Application for the return of a recognizance of a security

IN THE GUERNSEY MAGISTRATE'S COURT

Law Officers of the Crown

V

Maximillian Simon Rupert Fawcett

In the Matter of an Application for the Return of a Recognizance of a Security

Date of Hearing: 13th September 2018

Judgment Handed Down: 27th September 2018

Before: Graeme Dewar McKerrell, Judge of the Magistrate's Court

Counsel for the Prosecution: **Crown Advocate C Dunford**

Counsel for the Defendant/Applicant: Advocate S Steel

Law and Cases referred to:

The Bail (Bailiwick of Guernsey) Law, 2003, as amended

Law Officers of the Crown v Stephen Brian De Jersey (GLR 2007-08 Note 2)

Introduction

1. In this case, the defendant has been committed to stand trial in the Royal Court and has already made his first appearance at a Plea and Directions Hearing. Ordinarily, the act of committal would bring an end to the proceedings as far as this court is concerned. However, an issue has arisen that requires determination by me because it arises in the context of the defendant's remand status whilst within the jurisdiction of this court.

2. On 11 May 2018 the defendant appeared in this court and was released on bail, subject to a security of £10,000 being lodged and the following conditions being observed:

(a) not to contact or attempt to contact directly or indirectly by any means a named person; and
(b) reside at either of his parents addresses in the UK.

The security was lodged with the court by the defendant's father that day, which allowed the defendant to return to live in the UK pending his next court appearance.

3. Despite what Advocate Steel argues Mr Fawcett (senior) could have been left in no doubt as to what his obligations were and the risk he faced of losing the money because the judge explained it to him in clear terms:

> *"…you realise Mr Fawcett that if Maximillian doesn't surrender to court in due course or breaches any of those conditions that I have mentioned, particularly the contact condition, you are liable to forfeit the whole of that ten thousand pounds. Is that clear to you?"*

Mr Fawcett indicated that he understood. He went on to sign the normal "Recognizance of Accused's Security" form, which clearly states that the payment lodged *"will be enforced against me in accordance with such order as may be made by the Court if (name) fails to comply with any of the conditions of his Bail together with the Conditions entered hereon."*

4. On 26th June 2018, the defendant re-appeared in this court having, it was alleged, breached the non-contact condition of his bail. The breach was denied but, after a short hearing, was proved to the required standard. Consequently, the defendant was remanded into custody and that remains his present status.

5. The matter I am being asked to determine is whether the security lodged by Mr Fawcett (senior) should be returned to him in light of the fact that the breach of bail was not a failure to surrender to custody but a breach of the non-contact condition.

Discussion

6. In 2007, this court was required to consider an application to forfeit a surety in *Law Officers of the Crown v Stephen Brian De Jersey* (GLR 2007-08 Note 2) in which, in that context, is set out a helpful exposition of the common law position and under The Magistrate's Court Law, 1954 ("the 1954 Law"). The 2003 Law is described, correctly in my view, as providing extra legislative provisions to bail as it already existed under the 1954 Law, but which has since been repealed. Indeed, I recall that one of the reasons why the 2003 Law was introduced was as part of a package of "tidying-up" measures that were required before The Human Rights (Bailiwick of Guernsey) Law, 2000 could be brought into force.

7. Whatever the background, the broad overall picture is at the time of its introduction our 2003 Law was closely modelled on The Bail Act, 1976. Since that time, the latter has been developed in ways that our legislation has not but the fact remains that there is a close synergy between the two pieces of legislation.

8. With that in mind, both Advocate Steel and Crown Advocate Dunford have referred me to Blackstone's Criminal Practice 2018 edition where at paragraph D7.60 it is stated:

*"**Deposit of Security***

...As with sureties, security may be required as a condition of bail only if it is considered necessary to prevent absconding. Where security has been given in pursuance of s.3(5) and the person bailed absconds, the court may, unless there appears to have been reasonable cause for the failure to surrender to custody, order forfeiture of the security."

9. What the relevant part of the 2003 Law say is:

"General provisions

3. (1) Persons granted bail in criminal proceedings shall be under a duty to surrender to custody, and that duty is enforceable in accordance with section 10.

(2) Save as provided by this section, a person granted bail in criminal proceedings shall not be required to provide –

(a) a security or recognisance; or

(b) a surety or sureties;

for his surrender to custody, and save as aforesaid no other requirement shall be imposed on him as a condition of bail.

(3) A person granted bail in criminal proceedings may be required, before release on bail –

(a) to provide a surety or sureties to secure his surrender to custody;

(b) to give security for his surrender to custody, and the security may be given by him or on his behalf.

(4) A person granted bail in criminal proceedings may be required to comply, before release on bail or later, with such requirements as appear to the court to be necessary to secure that -

(a) he surrenders to custody,

(b) he does not commit an offence while on bail,

(c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person,

(d) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence,

(e) before the time appointed for him to surrender to custody, he attends an interview with an advocate acting on his behalf in the proceedings;

and in any enactment "the normal powers to impose conditions of bail" means the powers to impose conditions under paragraphs (a), (b) or (c) above.

(5) A person granted bail in criminal proceedings may be required to comply with such conditions as appear to the court are necessary to secure his own protection or welfare.

