IN THE HIGH COURT

OF

TRINIDAD AND TOBAGO

BAIL APPLICATION NO. CV 2008-00639

BETWEEN:

ISHWAR GALBARANSINGH, STEVE FERGUSON

THE APPLICANTS

V.

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO,

HIS WORSHIP SHERMAN MC NICHOLLS, CHIEF MAGISTRATE

THE DEFENDANTS

RULING GIVEN BY THE HON. JUSTICE HOLDIP

FIRST CRIMINAL COURT, PORT OF SPAIN ASSIZES

ON THE 14TH DAY OF JULY, 2010

APPEARANCES:
MRS. P. ELDER, S.C.,
MS. M. SOLOMON holding for MRS. S. CHOTE (absent)
MR. O. HINDS, JNR
appeared on behalf of THE APPLICANTS

MR. K. RAMKISSOON, MR. D. WEST (absent)
MR. K. DOUGLAS (absent)
appeared on behalf of THE DEFENDANTS

REPORTED BY:
NICOLE STOUTE

RULING

On the 20th July, 2006, Ishwar Galbaransingh and Steve Ferguson, the applicants for bail in the matter now before the Court, were served with provisional warrants for their arrest so that extradition proceedings could begin against the two who are wanted in the United States of America where they both face a total of 95 counts of Conspiracy to Defraud, Fraud and Money Laundering charges arising out of the Piarco Airport development project. Both men appeared before the Chief Magistrate, Sherman Mc Nicholls, and were granted bail at that time in the sum of one million dollars each.

On the 14th July, 2008, both applicants were committed to be extradited to the United States of America. The Chief Magistrate, having no statutory power to grant bail, ordered that the applicants be remanded in custody to await the decision of the Attorney General as to their surrender to the United States of America pursuant to Section 16 of the **Extradition Act**.

Sometime earlier on, to wit, December 13th, 2007, both applicants had lost challenges at the Court of Appeal where they had sought to review the decision of the then Attorney General, John Jeremie. That authority to proceed was signed on 20th July, 2006. The provisional warrants for their arrest pursuant to the authority to proceed was also challenged. The ruling which was handed down by the then Justice of Appeal Margot Warner paved the way for the start of the extradition proceedings.

On the said 14th July 2008, the applicants then went before the High Court seeking bail. Their application at the time was unopposed and it saw them being granted bail in the sum of one million dollars each with the surety to be approved by the Registrar of the Supreme Court. Their travel documents were surrendered and they had to report to the Four Roads Police Station each Monday and Friday in every week. The judge, at the end of the sitting, by consent, enlarged the terms of his Order in the following terms:

> "Bail in the above terms until 28th July 2008, or in the event of the filing by the applicants of habeas corpus proceedings in the High Court in accordance with Section 13 of the **Extradition (Commonwealth and Foreign Territories) Act**, Chapter 12:04 until the hearing and determination of such proceedings."

The applicants filed habeas corpus proceedings on 24th July 2008. "The writ of habeas corpus ad subjuciendum has as its primary purpose to allow the Court to inquire into the legality of a complainant's detention and there to ascertain whether the cause for detention is sufficient in law." That quote represents an accepted view from the case of **R. v. the Commissioner of Police and Corrections ex parte Cephas**, (1976) 24 W.I.R. 402 at page 404.

The habeas corpus application was dismissed by the High Court on 6th May, 2009. The applicants continued to be on bail on the same terms and conditions as set by Justice Brook in his Order of 14th July 2008.

The applicants appealed to the Court of Appeal and approximately one year later, namely on 3rd May 2010, their appeal was dismissed. The Court of Appeal further granted a stay of any Order to return the appellants to the United States for a period of 72 hours, beginning from 3rd May 2010. The second Order and the one which is of relevance to us is that: Bail to continue pending the determination of any application for special leave to appeal to the Privy Council.

The applicants did appeal for special leave to the Privy Council which ruled as follows on 7th June 2010, the ruling being that:

> "After consideration of the appellants' application for permission to appeal the Order made by the Court of Appeal of the Republic of Trinidad and Tobago on 3rd May 2010 and of the notice of the acknowledgment filed by the respondent, it is declared that the appellants have no right of appeal."

