THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

SAINT LUCIA

CRIMINAL CASE NO. SLUCRD 2010/0761

BETWEEN:

PC 707 ANTOINE

AND

EURIOUS EUGENE

Defendant

Appearances:

Mrs. Petra Nelson for the Surety, Silvius Alphonse
Ms. Tina Mensah, Crown Counsel for the Crown

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2011: May 13 and 27

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RULING

[1]. **BENJAMIN, J. :** On June 25, 2010, a charge was laid in the First District Court against the defendant, Eurious Eugene, for the offence of stealing by reason of employment contrary to section 197 (1) of the Criminal Code of Saint Lucia 2004. The charge alleges that between Monday 31st May 2010 and Tuesday 8th June 2010 at William Peter Boulevard he stole EC$105,190.94 to which he had access by reason of his employment.

[2]. The defendant was admitted to bail in the sum of $10,000 with surety subject to stated conditions. The recognizance form is dated July 8, 2010 and is signed by the defendant, his surety, and the learned Magistrate. The name of the surety is given as Sylvius Alphonse of Cacao, Babonneau. The signature of the surety appears below a printed acknowledgement to be bound to forfeit to the Crown the sum of $10,000.00 in the event that the defendant failed to perform the obligation to attend Court for the hearing of the matter as required. The form additionally lists the following conditions: -

"1. Surrender travel documents to the Court

2. Not to contact the Virtual Complainant, any member of his or her family or any prosecution witness directly or indirectly

3. Not the leave the state without Courts (sic) permission

4. To report at the Micoud Police Station on Wednesdays between 7:00 a.m. and 7:00 p.m."

[3]. At the initial hearing before the District Court, the matter was set for sufficiency hearing. After appearing before the High Court as required, the defendant failed to appear on the adjourned date of March 17, 2011 when a warrant was issued for his arrest. The Court simultaneously ordered that the Surety be summoned to show cause why the security ought not to be forfeited to the Crown.

[4]. The surety, Silvius Alphonse, filed a notice of application dated April 15, 2011 seeking an order that the Court should not forfeit the recognizance entered into on July 8, 2010. The application was accompanied by an affidavit setting out the reasons in support of the grounds for the granting of the order. At the hearing, the affidavit was supplemented by the oral testimony of the Applicant/Surety.

[5]. The surety is a Customs Officer. He resides with his fiancée in rented premises and his dependants include his retired mother and three children attending school. He is the cousin of the defendant.

[6]. In his affidavit, Mr. Alphonse deposed that the defendant's parents and other relatives did not have the means to stand bail and consequently, he acceded to pleas from the mother of the defendant to assist. The amount of $10,000 required for the recognizance was withdrawn from his bank account. These funds he described as his life savings.

[7]. The defendant swore that when he made the deposit of cash and signed the documents, his duties as surety were not explained to him. Without seeking to impugn this assertion, it must be at once pointed out that the recognisance form referred to above set out the obligations placed on the defendant of which the surety signed to warrant performance. It was urged that the language was not amenable to easy comprehension. It seems to be that Mr. Alphonse being of responsible rank in the Customs and Excise Department ought to have made inquiries to satisfy himself as to the meaning of the document that he was being asked to sign.

[8]. This suggested lack of appreciation of the consequences of his obligation as surety was belied by Mr. Alphonse's account in paragraphs 12 and 13 of his affidavit. In those paragraphs, he stated that he would call the defendant as the date of the case approached and would also attend at the Court to ensure his appearance. In general he stayed in contact with the defendant who lives distant from him in Micoud village to ascertain the next court date and to remind the defendant. However Mr. Alphonse states: "I did not

realize that I would have to personally bring him to court to ensure his attendance and to ensure that he did not breach any of his bail conditions." In other words, he claimed to be unaware of the very obligation acknowledged by his signature.

[9]. As to his knowledge of the defendant's failure to appear, Mr. Alphonse stated that during a visit to the defendant's parents at the end of March or in early April, 2011, he was informed that the defendant no longer lived there. Therefore he was unable to contact the defendant. It is noteworthy that the defendant first did not appear on March 11, 2011 and a bench warrant was eventually issued on March 17, 2011. It follows that Mr. Alphonse was not diligent in ascertaining the adjourned dates of the case as he understood to be his duty as surety. This failure flies in the teeth of the averments in paragraph 13 of his affidavit.

[10]. Mr. Alphonse further stated that when served with the summons he was informed by the Police Investigator that the defendant had been absent from Court and that the Police had information that he had left Saint Lucia for Barbados on a LIAT flight by means of an emergency passport.

[11]. Subsequent to the first hearing of this application, an affidavit sworn to by an Immigration Officer detailed the departure of the defendant from Saint Lucia by air on February 26, 2011 for Barbados using Saint Lucia Passport Number RO16574 issued in the name of the defendant on May 15, 2008.

