

IN THE SENIOUR COURTS OF BELIZE
CENTRAL SESSION – CITY OF BELMOPAN, CAYO DISTRICT
IN THE HIGH COURTS OF JUSTICE

Indictment No. S23 of 2013

Between:

The Queen

and

[1] Juan Fuentes Zelaya

Defendant

Appearances:

Ms. Christelle M Wilson, counsel for the Queen.

Mr. Arthur Saldivar, counsel for the Defendant.

Dates:

Trial Dates: 2018: October 17
 November 22, 26
 December 3, 4, 17
Judgment Date: 2019: January 22

DECISION

In re: Clinton Hernandez (surety)

[1] **CUMBERBATCH. HON. MR. FRANCIS M.; J:** The Accused was indicted by the Director of Public Prosecution for four counts of incest contrary to section 47(1) of the ***Criminal Code***¹. The Supreme Court granted bail in the sum of nine thousand

¹ CAP 101 Criminal Code section 47(1)(2) of the Substantive Laws of Belize Revised Edition 2020

five hundred dollars (\$9,500.00) and one Clinton Hernandez ('the surety') entered into a recognizance for the said sum to ensure that the Accused was admitted to bail and that he would surrender himself to the Supreme Court for his trial.

[2] On the 16 October 2017, the Accused was absent from court, and it was further discovered that he had been in breach of his reporting conditions to the Dangriga Police Station.

[3] This court issued a warrant for the arrest of the Accused and further ordered the surety be summoned to show cause as to why the recognizance should not be forfeited. The surety was duly summoned and appeared represented by counsel, Mr. Arthur Saldivar. Defence Counsel sought and was granted leave of the court to have the proceedings adjourned to allow his client an opportunity to locate the Accused. This proved, however, to be an exercise in futility.

[4] At the hearing, the court heard testimony from the surety who stated that for the past 30 years he has held the position of Commissioner of the Supreme Court and that he had known the Accused who from time to time requested his services as an officer of the Court. He admitted that to some extent he was aware of what he had to do when he bailed the Accused but that he now knows what he had to do.

[5] Under cross-examination by Crown Counsel the surety said he did not understand that he would forfeit the sum in the bail bond if the Accused did not attend court. In answer to questions by the court, he said, that though he ensures that persons

47.-(1) Every person who, with or without consent, has sexual intercourse with a person who is under the age of fourteen years commits the offence of unlawful sexual intercourse and is liable on conviction on indictment to imprisonment for a term that is not less than twelve years but may extend to imprisonment for life.

who swear documents before him read and understand their contents before so doing he, however, did not read the contents of the recognizance before he signed same.

[6] The court heard and considered oral and written submissions from Mr. Saldivar for the surety and oral submissions from Crown Counsel. The thrust of the Defence Counsel's submission is that though his client is liable to suffer forfeiture of the said sum the court should in the circumstances forfeit a reduced sum of money instead of the full amount of nine thousand five hundred dollars (\$9,500.00).

[7] Section 165 (1)(a) of the **Indictable Procedure Act**² provides:

“Subject to this section where a fine is imposed by, or a recognizance is forfeited before, the court an order may be made in accordance with this section,

(a) Allowing time for the payment of the fine or the amount due under the recognisance;

(b) Directing payment of the said amount by instalments, of such amounts and on such dates respectively as may be specified in the order;

(c) Fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered;

(d) In the case of a recognisance, discharging the recognizance or reducing the amount due thereunder”.

² **Indictable Procedure Act** CAP 96 of the Substantive Laws of Belize Revised Edition 2020.

[8] It is common ground that the local legislation is silent on guidelines to be applied and considered by the court in determining if and to what extent there can be a reduction of the amount due and payable by the surety. Thus, I will turn to the English authorities on this matter.

[9] In the decision of the English Court of Appeal of **R v Maidstone**³ Crown Court ex parte Lever & Connell (1996) 1 Cr App Rep 524 Butler-Sloss LJ opined thus at page 526;

“... the power of a judge to estreat some or the whole of a recognizance upon the application of a surety is to be found in rule 21 of the Crown Court Rules ...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 fulfil the obligation which he has undertaken. 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 non-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 in itself a reason to reduce or set aside the obligation

³Court of Appeal in R v Crown Court at Maidstone, Ex Parte Lever [1995] 2 All ER 35 and the dicta of Butler-Sloss LJ at pages 37–38.

entered into by the surety to pay in the event of a failure to bring the defendant to court. The court may in the exercise of a wide discretion decide it would be fair and just to estreat some or all of the recognizance.”

[10] Later in the said decision Hoffman LJ at page 530 stated similar principles to those of Butler Sloss LJ aforesaid. He went on to state thus at page 531:

“... the real pull of bail, the real effective force it exerts, is that it may cause the offender to attend his trial rather than subject his nearest and dearest who has gone surety for him to undue pain and discomfort.... It follows that in one sense the system has unfairness built into it. It may result in persons entirely innocent having to suffer on account of the wrongdoing of another. The courts rely on the moral pressure which this prospect should apply to the mind of the Accused. But the pressure would evaporate if judges were not willing as a general rule to harden their hearts against a plea of lack of culpability when it turns out that the surety’s trust in the defendant was misplaced”.

