was charged with a number of offences including Kidnapping False Imprisonment Robbery with Aggravation and Corruption. The Applicant was previously granted bail by another Judge in Chambers in the sum of \$150,000 with a surety to be approved by the Registrar of the Supreme Court.

The Applicant having been unable to get the necessary approval by the Registrar, has filed a fresh application to the High Court seeking to have this court approve his common law wife Ms Asha Salickram as his surety.

In making this application Counsel filed his application by way of an affidavit annexing a certificate of title in the name of the prospective surety.

When the application first came up before the court, the Court adjourned the matter and invited the State to make the necessary enquiries to confirm that the prospective surety was the applicant's common law wife.

On the adjourn date the State had no objection to the application and the Court on the material before it approved the common law wife as the surety.

Having approved the common law wife as the surety it was brought to the Courts attention shortly after the hearing was completed that the Certificate of Title appeared to have been used to secure bail for 3 other persons. This information was forthcoming from the Court registry staff when they did their searches. The Court immediately stayed the Order and invited the parties back before the Court to invite representations from both sides.

It is important to point out that the affidavit filed originally in support of this application did not expressly deal with all the requirements of Section 16 of the Bail Act.

At that hearing Counsel for the Applicant when told of the concerns relative to the searches conducted by the court, indicated that his instructions were that the Certificate of Title although used to take bail was now clear as the persons who the common law wife had taken bail for previously had either won their cases or in one particular case the bail had been revoked and accordingly her obligations to that person was at an end.

The Court was provided with one extract supporting Counsel's instructions and was informed that there was difficulties in obtaining the other extracts. In the absence of extracts establishing that the matters were completed the court invited Counsel to address the Court on the following issues:-

1. What matters the Court should take into account when asked to approve a person as a surety and secondly
2. What procedure should the court follow when dealing with applications to have the court approve a surety.
3. Does the fact that someone uses a particular piece of property to secure bail preclude that person from using that same piece of property to secure bail for another person.

As a general rule a Court (whether a Judge, Magistrate or a Justice of the Peace at a police station) when determining whether or not to grant bail must address its mind to a number of matters.

Where a Court decides to grant bail with a surety for the purpose of securing a persons surrender to custody, it becomes necessary for the court to specify a relevant person who will ensure that recognizance of the surety is properly entered into.

In the normal course of things this would be the Registrar of the Supreme Court where the order is made by the High Court and where the order is made in the magistrate's court it will usually be the Clerk of the Peace.

If no person is specified by the Court, Section 16 (4) of the Bail Act mandates certain specified persons to ensure that recognizance of the surety is properly entered into. The Bail Act Chap 4:60 outlines a number of provisions that regulate the manner in which the grant of bail with a surety should be dealt with. In particular sections 16 of this Act provides as follows:-

Section 16.

(1) This section applies where a person is granted bail in criminal proceedings on condition that he provides a surety for the purpose of securing his surrender to custody.

(2) In considering the suitability of a proposed surety referred to in subsection (1), the Court shall—

(a) have regard, amongst other things, to—

(i) the surety's profession, occupation, trade or business;

(ii) his character and his previous convictions, if any; and

(iii) his proximity, whether of kinship, place or residence or otherwise, to the person for whom he is to be a surety; and

(b) require the surety to make a statutory declaration in the form set out in the Second Schedule.

(3) Where a Court grants a person bail in criminal proceedings under subsection (1), but is unable to release him because no surety or no suitable surety is available, the Court shall fix the amount in which the surety is to be bound and subsections (4) and (5) shall apply for the purpose of enabling the recognizance of the surety to be entered into subsequently.

(4) A recognizance of the surety under subsection (3) may be entered into before such of the persons or descriptions of persons as the Court may by order specify or, if it makes no such order, before any of the following persons:

(a) where the decision is taken by a Magistrate's Court, before any Magistrate or Clerk of the Peace;

(b) where the decision is taken by the High Court or the Court of Appeal, before any of the persons specified in paragraph *(a)* or, where the Rules of the Supreme Court so provide, by a person of such other description as is specified in the Rules.

