THE REPUBLIC OF TRINIDAD AND TOBAGO

CR-HC-POS-IND -707-2022-1

CR-HC-POS-IND-69-2021-1

CR-HC-POS-BAIL406-2023-1

CR-HC-POS-IND-575-576-1

IN THE HIGH COURT OF JUSTICE

PORT OF SPAIN

IN THE MATTER OF THE BAIL ACT AS AMENDED

BETWEEN

TERREL TONEY

Applicant

TESSON BRADSHAW

Applicant

MARLI WILLIAMS

Applicant

KEVON MARSHALL

Applicant

v

THE STATE

Before the Honourable Madame Justice Gail Gonzales

Date of Delivery: January 28, 2025

Appearances: Mr. W Sturge for the Applicants

Mrs. T Seecharan and Mr. Soo Hon for the State

REASONS FOR DECISION

1. These applications are being dealt with together solely because the law applicable to all of them are the same.

The application of Terrel Toney

2. The applicant was charged with a triple murder which occurred on February 6, 2009. He has now applied for bail. Counsel purported to make the application under section 5(2) (a) of the Act as amended. He relied on sections 5 (2), 5(5) and 5(8) in support of his application. He contends that since the applicant's trial has not started since the reading of the charge to him in 2009, he is applying for bail under section 5(5) of the Act. He argues that, that section does not require the applicant to show exceptional circumstances. According to counsel, by virtue of subsection 8, an application under subsection 5 does not require the applicant to establish exceptional circumstances.

The application of Tesson Bradshaw

3. The applicant was charged with a double murder which occurred January 2, 2024. On August 28, 2024 counsel for the applicant made an application for bail on his behalf. Counsel purported to make the application under section 5(2) of the Act but also relied on section 5(5). He referred to section 6(2) as well.
4. Despite mentioning the amendment to the Bail Act which changed the whole scheme for the grant of bail in cases of murder, counsel relied exclusively on the procedure as it existed before the amendment, basing his application on the presumption in favour of the grant of bail and the factors the court must take into account in exercising its discretion to deny bail to the applicant under section 6(2). Although he referred to the personal circumstances of the applicant he did not seek to establish any exceptional circumstnces.
5. The State responded October 9, 2024. They contended that with the amendment, the onus is on the applicant to show exceptional circumstances to warrant the grant of bail. They

contended, relying on the South African case of **S v Petersen**[1] that "generally speaking, "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness remarkableness, peculiarity or difference"**.** They argue that the applicant has failed to show exceptional circumstances.

6. They further contended that by virtue of subsection 8 the burden is on the applicant to prove exceptional circumstnces. Counsel referred to section 5(5) but made no submissions as to its effect on the proceedings or whether an application can be made under that section as suggested by the applicant.
7. Counsel was also ordered to file submissions on the need to establish exceptional circumstances by December 23, 2024. To date he has failed to do so.

The application of Kevon Marshall

8. The applicant applied for bail on 7 June 2023. That application was refused on February 27, 2024. On August 1, 2024 five months after the refusal the applicant reapplied for bail. Between the time of the refusal the law changed creating a whole new scheme for the grant of bail in murder cases.
9. The applicant through counsel is contending that he that by virtue of section 5(5) of the Act, the passage of time is an exceptional circumstance that warrants the grant of bail.

The application of Marli Williams

10. Two days before the amendment of the Bail Act came into force the applicant applied for bail after being refused in 2023. By order dated 9 September 2024 it was ordered that the applicant file grounds to establish exceptional circumstances. To date, counsel for the applicant has failed to put forward any information before the court from which it can find that there are exceptional circumstances making the applicant eligible for bail. Counsel for the State has objected to the grant of bail on the grounds of the absence of a change of material circumstances.

[1] A02/2022

11. At the hearing of the bail applications counsel for the applicants was allowed to make oral submissions to which the State responded. He further submitted written arguments.

The written submissions of the Applicants

12. Counsel submitted that the wording of the sections 5(2)(a), (5) and (8) of the Act as amended make it clear that the applicants do not have to prove exceptional circumstances. He contends that subsection 2(a) has to be read subject to subsections (3) (4), (5) and (6).
13. He says that in subsection (3) the test is exceptional circumstances. In subsection (4) the test is sufficient cause. He says that subsection 5 creates no requirement to show exceptional circumstances or satisfy any further statutory burden. He argues that in such circumstances, the presumption in favour of the grant of bail remains. The applicant is entitled as of right to apply with the court being called upon to exercise its discretion under section 6(2) of the Act.
14. He further argues that subsection 5 creates an entitlement of an accused to apply for bail if there is a failure to take evidence within 180 days of the charge being read or a delay in bringing him to trial within a year of charge.
15. He contends that the wording of subsection 5 creates a legitimate expectation of a trial within a stipulated time and therefore the effluxion of time is in essence a change of circumstances.

