

IN THE COURT OF APPEAL OF BELIZE AD 2020

CRIMINAL APPEAL NO 6 of 2020

VIRGILIO BANEGAS

Applicant/Appellant

v

THE QUEEN

Respondent

BEFORE

The Hon Madam Justice Minnet Hafiz Bertram

Justice of Appeal

H M Hamilton for the applicant/appellant

C Vidal, Director of Public Prosecutions for the respondent

23 December 2020 (**On written submissions**)

Introduction

[1] This is an application for bail by Virgilio Banegas ('the applicant') pending appeal, pursuant to section 34(1) of the Court of Appeal Act, Chapter 90 of the Substantive Laws of Belize (Revised Edition) 2011. The application is supported by the affidavit of the applicant sworn on the 16 September 2020.

[2] The applicant was tried for the offence of unlawful sexual intercourse before Moore J in the Supreme Court. The trial commenced on the 11 February 2020 and on 12 February 2020, the jury convicted the applicant of the alternative offence of sexual assault. The hearing for sentencing took place on the 11 March 2020, and at the conclusion thereof, the trial judge sentenced the applicant to six years imprisonment.

[3] The applicant filed a notice of appeal against his conviction and sentence on the 19 March 2020, without any grounds of appeal. The notice against conviction was not filed

within 21 days as provided by section 27 of the Court of Appeal Act. It was filed out of time and therefore, not properly before the Court. In relation to the appeal against sentence, it is properly before the Court, having been filed with the 21 days of sentence.

[4] The application for bail was determined by the Court (single judge) on written submissions. On 12 November 2020, the decision was promulgated whereby bail was refused and reasons promised to be given in writing. The reasons follow.

Affidavit evidence by the applicant in support of application

[5] By the affidavit sworn on 16 September 2020, the applicant deposed that he is 70 years old. He stated that the transcript of his trial before Moore J is not ready and therefore his appeal will not be heard in the upcoming session. He stated that he was extremely concerned because of his medical condition and he feared that his medical condition will worsen before his appeal is heard.

[6] He deposed that he has been a diabetic for over 10 years and since his incarceration in March 2020, his medical condition has not improved. The applicant exhibited a medical report from Dr. Kenton Hernandez dated July 2020, ('Exhibit VB4') which he stated confirmed his medical condition, that is, that he has been diagnosed with diabetes, hypertension and require counselling.

[7] The medical report of Dr. Hernandez is dated 28 July 2020. In that report, he stated that he was requested to perform a medical evaluation on the applicant who is an inmate at the prison. Further, that although the applicant has been said to be a known hypertensive there was no evidence of prior treatment to him from his medical records. Dr. Hernandez attached a report from Dr. Patricia Orosa dated 6 March 2020, who diagnosed the applicant with high blood pressure.

[8] The recommendation made by Dr. Hernandez in his report states:

“Patient is required to follow up BP reading with the medical officer at prison. If diagnosed as hypertensive he will be need to be placed on treatment. Patient will also need to do a glucose tolerance test. If patient is diagnosed as a diabetic, he will be required to do eye screening for diabetic retinopathy. He will also be required to do a chest X ray and an electrocardiogram. Patient is stable physically but mentally, he has a pessimistic attitude about being incarcerated and this may negatively affect the patient’s mental health. Patient will require counselling.”

[9] The applicant raised two other grounds in his affidavit apart from his medical condition. He deposed that there was no Victim Impact Statement prior to his sentencing in accordance with Practice Direction dated 23 March 2007. Further, he stated that the six year sentence passed by Moore J, was erroneous and excessive and as such on appeal he will seek to have the sentence set aside and his conviction quashed. (These grounds were not stated in the Notice of Appeal).

Affidavit evidence in opposition to bail

Affidavit of Javier Chan

[10] In an affidavit sworn on 4 November 2020, Javier Chan, Senior Crown Counsel in the Office of the Director of Public Prosecutions, who appeared on behalf of the Crown in the trial of the instant matter deposed as to the reason for not filing a victim impact statement.