(5) Where a surety seeks to enter into his recognisance before any person in accordance with subsection (4), but that person declines to take his recognisance because he is not satisfied with the surety's suitability, the surety may apply to—

(a) the Court which fixed the amount of the recognisance in which the surety was to be bound; or

(b) a Magistrate's Court for the district in which he resides,

for that Court to take his recognisance and that Court shall, if satisfied of his suitability, take his recognisance.

(6) Where, in pursuance of subsection (4), a recognisance is entered into otherwise than before the Court that fixed the amount of the recognisance, the recognisance shall have the full force and effect as if it had been entered into before that Court.

Having regard to the provisions outlined it is possible to make the following observations as they relate to an application to have a Court approve a person as a surety.

Determining Suitability

Once a Court has set bail with a surety to be approved, the party entrusted with the discretion whether to approve a particular person as a surety has to exercise that discretion judicially.

In particular the party exercising that discretion whether a Clerk of the Peace, Registrar, Magistrate or Judge must have regard to the matters outlined in Sections 16 (2) of the Bail Act which mandates the party determining whether to approve a surety to have regard, amongst other things, to (i) the surety's profession, occupation, trade or business; (ii) his character and his previous convictions, if any; and his proximity, whether of kinship, place or residence or otherwise, to the person for whom he is to be a surety.

Furthermore the section also requires that the surety make a statutory declaration in the form set out in the Second Schedule of the Bail Act.

Corre and Walchover on Bail In Criminal Proceedings provides useful guidance on the way the provisions in the United Kingdom are construed, it is useful to note that the matters to be taken into account appear to be similar to our provisions.

2.1.5.2 Primary consideration: sufficiency of proposed surety's resources

The principal consideration which the court must determine in assessing the suitability of sureties is the question whether they have sufficient financial resources to answer for the sum in which they are to be bound: Hawkins, *Pleas of the Crown*, 1716, c.15, s. 5. It is for magistrates or judges in their discretion to determine whether the surety has sufficient funds: *R v Saunders* (1849) 2 Cox CC 249. Since proposed sureties may only be required to enter into a recognizance for sums which it is within their ability to pay, it has been observed that the recognizance must come out of the surety's personal property, not out of any joint property of the matrimonial home: *R v Southampton Justices, ex parte Green* [1976] QB 11. Although the court will always be rigorous in inquiring into the means of proposed sureties, this does not exempt sureties from responsibility in the assessment of their means. In *R v Waltham Forest Justices, ex parte Parfrey* (1980) 2 Cr App R (S) 208, Donaldson LJ said (at p. 211): 'There is an obligation on a surety to be fully satisfied that he or she can meet the liability which will arise if the accused person does not surrender to bail.' The Home Office circular HO 206/1977 advises at p. 6 that '[i]t is for the court to decide what extent the means of the individuals put forward as sureties should affect the amount in which they stand'. It is irresponsible, and possibly a matter for consideration by a professional disciplinary body, for lawyers or legal executives to tender anyone as a surety unless they have reasonable grounds for believing that the surety would, if necessary, be able to meet his financial undertaking: *R v Birmingham Crown Court, ex parte Rashid Ali and another*; *R v Bristol Magistrates' Court, ex parte Davies*; *R v Immigration Appellate Authority, ex parte Davies*, *The Times*, 16 October 1998. Unless the surety has had separate legal advice, a court clerk should make some inquiries so as to be satisfied that the surety would, if necessary, be able to pay: *ibid.*

2.1.5.3 Character and criminal record The character or any previous convictions of a surety will *prima facie* be highly material. A person with convictions will not automatically be rejected, particularly where the convictions are old and in a category different from that involved in the instant case, but it is usually advisable to find sureties with a clean record in order to avoid objections being raised on that ground.

2.1.5.4 Proximity The proximity of the surety to the accused in terms of kinship or friendship may be an advantage or a disadvantage depending on the circumstances. In one case the existence of a close relationship may deter

the accused from treating the surety's stake as expendable. In another case it may increase the risk of connivance and collusion. Geographical proximity will generally be an advantage through making it easier and more convenient for the surety to monitor or supervise the accused. Relatives or friends living a distance from the accused would be less acceptable to a court than those residing in the same district.