And the Order of the Court goes as follows:

> "And it is ordered,
> **(1) that the application to stay the appellants' extradition be refused;**
> **(2) that the application for permission to appeal be refused."**

The applicants were eventually arrested on 15th June 2010 and an application for bail was presented on their behalf. It was heard and dismissed by Justice Kokaram on 16th June 2010.

Advocate counsel for the applicants, Mrs. Pamela Elder, Senior counsel, argued that the legality of the arrest was not a factor which was placed before Justice Kokaram, and thus, this is a material change of circumstances which should allow this Court to hear this application for bail. Mrs. Elder also argued that this Court has the jurisdiction to hear this renewed application for bail by another judge of first instance.

The substance of her arguments which were addressed to me was that the Court, as constituted, was not being asked to review Justice Kokaram's ruling, that this is a second bail application which the applicants were entitled to make as a de novo hearing. That in this hearing, the applicants would have had the right to go over everything which was said at the first application and to advance new issues at this second hearing.

In support of her arguments, counsel relied on the cases of **R. v. Nottingham Justices ex parte Davies**, (1981) Q.B. 38 and 71 Cr.App.R., 178, and the local case of **Negus Benito v. the State** (unreported) decision of Justice Persad, delivered on 11th December 2009.

In **R. v. Nottingham Justices**, Lord Justice Donaldson noted at page 775 of that judgment that the application for judicial review raised the question of how justices should approach renewed applications for bail by accused persons who have been reprimanded in custody pending the hearing of their cases. The problem he noted was one of general importance.

At page 777 of that said judgment, the Court held that in refusing to entertain a full deployment of a renewed bail application on its merits, that the Justices were applying a policy which was discussed and agreed in the previous month, "That under that policy and on the third successive application for bail, the previous applications having been refused, the Nottingham City Justices refused to hear full argument in support of an application for bail unless they are informed that there are new circumstances and that they further considered that the nature of the new circumstances is such to justify them in full agreement."

At page 779, again, Lord Justice Donaldson went on to state that "As a policy or approach, the Nottingham City Justices make a distinction between the first and second occasions on which bail is considered and subsequent occasions. Without more explanation, it would be impossible to justify this distinction since the decision of the Justices on the first application that Schedule 1 circumstances -- that is, Schedule 1 is similar to Section 6(2) of our (1994) Bail Act -- then existed is just as authoritative a finding of the position at that time. But they have of course given an explanation for their practice. It is that experience shows that on the occasion of the first application, the full facts are not usually available to the duty solicitor and so to the Court. Accordingly, on the second application, it is almost always possible for an applicant for bail or his advocate to submit correctly that there are matters to be considered which were not considered on the first occasion."

The circumstances prevailing in the matter before this Court are tendered as analogous to the situation in **R. v. Nottingham Justices**, on the basis, firstly, that it is a renewed application; secondly, that there are new circumstances, namely, that the previous Court did not consider Sections 6(2) and (3) of the **Bail Act** in the exercise of its discretion; and thirdly, that the legality of the process for arresting the applicants at this stage is also being questioned.

The general effect of the decision was that a Court was not bound to entertain an application for bail after it had previously been refused, unless it was satisfied that there had been a material change of circumstances. A decision to refuse bail presupposed that the Court had found as a fact that there were substantial grounds for believing that one of the events in Section 6(2) would occur. A later Court was bound to accept that finding of fact, otherwise it would be acting as an appellate court unless there was a material change in circumstances. In this case, committal to await the warrant of return does not constitute a material change in the circumstances. The authority for that statement I have found to be Archbold 2010 Edition, page 255, and what is recorded therein at paragraph 3-17.

Now, in the later case of **R. v. Reading Crown Court ex parte Malik** (1981) Q.B. 451, or 72 Cr.App.R., 146, a court headed by the same Lord Justice Donaldson said, at page 457, that the decision in **R. v. Nottingham Justices** in terms refers only to bail applications which are made in the Magistrates' Court. However, the same principles do apply to the Crown Court.

Counsel for the State, Mr. Ramkissoon, questioned whether this Court was the proper forum, that at the end of the day, this sitting judge was being asked to review the decision of a fellow judge exercising similar jurisdiction. Counsel suggested that there were, in fact, no new circumstances, though he does concede that the issue of the legality of the arrest of the two applicants is now for the first time being ventilated, it not having been done before Justice Kokaram.