[11] He stated that the victim, according to the evidence of her date of birth given by her mother at trial, was 14 years and 9 months at the time when she was sexually assaulted by the applicant. At the time the applicant was 67 years of age and was the neighbor of the victim’s grandmother. At paragraph 5 of the affidavit, Mr. Chan deposed that, “...*Banegas called 3 witnesses in mitigation and both sides made submissions. I had not filed a Victim Impact Statement because the victim and her mother had expressed to me that they did not wish to take any further part in the proceedings and just wanted it to be left in the hands of the judge.*”

Affidavit of Javier Novelo

[12] Javier Novelo, medical doctor, in an affidavit sworn on 4 November 2020, deposed that he has been employed at the Belize Central Prison for the past six years. He has the responsibility to conduct examinations *“on and record the state of health of all prisoners while they are incarcerated, which includes the provision of medication where necessary and responding to any situation that requires medical attention.”* He had examined the applicant at the prison and deposed from paragraphs 5 to 11 the following:

“5. Inmate Virgilio Banegas was first examined at the Medic Centre of the Belize Central Prison, by me, on the 17th day of March 2020. He indicated that he was hypertensive. Upon examination, his blood pressure and other vital signs were within normal limits. He was at that time, considered to be in good health.

6. He was re-examined by me on 27th March 2020 upon the request of his attorney-at law, Mr Hurl Hamilton. Again, based on the result of my examination, my conclusion was that he was in good health. I provided a report of my findings to Mr Hamilton.

7. He was thereafter examined at the Medic Centre of the Prison, on 28th July 2020, by Dr Kenton Hernandez. This was a private examination. Dr Hernandez noted on that day that Banegas' blood pressure was elevated and recommended medication which was provided by our pharmacy.

8. A single reading of elevated blood pressure cannot result in a diagnosis of hypertension. There may be many reasons that a person's blood pressure can be elevated on a particular day. The report of Dr Hernandez had not been shared with me prior to the time of my being asked to provide an affidavit. I have now been able to read the report and I have noted that the doctor himself has not diagnosed Banegas with either hypertension or diabetes.

9. I have also read the report of Dr Patricia Orosa, dated 6th March 2020, which is prior to Banegas' admission to the Prison. In this report, while the doctor states that Banegas suffers from high blood pressure, there is no mention of diabetes and I have also noted that the medication prescribed is not specifically for hypertension or diabetes. Nimodipine is a blood thinner to prevent strokes. Clopidogrel assists to prevent heart attacks. Atorvastatin is to lower cholesterol and Enantyum is a pain killer. While Nimodipine and Clopidogrel can contribute to the lowering of blood pressure, they are not specifically antihypertensive medications.

10. Banegas has made various complaints over the period that he has been at the Prison, mostly in relation to body pains caused by injuries sustained prior to his incarceration, the most significant of which, according to the information that he provided, is a head injury which he had suffered some 8 years before. He has received treatment as necessary for those complaints. None of these complaints related to hypertension, diabetes, or complications from either and at this time, there is no diagnosis for hypertension or diabetes for Banegas.

11. If at any time during the course of Banegas' incarceration at the Belize Central Prison that diagnosis changes, he will receive the necessary treatment that he requires just as all the other inmates at the Prison currently do.”

The law on admission of appellant to bail

[13] Section 34 (1) of the Court of Appeal Act provides:

“34. (1) The Court may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.”

[14] This section is discretionary, and therefore, bail pending an appeal after conviction is not a matter as of right. The discretion conferred by section 34(1) is not ordinarily exercised in favour of the grant of bail. It is only where there are special or exceptional circumstances that the discretion is exercised by the Court. The Director has provided three judgments from this Court which adequately addressed special or exceptional

circumstances. These are: **Ruperto Magana v The Queen**, Criminal Appeal No. 2 of 1988; **Eustaquia Torres v The Queen**, Criminal Appeal No. 3 of 1988; and **Coye and Others v The Queen**, Criminal Appeal No. 19 of 2012.

Submissions for the applicant

[15] Learned counsel, Mr. Hamilton for the applicant relied on the case of **Sefo and another v R** (2005) LRC 576, a decision from the lower court of Tongo, where Ford J outlined some of the factors an appellate court may take into consideration in determining the issue of bail pending appeal. Those factors are stated in the Bail Act 1990 and includes, reasonable prospect of success, the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served and there are substantial grounds for believing that if the applicant is released on bail he will surrender to custody without committing any offence while on bail. Counsel further submitted that in Tongo, a Commonwealth jurisdiction, there is a Bail Act unlike in Belize. Nevertheless, it can be used as persuasive authority in the determination of the bail application. Counsel further relied on the case of **The State v Lynette Scantlebury** (1976) 27 WIR 103, where Chancellor Haynes opined that an applicant for bail had to show that there were special circumstances which would make it just to grant bail pending the appeal.