2.1.5.5 Persons debarred from standing as surety There are a number of categories of persons who are not permitted to stand as surety. They are:

- a. the defendant's solicitor (not precluded by law, but it has been held that it is not expedient for solicitors to act as surety for their clients: *R v Scott-Jarvis, the Times*, 20 November 1876, QB);
- b. a minor (by analogy with the general law of contract, although there is no direct authority on the point);
- c. a person in custody (since this will preclude the exercising of control of the accused);
- d. a person who has been indemnified by the accused.

2.1.5.6 Irrelevant factors The political opinions of the proposed surety are irrelevant: *R v Badger* (1843) 4 QB 468, in which the Divisional Court criticized magistrates who refused to accept Chartists as sureties for people arrested in Chartist disturbances. If political opinions are irrelevant, then a *fortiori* regard may not be had to the race, religion, or sex of a proposed surety. Disability may be a relevant consideration, but only if it might result in the proposed surety being unable to exercise control over the defendant.

Jurisdiction of the Court granting Bail to Approve a Surety

It appears that where a particular Court sets bail with a surety and requires the recognizance to be entered before a particular person¹ it is not open to the party wishing to have a particular surety approved to apply to the same Court that made the order for bail unless the person designated to approve the surety (pursuant to sub section 4) has declined to take the recognizance because he/she is not satisfied with the surety's suitability.

¹ As required by Section 16 (3) and 16 (4) Bail Act Chap 4:60

It is only after being declined that the party seeking to act as surety can apply to the original court that fixed the recognizance.

In other words the effect of Section 16 (5) of the Bail Act is to mandate that where a High Court sets bail in a particular sum with a surety to be approved by the Registrar of the Supreme Court for example, a person seeking to be approved as Surety by the court making the order will not be entitled to come before the High Court² for such an approval unless he can establish that the Registrar of the Supreme Court has declined to take the recognizance because he/she is not satisfied with the surety's suitability.

Similarly the effect of Section 16(5) is to mandate that if a Magistrate makes an order setting Bail with a surety in a particular sum to be approved by the Clerk of the Peace, it will not be open to the party seeking to have a particular surety approved by the same Magistrate who made the order for bail, unless he can establish that the Clerk of the Peace has declined to take the recognizance because the clerk was not satisfied with the surety's suitability.

Procedure to approve a surety.

Once a an application is made to have a person approved as a surety, the decision maker whether it be a Judge, Magistrate Registrar Clerk of the Peace or Justice of the Peace must have information on a number of matters before they can properly exercise their discretion.

The information includes the matters outlined in the Statutory Declaration found at Schedule 2 of the Bail Act as well as the matters outlined in Section 16 (2) a of the Act.

² Or alternatively the Magistrate Court for the District he resides in [See Section 16(3)b Bail Act]

It stands to reason that before the decision-maker can determine whether to approve an individual as a surety the decision maker must have the required information in a form that allows the appropriate personnel to make the necessary enquiries.

Where an application is to be made to a court (whether High Court or Magistrate's Court) as opposed to the Registrar and or a Clerk of the Peace to approve someone as the surety, the person applying is required to file the statutory declaration as required by Section 16 as well as put before the court adequate information for the Court to exercise its discretion.

By putting this information before the Court prior to the hearing of the application assists in several ways, it allows the prosecution to verify the applicant's antecedents as well as it allows the Court staff to verify whether the prospective surety has ever taken bail in other courts throughout the country. Further by having a sworn declaration which specifically deals with the matters outlined in section 16 (2) allows the court to discern whether a persons providing the declaration may be seeking to mislead the Court.

In cases where the information is taken on oath before the Court adequate time will usually be necessary to allow adequate checks to verify this information. As a general rule this information should be capable of being verified within a reasonable time which in most cases should take no more than several hours as opposed to days.

Application to the Present Case

In the present case because the initial application to the Court did not provide the necessary information leave was granted (without objection by the State) to the applicant to file the appropriate documents to support his application. The applicant was also invited to address the court by way of written submissions on the following issues:-

1. What matters the Court should take into account when asked to approve a person as a surety and secondly
2. What procedure should the court follow when dealing with applications to have the court approve a surety.
3. Does the fact that someone uses a particular piece of property to secure bail preclude that person from using that same piece of property to secure bail for another person.

