



**IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS**

B 08/2022



Rex

Applicant

and

**Barbara Ferguson
William Dean**

Respondents

HEADNOTE

Criminal law-Bail-Surety-Withdrawal-Recognizance-Forfeiture-Discretion-Defendant absconding before trial- Culpability of sureties-Prima facie liability of surety to forfeit the whole recognizance-

BEFORE:-

Hon. Justice Lobban Jackson

APPEARANCES:

Ms. Mikia Mills for the Crown
Sureties- unrepresented

Delivered: November 15, 2022

RULING

Introduction

1. Before the Court is an application by the crown to estreat the recognizance entered into by Ms. Barbara Ferguson and Mr. William Dean on May 6, 2022 in respect of Mr. David Lit, herein after referred to as “the defendant”, who has absconded before his trial.
2. On April 11, 2022, the defendant was arrested and charged with Possession of Controlled Drugs with Intent to Supply, contrary to section 6(3) of the Control Drug Ordinance Chapter 3.14 and Knowingly Being Concerned in Fraudulent Evasion. As a result of that arrest the defendant escaped custody and was also charged with and Escaping Lawful Custody.
3. The defendant was granted bail by the Supreme Court on April 22, 2022 in the sum of \$80, 000 with two sureties and a number of conditions. On May 6, 2022, he was able to take up the offer of bail when Ms. Ferguson and Mr. Williams presented themselves as suitable sureties.

Chronology

4. By letter dated August 4, 2022, Ms. Barbara Ferguson wrote to the Registrar of the Court to indicate her discomfort in continuing to stand surety for the defendant as she was unable to reach him by phone. As a result, the matter was listed on August 11, 2022 for a hearing of an application to come off record as surety.
5. When the case was called on August 11, 2022, Ms. Ferguson attended, however, there was no proof that the defendant had been served a summons to attend. The case was therefore adjourned to August 17, 2022 for the defendant to be served.

6. The defendant did not attend Court on August 17, 2022.
7. On the said date (August 17, 2022) D/PC. Jamaal Harvey of the Royal Turks and Caicos Islands Police Force gave evidence that he had been contacted by Officer Godwin Dwayne Charles, the arresting officer in the case against the defendant and as a result, he had made attempts to serve a summons on the defendant to attend Court.
8. Officer Harvey gave evidence that he checked several addresses based on information he received and also the address listed on the Recognizance for bail. However, he could not locate the defendant. Checks were made at the Grace Bay Police Station where the defendant should have been reporting as a condition of his bail, however, the reporting log noted that the defendant had not reported since that log commenced on July 1, 2022.
9. On making further enquires, and as a result of a conversation with Detective David Wilson, the information which the police received is that the defendant is no longer in the Turks and Caicos Islands; and that he is said to be in the Dominican Republic.
10. At that stage of the proceedings the crown indicated that they were objecting to Ms. Ferguson's application to be released as surety for the defendant and asked for time to file submissions in that regard. The proceedings were adjourned to August 31, 2022. Ms. Ferguson was advised that it was open to her to seek legal advice or retain the services of an attorney prior to the next hearing.
11. On August 31, 2022 Ms. Ferguson gave evidence in support of her application to come off record as surety for the defendant. She agreed that she stood surety for the defendant and that she was aware of her responsibilities and liabilities, having signed the recognizance and also that her responsibilities had been explained to her at the time of signing.

12. Ms. Ferguson gave evidence that from the second to last week in July 2022, she was unable to contact the defendant by phone. Prior to that Ms. Ferguson said she saw the defendant twice and spoke with him a few times since she signed as his surety.
13. Evidence was given by Ms. Ferguson that she did not know the defendant before she signed as his surety, but that she has done so as a favour to the second surety, Mr. William Dean who is her son.
14. On one occasion when Ms. Ferguson has spoken to the defendant, he had said he wanted to leave the country because he had no more money and he would ask the judge to allow him to leave until it was time for his case. That conversation was had at the defendant's last court date.
15. Both the Prosecution and Ms. Ferguson made submissions in relation to the application to come off record as surety.
16. On August 31, 2022, this Court ruled that the application to come off record as surety was refused and the matter set down for hearing on September 26, 2022, for the sureties to show cause why the entire sum of \$ 80, 000 should not be forfeited.