[16] Mr Hamilton submitted that in the instant matter, the applicant has proved that he has a medical condition and further he is of an advanced age, which are special circumstances in supporting the grant of bail pending appeal.

[17] Counsel further submitted that the applicant has a reasonable prospect of his appeal succeeding. The reason being that the sentence of six years was erroneous and excessive as a result of the failure of the trial judge to first obtain a victim impact statement. Also, that the sentence could have been a fine if there was such statement.

[18] Mr. Hamilton also submitted that the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served and further the applicant will be

eligible for parole in March 2023. Counsel relied on **Re Application for Bail by Zoudi**, where it was held that for the purposes of determining whether exceptional circumstances exist, the expiry of the non-parole period should, unless it appears that the applicant will not be released around that time, be treated as a relevant consideration of the same kind as the expiry of the non-suspended portion of a partly suspended sentence.

Submissions by the Director of Public Prosecutions

[19] The learned Director of Public Prosecutions opposed the application for bail pending appeal on two grounds: (a) there is no appeal against conviction properly before the Court and (2) the applicant has failed to demonstrate that there are special or exceptional circumstances which justify his release.

[20] The Director submitted that the applicant's appeal on conviction was filed out of time and not properly before Court. See section 27 of the Court of Appeal Act which provides that the notice of appeal or notice of application for leave to appeal shall be filed within 21 days. She further submitted that no grounds of appeal against conviction had been advanced by the applicant.

[21] In relation to bail pending appeal, the Director submitted that Mr. Hamilton failed to refer to judgments of this Court which are on point, namely, **Magana; Torres and Coye**. She submitted that these three decisions establish the following:

“(1) bail pending appeal is not as of right, it is at the discretion of the Court and will only be granted where special or exceptional circumstances are shown to exist;

(2) the paramount consideration is whether the applicant has a prospect of success on appeal and the Court must be in a position to properly assess that prospect;

(3) a special or exceptional circumstance may be the possibility that an ultimately successful appellant may end up having served all or most of his/her sentence by the time the appeal is heard and determined;

(4) ill-health in itself does not amount to a special circumstance.”

[22] In relation to sentence, the Director submitted that there is no prospect of success on appeal of that ground. The reason being that the ground betrays a misinterpretation of the Practice Direction on Victim Impact Statements, as well as the likely effect of Victim Impact Statements on the sentence to be imposed by a trial judge. The learned Director referred the Court to paragraph 1 of the Practice Direction which shows that it does not oblige a judge or the prosecution to obtain a Victim Impact Statement. Further, counsel for the applicant has not shown how the Statement would have resulted in a lower sentence having regard to the nature of the case (sexual assault), the age of the applicant and the age of the victim.

[23] In response to the point that the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served, the Director submitted that there is no evidence before the Court to suggest that the matter will not be listed in the first session of the Court in 2021. At that time, the applicant would have served one year of a six year sentence which is not a substantial part of it. Further, in relation to the eligibility for parole, there is no basis for the proposition that the appeal will take as long as three years to be heard.

[24] On the point of age and illness, the Director submitted that there is uncertainty surrounding the ill-health of the applicant, as shown by the affidavit evidence. Further, ill-health by itself, does not amount to a special circumstance.

Discussion

Special or exceptional circumstances

(i) Age and ill-health

[25] Mr. Hamilton submitted that the applicant has proved that he has a medical condition and he is of an advanced age, which are special circumstances supporting the granting of bail pending appeal. The Director submitted that ill-health by itself does not amount to a special circumstance and also there is uncertainty in relation to the health of the applicant.