At the hearing of the application a declaration in conformity with the Second Schedule was filed before the court, also included on the declaration was information relative to the Surety's occupation, antecedents and her relationship to the person to be bailed.

In this case the proposed surety had used the Certificate of Title to secure bail for three other persons. It is accepted that the value of the property was well in excess of the combined value of the cumulative bail for the three previous bails plus the bail in the present case, however the court was concerned that there was a need for explanation as to why this person was in the practice of taking bail for other persons.

As a general rule a person can use a piece of property to secure bail for more than one person if and only if the surety has the approval of the Court. If a person does not get the approval of the Court a criminal offence is committed per section 19 of the Bail Act Chap 4:60.

Section 19.

(1) It is an offence for a person to stand surety on the consideration of property which, at the time of standing such surety, is being used as security for the purpose of standing surety for any other person unless the approval of the Court is first obtained.

(2) A person guilty of an offence under subsection (1) is liable on summary conviction to imprisonment for two years and to a fine of three thousand dollars.

In the normal course of things once the approval of the Court is sought there should be no objection to a piece of property being used to secure bail for more than one person once the court is satisfied that the value of the unencumbered property can cover the value of the bail for each person.

Other considerations may arise, if the property has been used to secure multiple bails then the court must ensure that the person seeking to be approved is not a professional bailor. Equally concerns may arise where a property is mortgaged in which case the decision maker must ensure that the property has enough value outside the mortgage obligations to cover the bail sum.

In this case the applicant seeking to be approved was able to satisfy the Court that out of the three persons for whom bail had been taken previously, had been either discontinued and or revoked thereby freeing herself of the previous obligations.

There being no question that the applicant was the common law wife of the person seeking bail, that there was property sufficiently valued to

cover the bail and all the material necessary for the court to exercise its discretion was before the court and having ensured that all the necessary checks had been completed the Court approved Ms Asha Salickram to act as surety.

Conclusion

In conclusion the Court would like to express its gratitude to Counsel for their assistance to the Court in trying to overcome the many hurdles that regularly arise in applications such as this one. It is fair to say that the consensus among all the parties before the court was as follows:-

1. That whenever an application is made to have a person approved as a surety, the person making that decision (whether Judge, Magistrate, Clerk of the Peace or Justice of the Peace) should have as much information as possible in line with the requirements of Section 16 (2) of the Bail Act in sufficient time to have the necessary checks done to verify the information.
2. That where an application is made to the Court that granted bail originally (as opposed to a Clerk of the Peace or Registrar), to approve a person as a surety, such application should only be made to the court that granted bail originally in circumstances where the person specified in the original order (or person authorized under Section 16(4) of the Bail Act) has declined to approve the prospective surety as bailor.
3. That once an application is to be made to the Court that granted bail originally (whether before the Judge or Magistrate) such application once made prior to the date of hearing of the application, must include a sworn declaration in line with the

precedent provided in Schedule 2 of the Act. Such declaration should also include material that satisfy the requirements of Section 16 (2) (a) of the Act. Once filed this allows the court an opportunity to do the necessary enquiries to properly adjudicate on the application.

4. The process of approving bail is one that must be done with expedition, once a person is granted bail it is expected that that person should be able to have the necessary documentation (once everything is in order) processed as quickly as possible to ensure that the individual can access his bail.
5. The failure by a declarant to disclose relevant material up front may be a compelling reason for a decision maker to refuse to approve a particular surety. Particularly where it turns out that the person seeking approval may have taken bail for others not necessarily with the same deed and not disclosed it, while this may give rise to a strong inference that the person may be a “professional bailor” such a presumption will have to be carefully balanced against the other factors such as occupation, antecedents and the relationship with the person seeking bail among other factors.
6. Having regard to Section 19 of the Act where a person seeks to use a piece of property to secure bail in circumstances where the same property has been previously been used to secure bail for someone else, such applications for approval can only succeed if the person applying is up front with the person exercising the discretion whether or not to approve the surety and declares this. The failure to make this declaration is a compelling factor that the person may again be a “professional bailor” such a presumption will have to be

carefully balanced against the other factors such as occupation, antecedents and the relationship with the person seeking bail among other factors.

Dated this Tuesday 27th July 2010

Rajiv Persad
Judge (Ag)