Summons for Sureties to show Cause-

Ms. Barbara Ferguson

17. At the hearing to show cause why the entire sum should not be forfeited, Ms. Ferguson gave evidence that she did her best to stay in touch with the defendant and that when she was not able to reach him, that she spoke with the other surety, Mr. Dean who assured her that he was still in touch with the defendant.
18. Ms. Ferguson said she was not comfortable not being able to reach the defendant and so she took steps to "take the bail back". It was towards the end of July that she was unable to reach him.

The letter that Ms. Ferguson wrote to the Registrar dated August 4, 2022 was admitted in evidence as evidence as exhibit 1. The Recognizance for bail with was signed by both sureties was admitted in evidence as exhibit 2.

19. In answer to the question why the full sum should not be forfeited, Ms. Ferguson said the following:

- "I felt uncomfortable that he was not reaching out to me when I called him
- Second of all I do not have it, I used my house for the surety and I did it because of my son.
- The land paper, my son and the Lawyer went and get my land paper, I told them I didn't know the guy, this is serious; I told him if anything happen, he would be responsible, I just feel sympathy for him because that was his [her son] friend.
- That's all I have and at my age, I don't have the money and I can't lose my house.
- I am begging mercy; I will be 60 [years old] on the 9th October, I really don't have it"

The Issue of Means

20. Ms. Ferguson said in terms of assets that she does not own a car, but that she has a bank account with \$12, 000. She is the owner of a house with two rooms off Millennium Heights, her name is the only name on the title and the house was valued at \$125,000 when she purchased it in 2012.

21. Of the \$1700 which she earns per month \$1,074.31 goes to her mortgage and her daughter helps her with the utility bills. Apart for her current job, Ms. Ferguson says she has no other sources of income.

22. In cross-examination by the Crown, Ms. Ferguson said that Recognizance for bail was read over to her and she signed it. She was also aware that her house was being used as collateral for the sum.

23. Ms. Ferguson gave evidence that she made every effort to locate the defendant. She went back to the place she had last seen him at Mango Reef. She also checked the Ritz Carlton and Shore Club; that she is still looking for him and is of the view that he is still here in the Turks and Caicos Islands.

Surety- Mr. William Dean

24. Mr. William Dean the second surety for the defendant testified that he met the him two and a half years ago through his business. Mr. Dean runs a Jet Ski business which books tours.

25. According to Mr. Dean, on May 6, 2022, he stood surety for the defendant in the sum of \$ 40, 000 and that he used four vehicles as collateral; there were two Suzuki Swift vehicles, a Toyota Alpha and a Chevy Silverado.

26. Mr. Dean said he was given a copy of the Recognizance and he read it over before he signed, also that he is aware of his obligations as a surety. He last saw the defendant two days before August 9th 2022.

27. For the entire time that Mr. Dean stood surety for the defendant they had been in contact until he got an email from the Court to advise that an application had been made for the other surety to be removed and that he had to attend court. He then made the defendant aware that he (Mr. Dean) had to go to Court. The last time he saw the defendant was at the Conch Shack.

28. Mr. Dean testified that he had confirmed that the defendant attended Court on the last date, through his lawyer, however, he was unaware that the defendant had not been signing in at the Grace Bay Police Station and had not made checks to see whether he had been compliant. However, he had been in contact with the defendant every other day by phone call or text message.

The matter of Means

29. Mr. Dean is the owner of one of the Jet Ski's used in his company. The other two do not belong to him. He has a bank account which is a business account with \$4, 000 and earns about \$ 3,500 per month from the business. It came out in cross-examination that two of the vehicles owned by Mr. Dean are used as rent -a -cars, and that he does make an income from renting those cars. He is also paid by the TCI Regiment for the days on which he works for them.
30. Exhibit 2 was shown to Mr. Dean and he agreed that he signed the recognizance in the sum of \$ 80, 000.
31. Mr. Dean say he sent the defendant a screen shot of the letter he received from the Court requiring his attendance, to which the defendant responded "that's odd. Wow!"
32. Mr. Dean said he was unaware when Ms. Ferguson had filed the letter requesting to be releases and that they hardly speak because they are both busy. However, he confirmed that he was aware that Ms. Ferguson had "put up her house" to sign for the defendant and that he had asked her to do so.
33. In relation to the disappearance of the defendant, Mr. Dean says he had been in contact with him, and his response was that he had not left the island but was "laying low" because his life was in danger, that he has a court date in February and will turn up then.
34. Mr. Dean says he had not been informed by the police that the defendant had failed to sign in.