[26] It has been shown by the authorities of **Magana, Torres** and **Coye**, that ill-health in itself does not amount to a special circumstance justifying the grant of bail. The authorities in Belize adequately addressed what may constitute special or exceptional circumstances. In **Magana**, the applicant in his affidavit evidence deposed that he was a diabetic but there was no medical certificate in that regard. But, that Court said, *“in any event this would not in itself constitute special circumstances justifying the grant of bail.”*

[27] In the case **Coye**, the applicants for bail had each been sentenced to three years imprisonment for money laundering. One of the applicants was age 65. Their applications for bail were made on the same grounds that have been advanced by Mr. Hamilton in the instant matter. In **Coye**, Morrison JA, as he then was, addressed what may constitute special or exceptional circumstances. He said at paragraphs 8 to 11 of the judgment:

“[8] Section 34(1) of the Court of Appeal Act provides that “The court may, if it deems fit...admit the appellant to bail pending the determination of the appeal”. However, as the court stated in **Magana**, it is clear on the authorities that the discretion conferred by this section “is not ordinarily exercised in favour of the grant of bail to a convicted person”. There must therefore be **special or exceptional circumstances**, one clear such circumstance being the possibility that an ultimately successful appellant may end up having **served most of his/her sentence** by the time the appeal comes to be heard and disposed of. It is also clear from the rulings in both **Magana** and **Torres** that **ill-health** in itself does not amount to special circumstances justifying the grant of bail.

[9] From the material before me, I am completely unable to make an assessment of the **prospects of success** of each of these appeals. To do so would, as Mr Saldivar frankly recognises, require a perusal of, at the very

least, the learned Chief Justice's summing up to the jury, as well as, preferably, the transcript of the evidence at trial, neither of which is currently available.

[10] As regards the **time that is likely to elapse before these appeals are heard**, there is nothing before me to suggest that, despite the appellants' pessimistic assessment of the state of the court's list, providing the transcript is ready in time, these appeals could not be heard at the March or, at the very latest, the June 2013 session of the court. Given the length of the sentences imposed on each of the appellants, I do not think that this could possibly be regarded as a disproportionate wait for a hearing in the circumstances.

[11] In the circumstances therefore, despite the fact that the **medical evidence proffered** by the appellants on these applications has been a considerable improvement over that apparently provided in both **Magaña** and **Torres**, I do not consider that the special or exceptional circumstances required for the grant of bail pending appeal have been shown on these applications. The applications are therefore refused." (emphasis added)

[28] The applicant in the present matter is 70 years old. In his affidavit evidence he supported his claim of ill-health with medical reports. I had considered the medical reports from Dr Hernandez, Dr Orosa and Dr Novelo and it seemed that the medical condition of the applicant was uncertain. The applicant has misrepresented in his affidavit evidence that he had been diagnosed with diabetes and hypertension as the medical reports showed otherwise.

[29] Dr Orosa describes Vanegas as a "*Patient who suffers with Blood Pressure.*" There is no information as to how this diagnosis was made by the doctor, that is, either by some form of test or information given by the applicant. Further, as shown by the medical report of Dr Novelo, the medications prescribed by Dr Orosa were not for the treatment of hypertension or diabetes.

[30] Dr Hernandez examined the applicant, upon the request of Mr. Hamilton, but did not diagnose him as hypertensive. At the time, the applicant had an elevated blood pressure without a diagnosis. As shown at paragraph paragraph 8 above, it was recommend

by Dr Hernandez that the applicant follow up on blood pressure reading and also to do a glucose test.

[31] The medical report of Dr Novelo, the prison doctor, is very enlightening as shown at paragraph 12 above. This report shows that *“at this time, there is no diagnosis for hypertension or diabetes for Banegas”* (the applicant). Most importantly, Dr Novelo has given his assurance, which I have no reason to doubt, that if at any time during the course of the applicant’s *“incarceration at the Belize Central Prison that diagnosis changes, he will receive the necessary treatment that he requires just as all the other inmates at the Prison currently do.”*

[32] Accordingly, I was unable to accept that the age of the applicant and his uncertain medical condition were special or exceptional circumstances justifying the grant of bail. I was satisfied that he can receive treatment in the prison in the event he is diagnosed with hypertension and/or diabetes.

(ii) Reasonable prospect of success

[33] Mr Hamilton submitted that the sentence of six years was erroneous and excessive as a result of the failure of the trial judge to first obtain a Victim Impact Statement. Further, he stated that the sentence could have been a fine if there was such statement.

[34] The Director submitted that there is no prospect of success on appeal of that ground as it betrays a misinterpretation of the Practice Direction on Victim Impact Statements, as well as the likely effect of Victim Impact Statements on the sentence to be imposed by a trial judge.

