[1988–90 Gib LR 83]

R. v. AVELLANO and POZO

SUPREME COURT (Kneller, C.J.): April 22nd, 1988

Criminal Procedure—bail—recognizances—appointment of sureties—court to inquire into and record details of surety's ability to pay recognizance before acceptance as surety—jointly-owned property not to be counted among potential surety's available means—court to make potential sureties aware of gravity attached to suretyship

Criminal Procedure—bail—forfeiture of recognizance by surety—circumstances in which entire sum became liable to forfeiture—surety to show on civil standard of proof why entire sum not to be forfeited—all circumstances, particularly financial means and conduct of surety in relation to defendant to be considered—court has discretion to reduce sum payable—complicity in defendant's non-appearance likely to result in total forfeiture—poverty and attempts to secure defendant's appearance militate in favour of partial or full remission

The Crown applied for the forfeiture of sureties' recognizances.

The first defendant failed to attend court in breach of his bail conditions; his father and sister, who had entered into recognizances of £10,000 each as his sureties, were therefore called upon to forfeit the sums due. They applied for remission of part of each sum.

The Crown submitted that (a) entering into a recognizance was a serious obligation, not to be relieved lightly by the court; (b) the starting presumption, which the sureties had not displaced, was that the entire recognizance should be forfeited; and (c) the burden was on the sureties to show why the recognizances should not be forfeited.

The sureties submitted in reply that (a) they lacked the means to pay the full amount of the recognizances; (b) the father had made assiduous efforts to secure the first defendant's appearance before the court, travelling three times to Spain to attempt to persuade him to stand trial, both of which militated in favour of exercising the court's discretion in their favour to reduce the sums payable; and (c) the sureties had to prove this only on the civil standard of balance of probabilities.

Held, making the following order:

(1) Both recognizances would be forfeited in part: the defendant's father would have to pay £5,000 and his sister £1,000, both over a period of time. The father would not forfeit the whole sum, despite having

£10,000 in savings, because he had tried persistently to get the defendant to appear before the court; the sister, whose income was less than her father's, and whose husband had failed to renew the insurance policy which she was required to show the court as evidence of her means, lacked the means to pay the whole sum of her recognizance, and would therefore forfeit a lesser sum. Neither recognizance would be remitted entirely, as the sister had not taken significant steps to inform the court that her husband had not renewed the insurance policy, and neither surety had informed the court that the defendant had left Gibraltar (paras. 20–22; paras. 25–28; para. 32; para. 34).

(2) Courts should make careful enquiries into the means of potential sureties to fulfil recognizances before accepting them as sureties, and ensure that their responses were recorded in writing, to assist with later discussions, such as those in the present case; a person's means in this context ought not to be counted as including any property held jointly, such as a family home. Sureties should be made aware of the gravity of the obligation they were undertaking by entering into recognizances (paras. 10–13).

(3) When determining whether a surety should be required to forfeit the entire amount of a recognizance as a consequence of the defendant's failure to attend court, the court should have regard to all the circumstances, in particular the financial means of the surety and his conduct relating to the defendant. A surety who connived at or assisted in the defendant's failure to appear was likely to forfeit the entire sum, whereas one who attempted to ensure his appearance might have the entire amount due remitted; the court, however, had absolute discretion in this matter. Here, where neither surety had informed the court that the defendant had left the jurisdiction, full remission was inappropriate, but both sureties' means, and the father's attempts to persuade the defendant to return to Gibraltar, militated in favour of a reduction of the sums due (paras. 14–17; para. 32).

(4) The burden undertaken by one who stood as a surety was a heavy one, and not one that the court would relieve lightly. It was for the surety to show that the court should use its discretion in his favour: the burden of proof required for this was the civil one of balance of probabilities, rather than the criminal standard, as no offence had been committed by the surety (paras. 7–8).

Cases cited:

(1) *Associated Provncl. Picture Houses Ltd.* v. *Wednesbury Corp.*, [1948] 1 K.B. 223; [1947] 2 All E.R. 680; (1947), 177 L.T. 641, applied.

(2) *R.* v. *Horseferry Road Magistrates' Ct.*, *ex p. Pearson*, [1976] 1 W.L.R. 511; [1976] 2 All E.R. 264; (1976), 140 J.P. 382; 120 Sol. Jo. 352, applied.