Mr. Ramkissoon further contended that the situation of renewed bail applications is a tenable one in the United Kingdom because they are governed by statutory provisions not found in our jurisdiction. And that in the absence of any statutory provision (Courts Act 1971), there is a restriction placed on the High Court to exercise its discretion. Thus, where there is no such legislation in place, such as in Trinidad and Tobago, the Court has no room for exercising its discretion.

It should be noted that in **ex parte Malik**, Lord Justice Donaldson drew a clear distinction between the jurisdictions of the High Court and that of the Crown Court. At page 456, paragraph B, he stated, "The jurisdictions of the Crown Court and of the High Court in relation to the grant of bail remains quite distinct, notwithstanding that judges of the High Court are empowered to exercise the jurisdiction and powers of the Crown Court, and when so doing are judges of the Crown Court." The authority for this, he stated, would have been Section 4(2) of **The Courts Act** (1971) of the United Kingdom.

He went on to say, further, that "There was at one time a widespread belief that the jurisdiction of the High Court to grant bail was not that of the High Court as such, but of the individual judges of that court. The logical consequence would be that the decision of one judge to refuse bail would not preclude another judge from entertaining the same application immediately thereafter or perhaps simultaneously. This belief should not have survived the decisions in **Re Hastings**. And there were three decisions of a similar nature that he alluded to, they were in **Re Hastings No. 1**, (1958) 1 W.L.R. 372 and then there was in **Re Hastings No. 2**, (1959) 1 Q.B. 358 and then in **Re Hastings No. 3**, (1959) Chancery, 368.

The Court went on in the headnote to hold per curiam that the jurisdiction of the High Court to grant bail is exercisable only by the judge in Chambers in the United Kingdom.

As to the statutory limitations on the number of applications, the Court further held that although the Crown Court rules contain no provision similar to the then English equivalent of Order 79 Rule 9(12)[which is similar to our Trinidad and Tobago Order 79], it should not be thought that simultaneous or immediately consecutive applications for bail can be made to more than one Crown Court judge.

In **Re Hastings No. 3**, Justice Vaisey remarked at page 700, paragraph B, "It is beyond my comprehension how

we judges of the High Court could be heard to overrule or otherwise interfere with a judgment which was the result of Lord Chief Justice Parker's hearing before his Divisional Court. How could we be heard to say that the conclusion and the order of our own court, the only court which exists, that is the High Court of Justice, was wrong and to say that something else should be done."

He continued. "By the **Supreme Court of Judicature Act**, the description under which we are appointed is, Justice of the High Court. The main fact which I wish to emphasize in this case is that there is but one High Court. There is one High Court to which all puisne judges, as they are called, belong. Although it is perfectly proper, I substitute Her Majesty judge to simply -- "that I or another judge should criticise or, indeed, on occasions depart from or refuse to follow a decision which is reached in the High Court, it is quite impossible for us to interfere with an Order made there in the same manner."

In concurring with the conclusion at which his fellow judge had arrived, Justice Harman reiterated, at page 701, "There had been a right to go from court to court. There had been a right in vacation to go from judge to judge, for the simple reason that the Court was not sitting in banc; but there had never been a right in term time to go from one judge to another when the court was available to which the applicant should properly apply."

He says, "In my judgment, this application," and that is in the same application in **Re Hastings No. 3**, "is precluded by the absence of the ancient but imaginary right to go round and round and round from judge to judge when the term is in progress. There never was such a thing; there is not now; and this applicant having had the judgment of the High Court cannot have another one."

In the unreported Barbados case of **Crawford v. R.**, delivered on 7th September 1984, Justice Williams held that when bail is refused by a judge of the High Court, it may not be granted by another judge of the court unless there has been a change in the circumstances of

the applicant or new considerations have arisen.

The material question therefore is:
Are there any new considerations which were not before the court when the Accused was last remanded in custody?

The scheme of the Bail Act 1994 gives a person by Section 4 a right to bail subject to the provisions of Section 5 and 6. The latter section gives the court a conditional discretion to refuse bail. In the case of **R v. Slough JJ. ex p.Duncan** 75 Cr.App.R.384,DC. Omrod L.J. stated at page 388...

> "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 in paragraph 2(a) or (b) or (c) (similar to Section 2 (i), (ii), (iii) in Bail Act 1994 Trinidad and Tobago) will happen. It is the existence of substantial grounds for the belief, not the belief itself, which is the critical factor. Accordingly if one court finds as a fact that substantial grounds do exist at the time of its determination, a later court must accept this finding. Otherwise the second court would be acting as an Appellate court and reversing the decision of a court of equal status, unless, of course there had been a material charge of circumstances."