[(6) *relates to murder cases and is not relevant*]

(7) If a parent or guardian of a child or young person consents to be surety for the child or young person for the purposes of this subsection, the parent or guardian may be required to secure that the child or young person complies with any requirement imposed on him by virtue of subsection (4), (5) or (6), but –

(a) no requirement shall be imposed on the parent or the guardian of a young person by virtue of this subsection where it appears that the young person will attain the age of seventeen before the time to be appointed for him to surrender to custody; and

(b) the parent or guardian shall not be required to secure compliance with any requirement to which his consent does not extend and shall not, in respect of those requirements to which his consent does extend, be bound in a sum greater than £500, or such other sum as the States may by Ordinance specify.

10. On the face of it, section 3 appears to make a distinction between the provision of a security or surety and other conditions of bail. Section 3(3) could not be more clear that the notion of providing a security or surety under this subsection is to secure the defendant's attendance at court on some future date. Section 3(4) is more widely drawn and is intended to permit the court to impose conditions to secure that the defendant does not, *inter alia,* commit offences on bail, interfere with witnesses or abscond. Crown Advocate Dunford, if I understand his argument correctly, suggests that the two sub-sections need not be read mutually exclusively. In other words, the wording of sub-section (3) does not prevent the imposition of a security or surety for a purpose other than securing the defendant's future attendance. Advocate Steel, on the other hand, argues that they are; otherwise, what is the point of section 3(3) if the wording of section 3(4) is wide enough to incorporate all that section 3(3) is designed to achieve? This argument is strengthened, he says, by virtue of paragraph 13 of the Schedule to the 2003 Law, which deals with enforcement of a security imposed pursuant to section 3(3) whereas there is no statutory mechanism for the enforcement of a security purportedly imposed under section 3(4). Equally, of course, as we know from *Law Officers of the Crown v Stephen Brian De Jersey,* there is no statutory mechanism at all for the enforcement of a surety.

11. One point that was not referred to me is the wording of section 3(7), which deals with the position of parents or guardian who stand as a surety for their juvenile charge. Although this sub-section relates only to sureties the potential importance is that it refers to a parent or guardian standing as a surety as a means of not only attempting to secure the future attendance of the child but also ensuring that other conditions of bail are observed. Two points emerge from this: (i) the responsibility of the parent or guardian stops upon the child attaining 17 years and (ii) the maximum "penalty" that can be imposed is £500. The fact that special provision is made in the context of juveniles suggests to me that such is not possible in the case of an adult defendant.

Conclusion

12. Guernsey law is not English law and we are not obliged to follow English precedent. Indeed, I often do not. Equally, the historical background to bail is not the same in each jurisdiction, as is demonstrated in part by Crown Advocate Dunford's helpful reference to *Bail in Criminal Proceedings* (1999 Edition Blackstones Press Ltd). The fact remains, however, that the current broad legislative provisions in the two jurisdictions are similar. Successive editions of *Blackstone's Criminal Practice* have always referred to securities and sureties being imposed solely for the purpose of securing attendance. In my long experience in Guernsey I have never known a security or surety to be imposed for any other reason.

13. My reading of section 3 is therefore that sub-section (3) is effectively a pre-condition to bail being granted in circumstances where it is feared the defendant will abscond. Put another way, if the court is substantially concerned that the defendant will abscond it may first want to be satisfied that an adequate security or surety is in place and without which bail will be refused, irrespective of what other conditions might be imposed. If a surety or security is found the court can then turn to sub-section (4) and consider what other conditions might be needed to further minimise the risk of the defendant absconding, such as, for example, daily reporting at the police station, the surrendering of photographic identification, etc.

14. It follows from this analysis that in my view a security or surety should only be imposed (other than in the case of a juvenile) to deal with the risk of absconding. In those circumstances, given that the proven breach of bail here was not a failure to surrender and that the defendant is not a juvenile, Mr Fawcett (senior) is entitled to the return of his £10,000 security.

15. As a footnote, I should add two points. The first is that I am not aware any formal application has ever been made by Mr Fawcett (senior) for the return of his money. The matter seems to have developed almost organically by Crown Advocate Dunford raising in correspondence with the Greffe the question of what should happen to it and at the same time producing some helpful written submissions, to which Advocate Steel responded. I have nevertheless proceeded as if such an application had been made on behalf of Mr Fawcett (senior). The second point, and the more important one, is that it did occur to me whether or not it was appropriate for Advocate Steel to be making representations on behalf of Mr Fawcett (senior) given that he represents his son. I have taken the view that because this was principally an argument based on law, it having already been proved that a breach occurred, he could do so. However, during the course of the hearing on 13 September Advocate Steel made representations, on the basis I should decide the law against him, that Mr Fawcett (senior) had taken all reasonable steps to ensure compliance with the condition and therefore the money should not be forfeited. That, it seems to me, must almost certainly give rise to a possible conflict of interest and Mr Fawcett (senior) should therefore have instructed another advocate. However, because I have been able to dispose of the matter purely on legal grounds in a way that does not prejudice the defendant in the criminal proceedings, I am content, on this occasion, to deal with it as I have. Had I not been able to do so Advocate Steel might have found himself in some difficulty.

Graeme Dewar McKerrell
Judge of the Magistrate's Court

Dated this 27th September 2018