(3) *R.* v. *Ipswich Crown Ct.*, *ex p. Reddington*, [1981] Crim. L.R. 618, applied.

(4) *R.* v. *Marlow JJ.*, *ex p. O'Sullivan*, [1984] Q.B. 381; [1984] 2 W.L.R. 107; [1983] 3 All E.R. 578; (1983), 78 Cr. App. R. 13; [1984] Crim L.R. 106, applied.
(5) *R.* v. *Southampton JJ.*, *ex p. Green*, [1976] Q.B. 11; [1975] 3 W.L.R. 277; [1975] 2 All E.R. 1073; (1975), 119 Sol. Jo. 541, applied.
(6) *R.* v. *Uxbridge JJ.*, *ex p. Heward-Mills*, [1983] 1 W.L.R. 56; [1983] 1 All E.R. 530; [1983] Crim. L.R. 165; (1982), 126 Sol. Jo. 854, applied.
(7) *R.* v. *Waltham Forest JJ.*, *ex p. Parfrey*, [1980] 2 Cr. App. R. (S.) 208, applied.

Legislation construed:
Criminal Procedure Ordinance, 1984 Edition, s.4:

> "Subject to the provisions of this and any other Ordinance, criminal jurisdiction shall, as regards practice, procedure and powers, be exercised—
>
> (a) by the Supreme Court in its original jurisdiction, in conformity with the law and practice for the time being observed in England in the Crown Court . . ."

D.J.V. Dumas for the sureties;
K. Harris, Senior Crown Counsel, for the Crown.

1 **KNELLER, C.J.:** Joseph Louis Avellano, the first defendant, failed to attend court on Friday, April 8th, 1988; his counsel did not know why he was not present. If a defendant fails to appear, the court should summons the surety or sureties, if there are any, to show cause why their recognizances should not be forfeited.

2 The word "recognizance," so far as the law is concerned, means a bond or obligation entered into and recorded before a court or a magistrate by which a person engages himself to perform some act or observe some condition, *e.g.* to appear when called upon, to pay a debt, to keep the peace, or to produce a defendant before the court when ordered to do so.

3 The sureties for Joseph Louis Avellano are his father and his sister. They have been called upon to show cause why they should not forfeit the recognizances which they entered into in the sum of £10,000 each.

4 Mr. Dumas has appeared for the sureties and Mr. Harris, Senior Crown Counsel, has helped the court on behalf of the Crown. There are, apparently, no authorities on the matter in Gibraltar, or at any rate they have not been cited to this court. Mr. Dumas has very helpfully provided six from England. Since the practice, procedure and powers of the Supreme Court of Gibraltar in its original jurisdiction are to be exercised by it in conformity with the law and practice for the time being observed in England, then it seems right and proper to turn to those that Mr. Dumas has cited.

5 The direction that the English practice and procedure in the Crown Court shall obtain here if there are no specific Gibraltarian laws on the matter is to be found in s.4 of the Criminal Procedure Ordinance. The authorities are: *Associated Provncl. Picture Houses Ltd*. v. *Wednesbury Corp*. (1); *R.* v. *Southampton JJ.*, *ex p. Green* (5); *R*. v. *Horseferry Road Magistrates' Ct.*, *ex p. Pearson* (2); *R*. v. *Waltham Forest JJ.*, *ex p. Parfrey* (7); *R*. v. *Ipswich Crown Court*, *ex p. Reddington* (3); *R.* v. *Uxbridge JJ.*, *ex p. Heward-Mills* (6); and *R*. v. *Marlow JJ.*, *ex p. O'Sullivan* (4).

6 I will endeavour now to set out the principles which I have extracted from those authorities in the hope that they will be of some help, not only to those before whom sureties' applications are recorded, but also as to how the courts should deal with the matter of forfeiture when it comes to the time when sureties have to show cause why they should not have their recognizances estreated.

7 The recognizance is really a document in the nature of a bond by which the surety enters into an obligation. If he fails in that obligation then he ought to pay the amount that he has promised to pay. Failure to fulfil the recognizance or the promise gives rise to a civil debt which arises on the bond that he signed. To prove that there has been a breach of the promise or the recognizance, the standard required is the civil one of the balance of probabilities; there is no call for proof beyond reasonable doubt.

8 That also goes for the standard of proof required when the surety comes to show cause. The reason for this is that an application to estreat a recognizance does not turn into a trial because the surety, of course, has not committed any offence and so no punishment—such as being dispatched to prison—follows, at any rate at the first stage. This debt is enforceable like a fine by a warrant of distress or committal to prison later.