The issues

16. The narrow issues raised by these applications are

    (1) whether an application for bail can be made under section 5(5) of the Act;

    (2) whether a person who falls under subsection 5 has to raise exceptional circumstances in order to be eligible for bail;

    (3) whether the mere effluxion of time is a change of circumstances to warrant the grant of bail on a reapplication

    (3) Whether the applicants are eligible for bail.

The Law

17. Section 5 of the Bail Act as amended (the Act) as far as is relevant provides that:

> *(2) Subject to subsections (3), (4), (5) and (6), a Judge or Master may grant bail to a person who is charged with —*
>
> *(a) the offence of murder before, on or after the commencement of the Bail (Amendment) Act, 2024, where he can show exceptional circumstances to justify the granting of bail;*
>
> *(5) Where a person is charged with the offence of murder or an offence mentioned in subsections (3) or (4) and brought before the Court but no evidence has been taken within one hundred and eighty days of the reading of the charge or where evidence has been taken but the trial is not completed within one year from the date of the reading of the charge, that person may apply to a Judge or Master for bail.*
>
> *(8) For the purpose of subsections (2)(a), (3), and (4), the accused person shall have the burden, on a balance of probabilities, of satisfying the Judge or Master of the existence of exceptional circumstances or sufficient cause, as the case may be, to justify the granting of bail.*

Analysis and discussion

Can an application for bail be made under section 5(5)?

18. The amendment to the Act, by virtue of section 5(2) removed murder from the category of offences for which persons charged were ineligible for bail. It created a new category of offences, persons charged with murder can be eligible for bail if they can show exceptional circumstances. In so doing it replaced the common law presumption favour of the grant of bail a presumption against the grant of bail. Persons charged with murder and other specified offences are now only eligible for bail where they could show exceptional circumstances or just cause as prescribed by the amendment. The amendment by virtue of

section 5(8) went further and reversed the burden of proof although the standard of proof on a reverse burden remained, on a balance of probabilities.

19. The application for bail by a person charged with murder is governed by section 5(2) which empowers a Judge or a Master to grant bail on a charge for murder. All bail applications for murder must be made under section 5(2)(a) of the Act, the only section that authorizes the grant of bail for murder, which is subject to, as far as is relevant sub section (5). Thus, any application for bail in murder cases must be made under section 5(2)

Whether a person who falls under subsection 5(5) must establish exceptional circumstances to be eligible for bail?

20. Counsel has argued that the amendment makes section 5(2) subject to section 5 (5). He argues that the phrase "subject to" means "except for" or "inconsistent with". The argument continues that, that means that under 5(5) persons are excepted from proving exceptional circumstances for the grant of bail. This court cannot accept that argument.
21. The power to grant bail under section 5(2) is circumscribed by 5 (5) meaning that the Judge's power to grant bail is limited by the provisions of 5(5). So that judge can only grant bail to a person entitled to apply under 5(5). That is a person whose trial has not started within 6 months of the reading of the charge or even if the trial has started is trial is incomplete within a year of the reading of the charge. The section clearly does not refer to any test or criterion for the grant of bail because it deals strictly with the right to apply nothing more.
22. Subsection 5 creates a fetter on the right of persons charged with murder to apply for bail. If a person is charged with murder that person may not apply for bail unless his matter was not started within one hundred and eighty days (6 months) after the reading of the charge or even if the trial was started, the trial is not completed within a year of the reading of the charge. It goes without saying that if the matter is not started after a year there is no fetter and the applicant can apply for bail.
23. What this section does, in keeping with the presumption against the grant of bail for murder is limit the right to apply for bail to a minimum of six months, if the matter is not started and then, to a year if the matter was started but not completed. It fetters the right to apply for

bail. The Judge or Master can only entertain an application for bail under 5(2) where the conditions of 5(5). Section 5(5) does not establish the test or criterion for eligibility for bail, section 5(2) does that. Subsection (5) is a prohibitive section not an enabling section and therefore an application for bail cannot be made under subsection 5. The "may" in subsection 5 refers to the applicant's right to apply. It does not refer to the Judge's or Master's discretion to consider the applicant's eligibility for bail. An accused's right to apply for bail should not be conflated with the eligibility for bail.

