

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA NO. Cr. 320/98

THE STATE

V

- (1) PETER HOMER**
- (2) MICHAEL PAUL**
- (3) SHERWIN ABRAHIM**

FOR

POSSESSION OF NARCOTICS FOR THE PURPOSE OF TRAFFICKING

Before the Hon. Mr. Justice M. Baird

Appearances:

Ms. M. Wilson appeared on behalf of the State

Mr. F. Solomon, S.C., Mr. I. Brooks and

Mr. D. Maharaj appeared on behalf of the Applicants.

RULING

The three applicants, Peter Homer, Michael Paul and Sherwin Abraham appeared before the Magistrate sitting at the Port of Spain Magistrate's Court on 23rd January, 1998 on a charge of possession of marijuana for the purpose of trafficking. They were refused bail and have now applied to a Judge in Chambers for admission to bail.

The application of Peter Homer was supported by affidavit of Solange Homer dated and filed on the 29th January, 1998. The application of Michael Paul was supported by Affidavit of Jacqueline Paul dated and filed 29th January, 1998. And the application of Sherwin Abraham was supported by affidavit of Jacqueline Paul dated and filed 29th January, 1998.

The three applications were heard together.

Mr. Solomon, leading Mr. Devish Maharaj, appeared on behalf of the three applicants. Miss Wilson appeared on behalf of the State.

A schema of Mr. Solomon's submission is that the sole ground of objection the State advanced to the granting of bail before the Magistrate was the seriousness of the offence. The sole ground, therefore, with which he was prepared to deal before this Court was the ground under Section 6: (2) (a) (i) of the Bail Act number 18 of 1994 (The Act). Mr. Solomon argued that it was not sufficient for the State to say that an applicant should be denied bail because of the seriousness of the offence with which he is charged. The State must show why the seriousness of the offence would so effect the accused so as to make it probable that he would not turn up for his trial. The State must do more than simply state the seriousness of the offence, because seriousness of the offence, per se, was not a ground for the refusal of bail.

Miss Wilson objected under Section 6:(2) (a) (i) of the Act to the applicants being admitted to bail; that is, on the ground that there was substantial grounds for believing that the applicants, if released on bail would fail to surrender to custody. Miss Wilson then proceeded to advance factors designed to quicken that ground of objection.

She catalogued those factors as follows:

(1) the cogency of the evidence.

(2) the nature and seriousness of the offence and this included the quantum of marijuana that is, 1650 kilograms with an estimated street value of \$2,904,000.00

(3) the prevalence of the offence.

(4) the likelihood of conviction and possible sentence.

(5) as respects the applicant, Michael Paul, his given address is 14 Nelson Street, Arima. This applicant was, however, ordinarily resident in the United States of America.

State Attorney made reference to a factor concerning the warehouse at which the applicants were arrested but that was subsequently left to wither on the bough. During the course of her submission, Miss Wilson recited a brief summary of facts surrounding the charge against each of the applicants. Mr. Solomon objected to this procedure and invited the Court not to act on those statements contending that they did not constitute evidence as they were not made the subjects of sworn affidavits.

By way of rejoinder, Mr. Solomon submitted that the summary of facts was not evidence which could be said to be cogent, even if it were proved. It was not inconsistent with innocent explanation, even if it were proved. It was not for the Court to assess the evidence because there was no evidence before the Court. The cogency might perhaps arise at the preliminary inquiry or at the trial itself. He further submitted the prevalence of the offence was not relevant to the application. He conceded, however, that if all the allegations were proved at the trial, then it would be more than likely that a heavy sentence would be imposed, but he contended that we were a long way away from proof. He stated that the applicant, Michael Paul, was normally resident in Trinidad but he spent a considerable amount of time abroad. He held a green card for the United States of America which he acquired when he was a student in the United States of America. Mr. Solomon argued that the fact that Michael Paul lived in the USA and had acquired immigration status was however immaterial to his application.

Order 56 of the Rules of the Supreme Court was amended by the Supreme Court (Amendment) (No .4) Rules, 1982, by the insertion immediately after Order 56 of the new Order 56 (A). Order 52 (A) is headed “Bail Applications.”

Rule 1 defines the Act as the Summary Court Act, chapter 4:20. It defines “Form” as a Form in appendix (A) and the word “magistrate” is made to include a Justice of the Peace.