9 So, when it comes to this court or a magistrates' court considering whether a surety is a suitable subject for giving a recognizance for the performance of a condition it should take into account the means of the person offering to be a surety. There is no point in accepting the promise or recognizance of somebody who cannot fulfil it if there is a breach of the recognizance later.

10 It seems to me, therefore, that the acceptance of someone as a surety should be a consequence of writing out what his replies are to questions concerning his status as a surety, the investments that he or she has, the income that he or she has each month and any other forms of wealth that might be brought forward in the event of a defendant failing to appear before the court and the surety being unable to show cause why the recognizance should not be forfeited.

11 This is something that should be recorded, in my view, because, later on, when there is an inquiry into whether the surety has shown cause or

not, it would be useful for the court to have before it some account of the proceedings before the court or the magistrate that accepted the recognizance of that surety.

12 When exercising its discretion as to whether or not to accept a surety, the court should direct itself properly on what the means of the surety are and call to the attention of whoever is standing as a surety matters such as his duty to produce the defendant when called upon to do so and to make certain that the defendant does not escape from the jurisdiction. Other considerations should be excluded from the exercise of this discretion by whoever is taking the evidence given by the person offering himself as a surety.

13 One further point should be made, according to the principles in the cited authorities, and that is that if a relative is accepted as a surety it must be because that relative has sufficient means of his or her own to pay the amount of the bond out of his or her own separate property. So, with a wife, no account should be taken of the value of the joint property of the wife and the husband, or of the matrimonial home, unless, of course, it is only in the name of the wife.

14 The court, when it is inquiring into whether the recognizance should be estreated, has a discretion to exercise. Estreatment is not automatic, as it used to be at common law, and it is for the surety to satisfy the court that the full amount need not be forfeited. This has been described as a very heavy burden.

15 The discretion should be exercised when the court has considered the extent to which the surety has been at fault in regard to the disappearance of the defendant or his failure to appear at the court when he is ordered to do so. So that really means that the court must investigate first what is known as the culpability of the surety.

16 There are rules or principles about this. First, if the surety has helped the defendant to disappear or aided and abetted him in doing so then it is proper to forfeit the whole of the recognizance, provided that the means are there to pay. If the surety has connived at the disappearance and has no means, there is no point in making an order that the whole of the recognizance should be forfeited. Suppose, secondly, that the surety has not been guilty of any want of diligence, but has used every effort to secure the appearance of the defendant: it might be—but would not necessarily be—proper to remit the recognizance entirely.

17 Some of the questions that the court should be asking include whether the surety has done all that he or she could be expected to do, and whether there was an opportunity for the surety to control the movements of the defendant and prevent the defendant from not attending the trial.

18 Turning now to the matter before the court today, we have here two sureties who each admit that they knew that he or she had made a very

solemn promise to make sure that the defendant returned to the court each time he was told to do so. And, according to their evidence, all this was very carefully explained to each of them by the Acting Registrar to whom the court had entrusted this task.

19 So I come to the matter of the culpability of each surety. The test is: did they do all that they could to see that the defendant turned up each time he ought to have turned up?

20 The father says that he had the son living at home, that his wife was cooking for him and his son, and that he felt certain that his son would attend court. He knew that the son had his passport with him so that he could leave the jurisdiction and travel into Spain. He knew that the son had, for one reason or another, failed to attend this court on other occasions. He admits that he did not at first tell the police or come to the court and pass on the information that his son had suddenly disappeared across the border into Spain.

21 He did, however, become very worried about his son, and about what might happen to the £10,000 that he has in savings when Alcantara, A.J. made the order to forfeit the £500 that he had promised to pay on the recognizance in the other case concerning his son. Then, with the help of Mr. Dumas, he went across into Spain to see his son three times, and did all that he could to persuade him to return to Gibraltar and stand trial. There came a day when he and a C.I.D. officer who had been warned of this by Mr. Dumas, and Mr. Dumas as well, went and stood at the frontier waiting for the defendant to appear on the horizon and fulfil his obligation to stand trial. They were disappointed because the defendant never arrived. So, asks Mr. Dumas for the father, what more could the father have done?