This ratio was followed in another unreported Barbados case of **Frederick Christopher Hawkeswerth, John Scantlebury and Sean Gaskin v. The Attorney General and The Commissioner of Police.** It was delivered on the 26th and 27th July 2004 before the Honourable Mr. Justice Christopher Blackman.

It should be noted that when one looks at the **Supreme Court of Judicature Act of Trinidad and Tobago**, Chapter 4:01, one would see in that interpretation section the Supreme Court means the Supreme Court of Judicature constituted under this Act and the Constitution, that at Section 3(1), reference is made to the former Supreme Court;

> "Where in any written law passed before the commencement of this act, reference is made to the former Supreme Court in the exercise of its jurisdiction and powers, other than its appellate jurisdiction and powers, or to any of the Judges of that Court, the reference shall be deemed to be a reference to the High Court or to a Judge of the High Court, as the case may be."

Further, at Section 5(2), and this is where it is important, the puisne judges shall have in all respects equal power, authority and jurisdiction;

> "The Puisne Judges shall, save as in this Act otherwise expressly provided, have in all respects equal power, authority and jurisdiction."

Now, counsel for the applicants has asked the question under what authority was the applicants arrested? In doing so, she traced the chronological progress of the case from the issue of the provisional warrant in 2006 to the eventual dismissal of the habeas corpus application by the Court of Appeal and the refusal of the Privy Council, both in 2010, May and June, respectively.

Now, the kernel of her argument is that after Justice Brook had granted bail to the applicants on 14th July 2008, it had the effect of extinguishing the remand order consequent upon the committal of the Chief Magistrate. It should be observed that the addendum to the Order of Justice Brook was that the bail should be until the hearing and determination of habeas corpus proceedings. Those proceedings, as we have seen, came to an end on 3rd May 2010, however the Court of Appeal, in its wisdom, allowed the applicants leave to apply for special leave before the Privy Council. In order to facilitate that opportunity, the applicants were granted their bail to continue pending the determination of their application for special leave.

The application being thus refused on 7th June 2010, what was the status of the applicants? Their counsel has argued that from the moment that Justice Brook had granted bail, which, in fact, was continued by the Court of Appeal, it had the effect of extinguishing the remand order of the Chief Magistrate. That the Court of Appeal should have made a more specific order with respect to the continued liberty or detention of the applicants.

The case of **R. v. Peter Charles Dimond**, (1999) EWCA Crim. at page 61, delivered on 15th January 1999, is proffered as authority that there was no ascertainable act by the Court of Appeal to bring the accused back under their jurisdiction.

The Lord Chief Justice in referring to a passage in the House of Lords decision of **R. v. Central Criminal Court ex parte Guney**, (1996) Appeal Cases, 616 and (1996) 2 Cr.App.R., 352, Lord Steyn said at page 622 G, "It is imperative that there should be an objectively ascertainable formal act which causes a defendant's bail to lapse at the beginning of a trial. In my judgment, that formal act can only be the arraignment of a defendant. The arraignment of a defendant involves, 1, calling the defendant to the bar by name; 2, reading the indictment to him; 3, asking whether he is guilty or not. When a defendant who has not previously surrendered to custody is so arraigned, he thereby surrenders to the custody of the Court. From that moment, the defendant's further detention lies solely within the discretion and power of the judge. Unless the judge grants bail, the defendant will remain in custody pending and during his trial."

Counsel's argument is, therefore, that there must be in existence an order of the Court for a warrant of arrest to the issue upon the lapse of bail. Once the appeal comes to an end, if one is not present in court there must be an order for the arrest of the defendant. The distinction which was drawn between this present case and the case of **Peter Charles Dimond** is that the applicants, in fact, in this case were already placed on bail, whilst in the former case, the relevant parties, namely, the counsel, the judge and the defendant himself,

were all labouring under a misapprehension as to the legal effect of the defendant's purported surrender to custody.

In his arguments, Counsel for the State centered his argument on the proposition that there was no illegality in the arrest process of the applicants because the warrant of committal which was issued by the Chief Magistrate remained a valid and effective document. That at no time when the applicants challenged the process, whether by constitutional motion or judicial review, did they ever seek a declaration on the validity of the committal warrant.