Rule 2 provides:

- “(a) An application to review a decision of a Magistrate under section 133 (A) or 134 of the Act may be made in the form set out as Form 49 (A).*
- (b) Where the appellant is in custody, the application shall be lodged with the Commissioner of Prisons who shall forthwith transmit the application to the Registrar.*
- (c) Where the appellant is not in custody, the application shall be lodged with the Registrar.*
- (d) A copy of the application shall be forwarded by the Registrar to the Director of Public Prosecutions.*
- (e) The Registrar shall forthwith fix and notify the Appellant and Director of Public Prosecutions of the date and time for the hearing of the application.*
- (f) The Appellant shall be entitled to appear at the hearing in person or by attorney and the Director of Public Prosecutions shall be entitled to appear on behalf of the State.”*

Rule 3 provides for the order of the Judge who hears the application to be in the form set out as Form 49 (B).

Paragraph 3 of the Supreme Court (Amendment) (No. 4) Rules provides for the insertion immediately after form 49 in appendix A, forms No. 49 (A) and 49 (B).

It must be borne in mind that section 133 (A) of the Summary Court Act deals with bail in respect of an appellant sentenced by a Magistrate to a term of less than three months, and Section 134 deals with bail in respect of an appellant sentenced by a Magistrate to a term of three or more than three months.

Form 49 (A) is simple and straightforward. It provides for the name and address of the Appellant; the offence; Court where tried; sentence; date of conviction; date of commitment; previous convictions. It also provides for terms on which the appellant was admitted to bail to be deleted where inapplicable, and proposed modification, deleted where inapplicable, and finally, the date and signature of the appellant.

On a perusal of Order 56 (A), the first consideration that obtrudes itself on the mind is the thunderous silence on the question of affidavits. There is no requirement that the application be supported by affidavit as there is no prohibition of an application being supported by affidavit. There is no requirement that any material before the Court should be made the subject of affidavit. Indeed, form 49 (B) clearly demonstrates that affidavits are optional, in that before the making of the Order, the Judge would have been required to hear attorney for the applicant or the applicant in person and to read affidavits, if any. Secondly, and also of significance, is the fact that rule 2 (a) does not make it mandatory that the application be made in the form set out as form No. 49 (A). It provides that an application may be made in such form.

One receives the impression that Order 56 (A) countenances a certain degree of informality in the making of such an application.

The situation in England, on the other hand, is much more formal. Order 79, Rule 9, paragraph 1 provides:

“Subject to the provisions of this rule, every application to the High Court in respect of bail in any criminal proceedings:

(a) Where the defendant is in custody, must be made by summons before a Judge in Chambers to show cause why the defendant should not be granted bail.

(b) Where the defendant has been admitted to bail, must be made by summons before a Judge in Chambers to show cause why the variation in the arrangements for bail proposed by the applicant should not be made.”

Paragraph 2 provides for the summons (in Form 97 (A) in Appendix A) to be served at least 24 hours before the day name therein for the hearing, where the application was made by the defendant on the Prosecutor and on the Director of Public Prosecutions, if the prosecution is being carried on by him; and where the application was made by the prosecutor or a constable under Section 3 (8) of the Bail Act 1976, on the defendant.

Paragraph 3 provides: “Subject to paragraph 5, every application must be supported by affidavit.”

Paragraph 4 provides that where a defendant in custody who desired to apply for bail was unable through lack of means to instruct a solicitor, he might give notice in writing to the Judge in Chambers stating his desire to apply for bail and requesting that the official solicitor should act for him in the application.

And paragraph 5 provides that where the official solicitor had been so assigned, the Judge might, if he thought fit, dispense with the requirements of paragraphs 1 to 3 and deal with the application in a summary manner.

What this Court considers to be of singular moment is the fact that whereas in England there are rules governing an application to the High Court for bail in any criminal proceedings, and whereas in this country there are rules, albeit less formal, governing the application for a review of a decision of a Magistrate granting bail under the section 133 A of the Summary Court Act, and the application for a review of a decision of a Magistrate granting or

refusing bail under Section 134 of the said Act, there are no rules in respect of an application for bail by an accused person made under Section 33 of the Indictable Offences (Preliminary Enquiry) Act, Chapter 12:01 as amended by Third Schedule of the Act. (It is to be noted that Section 34 of Chapter 12:01 was amended to read Section 33 by the Indictable Offences (Preliminary Enquiry) (Amendment) Act 1990.)