[35] It was my view, that there was no failure of the trial judge to first obtain a Victim Impact Statement before sentencing. This is not a pre-condition before sentencing. However, if one is prepared by the victim then the judge shall consider the statement. I cannot see how such a statement would help the applicant in getting a fine. Paragraph 1 of the Practice Direction states:

“For the purposes of determining the sentence to be imposed on an offender, the court shall consider **any** statement that may have been prepared in accordance with paragraph 2 of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.”

[36] If the statement was prepared, the victim who was 14 years and nine months of age, would have had to describe the harm done to her or loss suffered by her, arising from the commission of the offence. The applicant had been indicted for unlawful sexual intercourse but, the jury found that the victim had been sexually assaulted. I cannot comprehend how a Victim Impact Statement from the victim, a minor, in relation to sexual assault by a senior citizen would have benefitted the applicant in getting a lower sentence.

No transcript of proceedings

[37] The transcript of the proceedings in the trial court is not ready as confirmed by Mr Hamilton and the Director. Mr Hamilton submitted that this Court is therefore, not in a position to determine whether a realistic prospect of success exists on the merits of the conviction. Firstly, it should be noted, as rightly pointed out by the Director, that there is no appeal against conviction properly before the Court as the Notice of Appeal was filed later than 21 days after conviction. Also, as shown by the Notice, there is no ground of appeal against conviction.

[38] The ground of appeal on sentence (which is not in the Notice of Appeal) in relation to the Victim Impact Statement, shows no prospect of success. Additionally, one cannot ignore the fact that it is necessary to have a Record of proceedings to determine prospect of success whether in relation to conviction or sentence. As was shown in **Magana, Torres and Coye**, in order to consider whether an appeal has a chance of succeeding, the Court would have to consider: (a) the facts of the case as led in the evidence; (b) the nature of the defence led by the applicant; (c) the mitigation offered on his behalf and (d) the reasoning of the trial judge. Since the Record is unavailable, the prospects of success cannot be determined on that basis.

Bail conditions irrelevant if there is absence of exceptional circumstances

[39] Mr Hamilton, under the heading of prospect of success, submitted that the applicant has no previous convictions and previously abided by bail conditions set by the court below. He also argued that there is no evidence to suggest that if he is released on bail he will commit another offence or will not present himself for his appeal. I am in agreement with the submissions of the Director that these considerations are irrelevant as this application for bail was sought after conviction and there is an absence of likelihood of success on appeal. In the case of **Magana** the Court said,

“In support of the application it was submitted that the previous good character of the Appellant, the time which is likely to elapse before the appeal is heard, the present state of health of the Appellant and the probability of the appeal succeeding were factors to be taken into account. In addition, it was submitted that the Appellant had been on bail prior to his trial, was a Belizean and could provide suitable sureties in the event of bail being granted.

Section 35(1) of the Court of Appeal Act Cap. 73 provides that *"The Court may, if it seems fit, on the application of an Appellant, admit the appellant to bail pending the determination of his appeal."* It is however clear on the authorities that **the discretion conferred by these provisions is not ordinarily exercised in favour of the grant of bail to a convicted person.** There must be what is variously referred to as **special circumstances or exceptional circumstances.**” (emphasis added)

[40] These considerations stated by Mr Hamilton are therefore irrelevant in the absence of special or exceptional circumstances as shown in **Magana, Torres** and **Coye**.

(iii) *Appeal unlikely to be heard before the whole or a substantial portion of the sentence has been served*

[41] Mr Hamilton submitted that the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served and further the applicant will be eligible for parole in March 2023. I am unable to accept this submission. There is no evidence before the Court to suggest that the matter will not be listed in the first session of the Court in 2021 whether by virtual hearing or otherwise, providing that the transcript of proceedings is ready. If not, the appeal can be heard in the second session of 2021. At that time, the applicant would have served far less than two years of his sentence which is not a substantial part of the six year sentence. Further, the applicant will not be eligible for parole until 2023 and again there is no evidence that the appeal will take that long to be heard.

Conclusion

[42] I was satisfied on the affidavit evidence of Dr Novelo that the applicant can obtain treatment by the Prison doctor for diabetes and hypertension in the prison, in the event that he is so diagnosed. Further, I was of the opinion that there was no special or exceptional circumstance shown by the applicant for the grant of bail pending his appeal. It was for those reasons that I refused the application for bail by the applicant.

HAFIZ BERTRAM JA