24. Subsection 5 is unlikely to affect persons in pre-trial custody in excess of a year as there is no fetter on their right to apply.
25. If counsel's argument is taken to its logical conclusion it means that no accused charged with murder would have to prove exceptional circumstances to be eligible for bail. It would mean that if the matter is not started after 6 months of the reading of the charge the applicant does not have to show exceptional circumstances. If the matter is started and not completed within a year of the reading of the charge the applicant does not have to show exceptional circumstances and if more than a year elapsed giving you the right to apply the applicant does not have to show exceptional circumstances.
26. That would be so in the face of section 5(2) (a) which clearly states that in applications for bail in murder cases, bail may be granted when the accused can show exceptional circumstances. That cannot be the intention of the legislature. It makes more sense, that after the custody time limit imposed by subsection 5, the applicant may apply for bail pursuant to section 5(2) (a) and establish exceptional circumstances to be eligible for bail.
27. By making subsection (2) (a) subject to subsection 5 the legislature made the right to apply for bail for murder subject to or dependent on the conditional time limits imposed by subsection 5. All that means is that the court can only entertain an application for bail if evidence has not been taken within 180 days after the charge was read or if the matter was not completed within a year of the charges being read. The exercise of the discretion to grant bail remains under section 2(a) and the test is exceptional circumstances.
28. Subsection (8) establishes the burden and standard of proof required under the sections under which applications for bail can be made, referencing the test for eligibility for bail. It

confirms that the test under subsections (2)(a) is exceptional circumstances, subsection (3) the test is sufficient cause and subsection (4) the test is again, exceptional circumstances. Subsection (8) placed the burden of proving eligibility for bail on the applicant and confirmed the standard of proof as on a balance of probabilities.

29. The reason why subsection (5) is excluded from mention in subsection 8 is simply because it established time periods during which a person may not apply for bail. It is not an enabling subsection and therefore there is no need for any eligibility criterion or test. As I said in the bail application of **Roger Phillips**[2]**,** subsection 8 does no more, than create a fetter on the right to apply for bail.

Is the effluxion of time a change of circumstances that warrant the grant of bail?

30. Counsel has argued that the subsection (5) creates an entitlement for an accused to apply for bail if there is delay of more than a year, that delay is a change in circumstances that warrants the grant of bail. Again, this court cannot accept that argument.
31. Persons who have not had their trial completed after a year of the reading of charge have an unfettered right to apply. The only thing that subsection (5) created is a fetter on the right to apply. The criterion for eligibility for bail under this new regime is that you must show exceptional circumstances. This is so, on an initial application and it is so on a subsequent application. Change of circumstances must be exceptional. In all murder cases, the criterion for eligibility for bail is exceptional circumstances. Exceptional has been described by the courts as unusual, rare, peculiar to the accused, not something found in every bail application, not "run of the mill" but extraordinary.
32. The effluxion of a year contemplated by subsection (5) cannot be said to be exceptional to in and of itself warrant the grant of bail on a reapplication. Counsel's argument appears to be an attempt to lower or neutralize the threshold that the legislature has imposed. The test for the eligibility for bail in cases for murder whether it is an initial or subsequent application

[2] CR-HC-POS-2024-1414-1

is exceptional circumstances. The mere effluxion of time without more cannot be considered exceptional circumstances.

Are the applicants eligible for bail?

33. In these four cases the applicants must show exceptional circumstances making them eligible for bail before the State can contest the exceptionality of the circumstances or ask the Court to exercise its discretion to refuse bail pursuant to section 6(2) of the Act.
34. In all the cases the applicants have not sought to establish the existence of exceptional circumstances. Despite that, I have examined the applications to see if any exceptional circumstances can be discerned. In the case of Toney, the matter has already been considered by a judicial officer, who was of the view that a sufficient case has been made out against the applicant. In such a case, it is not for this court to assess the strength of the evidence. That is an exercise to be undertaken when a prima facie case is yet to be established either by a preliminary enquiry or a sufficiency hearing.
35. The Applicant is 36 years of age, and has been in custody for about 16 years. He has no previous convictions and has affixed place of abode. Whilst I acknowledge that a 16-year pretrial custody period is unacceptable it is not unique or peculiar to this applicant, it is not unusual in this and other jurisdictions. This case is being actively case managed with a view trial. Whilst undesirable it is not exceptional.
36. In the case of Bradshaw, he is 48 years old and at the time of this offence he was a soldier with the TTDF. He has no previous convictions and no breaches of prison rules. He has a fixed placed of abode. He has three children two of whom are minors and who were dependent on him. The case for the State is based on circumstantial evidence supported by CCTV footage. There is nothing to suggest that the evidence relied upon is incapable of establishing a case against the applicant for murder.
37. In both cases the applicants have advanced their personal circumstances which in the round do not disclose anything exceptional, unusual or unique, that would make them eligible for bail. In those circumstances, there is nothing for the State to challenge or disprove. In the absence of exceptional circumstances, the applicants, in keeping with the presumption

against the grant of bail for the offences with which they are charged remain ineligible for bail.

38. In the case of Williams and Marshall both of whom were previously refused counsel has shown no change of circumstances that are exceptional to warrant the grant of bail. The application is bereft of any information from which I can find that there are exceptional circumstances to make the applicants eligible for bail.
39. The respective applications for bail are dismissed.

G. Gonzales