Section 33 provides:

“Subject to the Bail Act 1994, the Court or a Judge may, at any time on the petition of an accused person charged with an offence, grant him bail and recognizance of bail may, if the Court or Judge so directs, be taken before any Magistrate.”

The practice and procedure governing an application, or more accurately, a petition, of an accused person for bail under Section 33 is no more formal than that governing an application for bail under Section 133 (A) or 134 of the Summary Court Act. Indeed, the procedure set out in order 56 A seems to be the adoption, *mutatis mutandis*, of the procedure that had already been in place as respects application under Section 33 of the chapter 12:01.

At the hearing of an application for bail under Section 33 of Chapter 12:01, the procedure which has been undeviatingly followed since time out of mind is that the Court would be furnished by the bail clerk of the Registry of the Supreme Court with a copy of a brief statement of facts, obtained from the police, surrounding the offence with which the applicant is charged. This statement of fact would eventually go on to form the substratum of the prosecution evidence at the preliminary enquiry, and at the trial. On that very document, the Court would be supplied with information concerning the criminal history of the applicant, if he does in fact have such a history, and with information as to whether the applicant had previously applied for bail in respect of the said charge for which his application was then before the Court. State attorney

would also be in possession of those documents and attorney for the applicant or the applicant in person would be entitled to this material, if he so desires.

The application, for which there is no prescribed form, need not be supported by affidavit. Indeed, an application supported by affidavit is something of a *rara avis*. Attorney for the applicant or the applicant in person would address the Court in an endeavour to persuade the Court to grant the application. State attorney would then recite the brief statement of facts referred to earlier and would announce whether or not the State was objecting to the applicant being admitted to bail. If there is an objection to bail, State Attorney would advance the grounds for the objections and would make reference to the applicant's criminal record, if he has one. Attorney for the applicant or the applicant in person would then make a rejoinder. The Court would then give its decision.

This procedure, though not governed by formal rules, is of venerable antiquity, and the Court can discern no good reason to disturb it. The Court travailed as it essayed to follow the arguments of Mr. Solomon that possession of those documents by the Court would result in the Court's mind being prejudiced at the hearing of the application. Indeed, reference was made to this procedure without disapprobation, in the judgment of Hosein J, in *Sinanan & Others v The Attorney General of Trinidad and Tobago*, H.C.A. 671 of 1969, a judgment, I might add, by which Mr. Solomon set great store. At page 7 it is stated:

“She is a temporary clerk I attached to the Registry of the Supreme Court. She performs the duties of bail clerk. She says that when applications for bail are made, she would pass them to the Criminal Records Office, Police Headquarters and the officers there would forward to her reports on the applicants which in turn she would place before the Judge hearing bail applications.....”

The Court is therefore of opinion that further consideration of this point would be a sleeveless errand.

The Court is also of opinion that in giving this summary of facts, the State does not have the burden of proving those facts beyond a reasonable doubt. These are applications for bail. The applicants are not on trial before this Court charged with any criminal offence; further, in these applications, this Court is not required to assess evidence and make findings of fact. The so-called statement of facts is, in essence, a compendium of allegations. Accordingly, the Court sees no need for prospective witnesses for the prosecution to go on affidavit in order to furnish the Court with evidence on oath. Were the Court to give currency to that proposition, it would open a Pandora's box from which, even Hope, would escape.

In entertaining this view, the Court derives comfort from the provisions of section 37 (3) of the Indictable Offences (Preliminary Enquiry) Act, Chapter 12:01 dealing with the power to revoke or require higher bail.

Section 37 (3) provides:

“Where an accused person has been admitted to bail by a Judge or a Magistrate and circumstances arise, which, if the accused person had not been admitted to bail, would justify the Judge or Magistrate in refusing bail or in requiring bail of a greater amount, the Judge or Magistrate may, on the circumstances being brought to his notice by any police officer of the First Division of the Police Service, issue a warrant for the arrest of the accused person, and after giving the accused person an opportunity of being heard, may either commit him to prison to

await trial or admit him to bail for the same or an increased amount as the Judge or Magistrate may think just.”