[11] In an earlier decision of **R v Southampton Justices**⁴, ex parte Corker (1976) 120 SJ 214 a court comprising Widgery CJ, Kllner Brown and Watkins JJ opined thus:

“... it cannot be right in my judgment that a surety who has entered into an obligation for several hundreds of pounds is able

⁴ The Queen v Southampton Justices, *United States v. Corker*, No. 22-10192 (11th Cir. Feb. 6, 2023)

to excuse himself when the time comes by simply saying” well of course I had very little chance to observe him and therefore it was really not my fault’. These are all the things that ought to be taken into account when the decision to give recognizance is taken, and the same with means. It would defeat the whole system of bail I think, if it becomes generally known that the amount payable was strictly limited according to the surety’s means and that anybody who had no means would not have to pay. Imagine the relish and speed with which persons would accept the obligation of surety if they were penniless and knew that was a total answer to any kind of obligation on the recognizance....be that as it may, it cannot be the law, I venture to think, that a surety can escape entirely by saying that he was not culpable and was penniless. These are matters to which he should have some regard to before he enters into his recognizance, and it must in turn be the subject of regard when any question of forfeiture arises...”

- [12] Mr. Saldivar in his submissions, has conceded that his client did nothing to ensure that the Accused complied with his bail conditions and was unaware that he was not attending court until he was summoned to attend this court aforesaid. It is against this background that he urges the court to consider in his client’s favour his status as an Officer of the Supreme Court for the past 30 years.

- [13] Section 15 of the **Supreme Court of Judicature Act**⁵ outlines the powers of a Commissioner of the Supreme Court which include taking affidavits and declarations and when so authorized by a judge, taking the examination of witnesses or receiving the production of documents.
- [14] I find that having regard to the awesome responsibilities and powers exercised by the surety for such a lengthy period of time it is astonishing that he would say he did not read the recognizance before he read it, nor did he understand its meaning and importance. Accordingly, I do not believe and accept that part of his testimony.
- [15] I find that the surety failed to carry out the duties and responsibilities required of him when he entered into the recognizance herein. What is more egregious is the fact that prior to him signing the recognizance he neither had a close relationship nor affinity with the Accused. However, counsel has not submitted an absence of culpability as a ground for a reduction in the amount to be forfeited. He relies on the ground of financial hardship.
- [16] In **R v Uxbridge Justices**⁶, ex parte Heward Mills a decision of the Queen's Bench Division dated 13 October 1982 McCullough embarked on a detailed and comprehensive examination of the known authorities on the law in this question. He summarized the most important principles to be derived from the authorities thus:

⁵ Supreme Court of Judicature Act Cap 91 Section 15(1) of the Substantive Laws of Belize (Revised Edition 2020

-(1) The Court may appoint, by an instrument or instruments under the seal of the Court, the requisite number of fit and proper persons to be commissioners of the Court for taking affidavits and declarations in any cause or matter and, when authorized thereto by a special order of the court or judge, for taking the examination of witnesses or receiving production of documents.

⁶ The Queen v Uxbridge Justices, ex parte Heward-Mills, [1983] 1 All E.R. 530 at 532 (Q.B.D.)

“... (1) When a defendant for whose attendance a person has stood surety fails to appear, the full recognizance should be forfeited, unless it appears fair and just that a lesser sum should be forfeited or none at all.

(2) the burden of satisfying the court that the full sum should not be forfeited rests on the surety and is a heavy one. It is for him to lay before the court the evidence of want and of means on which he relies.

(3) Where a surety is unrepresented the court should assist him by explaining these principles in ordinary language and giving him the opportunity to call evidence and advance argument in relation to them”.

[17] I will consider and apply the principles aforesaid in determining whether there ought to be a reduction of the amount of the recognisance to be forfeited. In this regard the law is very clear. The burden on the surety of satisfying the court that the full sum should not be forfeited is a heavy one. He must lay before the court evidence of want of culpability and means on which he relies.

[18] It has already been conceded by counsel for the surety that there is no want of culpability on his client's part. He did nothing to ensure that the Accused attended court and complied with his reporting conditions. Thus, this ground is not applicable in this matter and as such I say no more about it.

[19] Accordingly, I will give due consideration to the surety's means. He stated that he receives a monthly income of five hundred eighty-four dollars (\$584.00) by way of pension. He is still a serving Commissioner of the Supreme Court and has not

proffered any evidence of any disability which militates against him engaging in an income earning activity to assist him in the payment of the recognizance or any part thereof.

[20] I will accordingly make a reduction of two thousand dollars (\$2000.00) from the said sum of nine thousand five hundred dollars (\$9500.00). Thus, the surety shall pay the State the sum of seven thousand five hundred dollars (\$7500.00) in the following manner hereinafter set out.

ORDER:

[21] It is ordered that the surety shall pay the State the sum of seven thousand five hundred (\$7500.00) in the manner hereinafter set out:

- (a) The said sum shall be paid in monthly instalments of four hundred dollars (\$400.00) commencing on the 1 February 2019;
- (b) The surety shall thereafter continue to make payments of the said sum of \$400.00 on the first day of business of each and every month until the said sum of seven thousand five hundred dollars (\$7,500.00) is paid in full.

Hon. Mr. F M Cumberbatch

Justice of the High Courts