From the moment when Justice Brook granted bail under the wording and conditions placed upon the applicants, it is my opinion, and I so form, that the Order of the Chief Magistrate was not extinguished or vacated but, in fact, it was suspended until final determination of the habeas corpus proceedings. The magistrate was, under Section 12(4) of the **Extradition Act**, by virtue of his warrant, he commits the defendant into custody. The magistrate, in fact, has no power to grant bail.

Counsel for the State further argued that there was also an obligation which was placed on the applicants to surrender themselves into custody, they having been placed on proper bail; and their having failed to do so, the police were under a primary right to arrest them on the strength of the committal warrant.

During the course of her arguments, Senior counsel for the applicants did concede that when we looked at the provisions of the **Bail Act** (1994), there was a provision called "surrender to custody" and that the **Bail Act** stated that the two applicants, as they were in this case, were under a duty to surrender to custody.

One has to look at Section 3(1), namely, the interpretation section, and there one would find the definition as stated: "Surrender to custody" means in relation to a person released on bail surrendering himself into the custody of the Court or of a police

officer in accordance with the conditions under which bail was granted at the time and place appointed for him to do so."

She argued that the Court of Appeal was unequivocal about the time, that is, pending the determination of the application for special leave before the Privy Council. The refusal of the Privy Council effectively determined the pending matter. The Privy Council, in fact, ordered that the application to stay the appellants' extradition be refused.

Counsel did argue that there was no provision made as to the place where the applicants should surrender themselves and that the Court of Appeal, in fact, lapsed when it did not give a formal order saying that after the determination of the matter, they were to surrender -- in the event that the application went against them, that they were to surrender at a particular place and a particular time and hour. That is conceded that that did not happen at the level of the Court of Appeal.

It may be that courts will have to consider making it clear to persons surrendering to bail, may report to appointed court officers and that thereafter they are in custody even though they are allowed to sit and remain in the court precincts and that they may not leave the building without express consent.

I am of the opinion that even though the Court of Appeal did not clearly express a place for the applicants to surrender, they could have done so voluntarily at any police station or at the Criminal Registry of the Hall of Justice. The issue of bail was, indeed, a live one and had been discussed in albeit very cryptic terms when the matter was being determined or being argued at the level of the Court of Appeal on 3rd May 2010. The applicants must be taken to have had notice, and that is 'notice' in the legal sense, that if their applications before the Privy Council were unsuccessful, their bail would have immediately been revoked under the terms which were granted by the Court of Appeal.

This issue, though presented as a material change or new circumstance, does not, in my finding of fact, measure up to the standard of what a new circumstance should be. It was always something that could have been argued if the Senior counsel who presented the bail application before Justice Kokaram had, indeed, wished to do so.

Now, the greater proportion of time which was spent on making submissions before the Court was in the review of the many cases which were brought to the Court's attention for its perusal and adoption of the many principles espoused therein. The general thrust of the arguments on both sides was when was the discretion granted to the Court under the provisions of the Constitution of Trinidad and Tobago with respect to the right to reasonable bail and the circumscriptions of the **Bail Act** (1994) to be applied by the Court.

There is no doubt, from the many decisions presented to the Court, that were I seised of the jurisdiction, I would have had an inherent right and discretion to consider the grant of bail. I have taken the opportunity to read all of them and I make no pronouncement on the issue of the grant of bail, as I strongly believe that I am being requested to act as an appellate court and to review the findings and orders made by my Brother, Justice Kokaram. Leave to appeal was sought and I see no reason why I should interfere with the Order as it relates to bail or any of the other Orders which were so given.

The issues which were placed before me for my consideration for the grant of bail to the applicants was that I had jurisdiction to hear afresh the submissions for the grant of bail; that the legality of the arrest of the applicants was questioned or questionable, and that I had an inherent discretion granted by the Constitution, the **Bail Act** and the many Commonwealth authorities as to how my discretion ought to have been exercised.

I say that based on the authorities which have been put before me, this Court and those to which I have made specific reference to during the course of this ruling,

it is the Court's holding that it is bereft of the jurisdiction to review the Orders made by Justice Kokaram. Having refused bail to the applicants, leave, as I indicated, was sought and obtained to appeal to the Court of Appeal. The notice seeking bail, therefore, is hereby dismissed and the status quo of the applicants remain as is.

Malcolm Holdip
Judge

July 14th 2010