Parliament made no requirement for the Police Officer to give evidence on oath, whether viva voce or by affidavit, in order to bring the circumstances to the notice of the Judge or Magistrate, and this is as respects a situation where an accused person has already been admitted to bail.

The summary of facts surrounding the alleged offence with which the applicant Peter Homer is charged is that around 12:40 a.m. on 7th January, 1998, a party of police officers under the supervision of ASP Craig and including the complainant, Sergeant St. Cyr, went to a warehouse at Tumpuna Road, Guanapo where they observed five men packing a container. An examination of the contents of the container revealed 1650 kilograms of compressed marijuana with an estimated street value of (\$2,904,000.00) two million, nine hundred and four thousand dollars. The five men, including the applicant, were arrested and charged for the offence of possession of marijuana for the purpose of trafficking.

The summary of facts surrounding the alleged offence with which the applicant, Michael Paul, is charged is that around 12:40 a.m. on 7th January, 1998, a party of police officers under the supervision of ASP Craig and including the complainant, Sergeant St. Cyr went to a warehouse at Tumpuna Road, Guanapo where they observed five men packing a container. An examination of the contents of the container revealed 1,650 kilograms of compressed marijuana with an estimated street value of (\$2,904,000.00) two million, nine hundred and four thousand dollars. The five men, including the applicant, were arrested and charged for the offence of possession of marijuana for the purpose of trafficking.

The summary of facts surrounding the alleged offence with which the applicant, Sherwin Abraham, is charged is that around 12:40 a.m. on 7th January, 1998, a party of police officers under the supervision of ASP Craig and including the complainant, Sergeant St. Cyr, went to a warehouse at Tumpuna Road, Guanapo where they observed five men packing a container. An examination of the contents of the container revealed 1650 kilograms of compressed marijuana with an estimated street value of (\$2,904,000.00) two million, nine hundred and four thousand dollars. The five men, including the applicant, were arrested and charged for the offence of possession of marijuana for the purpose of trafficking.

The Court considered the affidavit of Solange Homer sworn to and filed on the 29th January, 1998, in support of the application of Peter Homer. It considered the affidavit of Jacqueline Paul sworn to and filed on January 29th, 1998, in support of the application of Michael Paul; and it considered the application of Jacqueline Paul sworn to and filed on 29th January, 1998, in support of the application of Sherwin Abraham.

There can be no successful challenge to the view that the seriousness of an offence simpliciter cannot constitute a valid ground for the refusal of bail. Under Section 6 (3) (a) of the Act, the seriousness of an offence is a relevant factor which the Court would take into consideration in deciding whether it would exercise its discretion to deny an applicant bail on the ground that the Court is satisfied that there are substantial grounds for believing that the applicant, if released on bail, would fail to surrender to custody. Seriousness of the offence is therefore not a ground for the refusal of bail but part of a larger clinical picture which the court will consider in determining whether it would exercise its discretion under section 6 (2) (a) (i) of the Act.

As the Court addressed this ground under section 6 (2) (a) (i), on which the State based its objection in respect of the three applications, it considered the nature and seriousness of the alleged offence with which the applicants are

charged, that is, possession of narcotics for the purpose of trafficking. It also considered the quantum of marijuana of which the applicants were alleged to have been found in possession, that is 1650 kilograms, and its estimated street value of the not insubstantial sum of \$2,904,000.00.

The Court was of opinion that these factors bore directly on the seriousness of the alleged offence projecting that seriousness into stark relief. Under section 6 (3) (e), the Court considered as relevant factors the disquieting prevalence of this type of offence and the likelihood that the applicants may be convicted and the probability that a heavy sentence would be imposed.

Having given its best consideration to all relevant circumstances, the Court is satisfied that there are substantial grounds for believing that the three applicants, if released on bail would fail to surrender to custody.

Over and above the above-mentioned factors considered by the Court in respect of the three applicants, the Court considered an additional relevant factor in respect of the applicant, Michael Paul, that is to say, that Michael Paul is a landed immigrant of the USA. He possesses what is popularly known as a green card and he resides for a considerable period of time in the USA.

The three applications are accordingly refused.

Dated this 2nd day of February, 1998

Melville Baird
Judge