The Law

35. The law relating to the forfeiture of recognizance has been settled for some time now, and there is a body of case law which supports this proposition. In the case of **R v. Horseferry Road Magistrates' Court, ex parte Pearson**¹ the Court held:

"In considering whether the recognizance should be forfeited, the magistrate was bound to start from the position that the applicant had entered into a serious obligation and ought to pay the amount which she had promised unless there were circumstances, relating either to her means or to her culpability, which made it fair and just to that she should pay a smaller sum"

36. In the case above, the applicant had entered into recognizance in the sum of 2000 pounds to secure the attendance of her brother for his trial date at court. However, two days before the trial the applicant learned of matters which cause her to believe that the defendant might not appear as required. She therefore went to the police station and submitted a written request to be released as a surety. The magistrate summonsed the applicant to appear before him and show cause why the recognizance should not be forfeited and further pointed out that she could only have secured her release if she had secured her brother's surrender into custody.

37. In arriving at a decision in **Horseferry**, Widgery C.J. considered the case of **R v. Southampton Justices**² with regard to culpability, where Lord Denning had this to say:

"By what principles are the justices to be guided? They ought, I think to consider to what extent the surety was at fault. If he or she connived at the disappearance of the accused man, or aided and abetted it, it would be proper to forfeit the whole of the sum. If he or she was wanting in due diligence to secure his

¹ [1976] 2 ALL ER 264

² [1975] 2ALL ER at 1077

appearance, it might be proper to forfeit the whole or a substantial part of it, depending on the degree of fault"

38. As the case law evolved, culpability carried less weight in the Court's decision to forfeit the recognizances where the sureties were not to blame for the accused's failure to attend court. In *of R v. Maidstone Crown Court, Ex parte Lever ; R v. Maidstone Ex parte Connell*³ the sister of the defendant charged with importation of drugs and a family friend had stood surety for him in the sum of 19,000 pounds and 40,000 pounds respectively. The defendant failed to report to the police station in breach of his bail condition and two days later he absconded. He failed to appear at his trial and the judge ordered that his sister forfeit 16, 000 pounds and the family friend 35, 000 pounds respectively.

39. In *Maidstone*, the Court of Appeal in a judgment delivered by Butler-Sloss LJ had this to say:

*"The general principle is that the purpose of a recognizance is to bring the defendant to court for trial. The basis of estreatment is not as a matter of punishment of the surety, but because he has failed to fulfill his obligation which he undertook. The starting point on the failure to bring a defendant to court is the forfeiture of the full recognizance. The right to estreat is triggered by the none -attendance of the defendant at court. It is for the surety to establish to the satisfaction of the trial court that there are grounds upon which the court may remit from forfeiture part or, wholly exceptionally, the whole recognizance. The presence or absence of culpability is a factor but the absence of culpability as found in this case by the judge, is not itself a reason to reduce or set aside the obligation entered into by the surety to pay in the event of a failure to bring the defendant to court"*⁴& ⁵

³ [1996] 1 Cr. App. R. 524

⁴ *Maidstone* pg. 526 E to G

⁵ "satisfaction of the trial court' is on the civil standard; that is on a balance of probabilities.


40. Having carefully considered the explanation of each surety and assessed their conduct in line with their obligations as sureties, and having considered the circumstances surrounding the defendant's disappearance; and having assessed the means of each surety to pay, and having applied the law outlined above to the facts of this case, I have determined there was some steps taken of Ms. Ferguson to remove herself as surety as soon as she was not able to reach the defendant by telephone, however, those efforts fell short of the standard to ensure that the defendant not only turned up to court but reported to the police station when required and maintain the address given to the court.

41. In relation to Mr. Dean, He had been in phone contact with defendant up to a few days before the application to come off record was listed for hearing. However, there was also a failure in terms of ensuring that the defendant reported to the police station and maintained the address given to the court.

Decision

42. In all the circumstances, it is hereby ordered that recognizance is forfeited in relation to that sum entered into by Ms. Ferguson less 20%, and the sum entered into by Mr. Dean less 15%. Mr. Dean had produced proof of assets using five motor vehicles valued at \$35, 500 in total. Ms. Ferguson produced a land title and is responsible for \$ 44, 500 for a total of \$80, 000. Ms. Ferguson is therefore liable to pay \$44, 500 less 20% which is \$ 35, 600 and Mr. Dean is liable to pay \$35, 000 less 15% which is \$ 30, 175.

43. Each surety is granted time to pay. The total amount should be paid in full within 18 months of today's date.



Hon. Justice Lobban Jackson
Judge of the Supreme Court