[12]. It must be reminded that it was a condition for the defendant's release that the travel documents of the defendant be surrendered. There is no indication on the file that this was done. There was no statutory declaration as to the defendant not being the holder of a passport. The Court is in doubt as to whether the passport was surrendered.

[13]. Mr. Alphonse deposed that he had been assured by the Police Investigator that he had the defendant's passport. The Officer has categorically denied this assertion on oath. However, the condition required the surrender of the passport to the Court and not to the Police. Be that as it may, the defendant was clearly in possession of his passport to facilitate his unchallenged departure from Saint Lucia.

14]. The evidence of the investigation, Police Constable 707 Antoine was received on oath. His clear evidence was that in his presence around the time when the defendant was granted bail, the defendant stated that he was not in possession of a passport. He denied being told by the defendant that he had lost his passport.

[15]. It has been the practice of the Court to require a declaration to the effect that the person to be bailed is not the holder of a passport. Perhaps, it is time for the Court to require such declaration to be obtained from the records of the Chief Immigration Officer or the competent authority for the issue of passports in Saint Lucia. This is an administrative matter which may well be incorporated into future orders for the grant of bail.

[16]. The basic purpose of bail is to ensure that the defendant surrenders to custody as required. The term 'surrender to custody' is handily defined in section 591 (1) of the Criminal Code of Saint Lucia as follows:

"(a) in relation to a person released on bail, surrendering himself or herself into the custody of the Court or of the Police Officer, according to the requirements of the bail, at the time and place for the time being appointed for him or her to do so."

In essence, this is the obligation of the defendant who is bailed. It is the performance of this obligation (and any other obligations the court may impose) that the surety must ensure. This arises from section 591(2) which enacts that a defendant may be required by the Court to give security for his or her surrender to custody or the security may be given on his behalf, as in the case. The power of the Court to impose certain conditions including the surrender of his or her passport to the Court, is provided for in section 601(3).

[17]. The application before the Court is for relief from forfeiture of the whole or part of the security of $10,000 deposited by the surety. Forfeiture of security given for bail is permitted by section 604 (1) and (2) of the Criminal Code as follows:

"(1) Where a person is given security in pursuance of section 601 (2), and the Court is satisfied that he or she has failed to surrender to custody, then unless it appears that he or she had reasonable cause for his or her failure or there are other mitigating circumstances, the Court may order the forfeiture of the security. "[emphasis added]."

(2) Where the Court orders the forfeiture of the security under subsection (1), the Court may declare that the forfeiture extends to such amount less that the full value of the security as it thinks fit to order."

These provisions clothe the Court with the discretion to forfeit either the entire security or a sum less than the full amount in the exercise of such discretion.

[18]. The seriousness of the obligation placed on a surety to ensure the attendance of the defendant at Court has been emphasized by Butter-Sloss, L.J. in her judgment in the Court of Appeal of England in R. V. Maidstone Crown Court exp. Lever and Connell [1996] 1 Cr. App. R. 524. Her Ladyship stated: -

> "The general principle is that the purpose of a recognisance 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 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 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 recognisance. 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 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 recognisance."

[19]. The net effect of the statutory provisions set out in section 604 is that upon the Court being satisfied that the surety had given security and that the defendant has not surrendered to bail, there arises a prima facie case for the forfeiture of the security. The Court must then

exercise its discretion based upon the surety, upon whom the onus lies, showing that he or she had reasonable cause for breach of the obligation or the existence of other mitigating factors.

[20] In this case, it cannot be denied that the real cause of the defendant's flight was his ability to access his passport, the whereabouts of which at the time he was released on bail are not clear to the Court. Be that as it may, the surety was not involved in this exercise although technically his signature required him to ensure that this was done.

[21] Mr. Alphonse gave evidence as to his earnings and his financial obligations. His basic monthly salary is $2,600.00 and he is paid overtime of between $800 and $1,000 per month. His obligations include monthly rental payments of $400.00, loans of approximately $1,500 per month and the maintenance of his three children to a maximum of $600.00 per month. Plainly, his obligations approximate his basic salary leaving his other living expenses to be covered by his overtime earnings.

[22] Having deposited the security since July 2010 from his savings, Mr. Alphonse was not relying on the money for his up-keep and to meet his financial obligations. However, having regard to his earnings, the sum of $10,000 is not insubstantial.

[23] The evidence gleaned from the surety himself suggests that he was less than vigilant in keeping contact with the defendant. Had he done so, there is no certainty that the fleeing of the defendant would have been thwarted. Whatever may be the negligence of others,

which can be taken into account, the culpability of the surety is of equal concern to the court though not the governing consideration.

[24] The obligation of a surety is onerous and individuals ought to think carefully and weigh the risk thrown up by the obligation before appending their signature and surrendering their hard-earned assets. The exercise of estreating bail is not a pleasurable task but there is no room for the discretion to be guided by sympathy.

[25] In the exercise of my discretion, I would remit half of the amount deposited and it is ordered that the sum of $5,000 be forfeited to the Crown.

KENNETH BENJAMIN
HIGH COURT JUDGE