22 When it comes to the sister, all she can say is that she trusted her brother to return to court. She knew that he was living with her father and mother. She saw him from time to time but did nothing else, and really there was nothing else that she could do. She had not taken part in the attempts to reason with the defendant and make him return to this court for his trial.

23 After consideration of culpability comes consideration of the means of each surety. When it came to proof of their means before the Acting Registrar, it is clear that the father produced evidence of savings worth more than £10,000, which was the sum for which he was putting himself forward as a surety for the appearance of the defendant.

24 The sister swears that she mentioned that she had an insurance policy, worth £10,000, on the household goods which she and her husband have in their residence.

25 When dealing with matters of insurance, of course, everyone is supposed to act with the utmost good faith, and therefore it can be

presumed that the sister was telling the truth when she said that to replace the household goods would cost £10,000. Whether or not they were worth £10,000 second-hand is another matter. People insure goods for their replacement value, or for their value when they are lost or destroyed. Which was the case here is not clear on the evidence which has been given to the court today. She also says that she was given one week to produce that policy by the Acting Registrar. We have not heard his account of this so, for the moment at any rate, what the sister says will have to be accepted because that would be the only fair way to treat this evidence.

26 She then maintains that when she returned home she discovered that her husband had not renewed the policy and, moreover, although the premium was only £40 per year, he refused to renew it. She hoped that he would change his mind and while she was waiting for this to happen, of course, the week had passed and she had not taken the policy back to the Acting Registrar. It came to the point where she picked up the telephone and told some gentleman on the staff of the Supreme Court that she could not produce the policy because it was no longer valid: he took her telephone number and said that he would call back on the telephone later. He did not do so.

27 She obviously knew at that stage that she did not qualify as a surety and she had not fulfilled one of the conditions which had been placed upon her before she could be accepted as surety. She took no further steps in this matter. She declares that she thought that the Acting Registrar or the staff of the court would then take them and she waited for that to happen. She did not come back here to be discharged and she did not tell the court or counsel for the defendant that she had been unable to fulfil the condition that the Acting Registrar had set her.

28 When it comes to the present means of each of the sureties, Mr. Avellano, the father, says that as far as income is concerned he has about £430 per month net for him and his wife to live on when tax, rent, telephone, water and electricity bills and so forth have been paid. And the sister, who also has the surname Avellano, having married a gentleman with the same name as her own, says that she has about £300 per month of her own which she puts into the household common fund for meeting expenses other than those of rent and water, electricity and telephone bills, which have already been accounted for, together with tax. So neither of the sureties has very much in the way of income.

29 The father still has £10,000 in savings. He has been ordered to pay £500 in another matter because his recognizance was forfeited by Alcantara, A.J. earlier this month. The father stood surety for the defendant, and the defendant did not turn up for trial in that case.

30 The father has time to pay this £500 at the rate of £100 a month. He has paid one sum of £100 and he has until the end of this month, April, in

which to pay the next instalment. There is a default sentence of imprisonment should he fall down on paying any of those instalments. It would seem that the sister has no investments or savings.

31 I have now taken into account the matters that are relevant when making an investigation into whether a surety should be ordered to forfeit the whole of the recognizance, part of it, or none at all.

32 So far as culpability is concerned, the father should have come much earlier to the court with all this news so that a warrant could have been issued and the defendant, together with his lawyer, would have known that he should either return very quickly and explain why he had not been here or find someone else to be his surety. The sister ought to have done the same.

33 The father has the means to pay the sum of £10,000; the sister cannot pay as much as that. It was made clear that the burden on the surety was a heavy one, but all that each had to do was to show on the balance of probabilities that each has done what can be done. They have not the means to pay the full sum which they promised to pay.

34 The discretion is one entirely for this court. Therefore, standing back from all this, and taking into account all the things which should be taken into account, weighing one thing with another and doing the best I can in the exercise of my discretion, I now order that the father should forfeit £5,000 and the sister should forfeit £1,000.

35 Mr. Avellano, the father, is to pay £5,000 in equal monthly instalments of £500 each at or before noon on the last working day of each succeeding month. The first one will be at or before noon on the last working day of April 1988. In default of payment of any instalment, he will go to prison for 20 days.

36 The sister of the defendant is to pay £1,000 in equal monthly instalments each of £50 per month at or before noon on the last working day of each succeeding month, beginning at or before noon of the last working day of April 1988. In default of payment of any instalment, she will go to prison for seven days.

Order accordingly.