

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM No. AXAHCV2024/0028

**IN THE MATTER OF SECTION 9 OF THE BAIL
ACT, 2021**

**IN THE MATTER OF A RULING AND
CONSEQUENT ORDERS OF THE
HONOURABLE MAGISTRATE PIYUMINI
WEERATUNGA MADE AND DELIVERED ON
10th MAY 2024 DENYING BAIL TO THE
APPELLANT AND ISSUING A WARRANT OF
REMAND**

WILLIAM HERBERT

APPELLANT

-AND-

**COMMISSIONER OF POLICE OF THE ROYAL ANGUILLA POLICE FORCE
(WITH NOTICE TO THE ATTORNEY GENERAL OF ANGUILLA)**

RESPONDENT

Before: His Lordship, The Honourable Justice Ermin Moise

Appearances:

Mr. Thomas Astaphan KC and Mrs. Tona Simpson Whyte for the Appellant
Mr. Theon Tross for the Respondent

2024: June 7.

- [1] **Moise, J.:** This is an appeal against the learned magistrate's decision to deny bail to the appellant. The appeal was not opposed, and the court therefore granted bail in accordance

with section 3 of the **Bail Act**¹. However, some of the issues raised on appeal were such that the court thought it important to put its decision in writing and undertook to do so.

The Facts

[2] In summary, the appellant was jointly charged with his father for two offences under the **Firearms Act**². Those were charges of possession of firearms without a user's license and for manufacturing firearms without being the holder of a manufacturing license. On 10th May, 2024, the appellant and the co-accused were taken before the magistrate at which point the police prosecutor objected to bail. It is apparent from what has been presented to me that no evidence was led by the prosecutor in relation to the objections. Much of what had been presented to the learned magistrate came from the bar table. The prosecutor intimated that the appellant had strong ties to Saint Kitts and is also a boat captain and therefore, there is strong likelihood of him absconding whilst on bail. The co-accused was none-the-less granted bail, for reasons which are not entirely clear to this court. This appellant was denied bail.

[3] The learned magistrate provided written reasons for her decision. She referenced section 3(1)(a) of the **Bail Act** and took into account the fact that the nature of the alleged offences was serious. She decided that the appellant was *“a young person with 2 complaints relating to illegal firearms where his own protection and well-being in the circumstances would be of concern to the court”*. Apart from the appellant's youth, there is nothing here to explain precisely what evidence was used to come to that conclusion. Although the learned magistrate took into consideration the appellant's constitutional right to liberty, she went on to note that *“there was a public outcry lately about the need for more serious actions from the law-enforcement authorities for offences related to illegal guns and ammunition in making society safe for everyone.”*

[4] This is the full extent of the reasons presented to the court for the denial of bail.

The Appeal

¹ Act NO. 22 of 2021

² F30

[5] Insofar as it relates to circumstances in which the magistrate denies bail to a defendant, sections 7 to 10 of the **Bail Act** refer at times to an application before the High Court and at other times to an appeal. In stating that the magistrate is obligated to give reasons for her decision to deny bail, section 7 goes on to state that the “...[c]ourt shall, in order to enable the defendant to make an application in the matter to a Judge of the High Court, give reasons for refusing bail or for imposing or varying the conditions. Section 8 states that “where a Magistrate’s Court refuses to grant bail to a defendant who is not represented by counsel, the Court shall inform him of the right of appeal conferred by section 10.” In section 9 the Act states that “a defendant to whom section 8 applies may appeal to a Judge of the High Court on notice to the Attorney General.”

[6] In the circumstances of this case, the appellant was represented before the magistrate. However, insofar as section 10 of the Act is concerned the following is stated:

(1) Where a Magistrate’s Court refuses bail in criminal proceedings or imposes conditions on the grant of bail in criminal proceedings, the Judge in the High Court may grant or refuse bail or vary the conditions.

(2) In granting bail under subsection (1), the Judge in the High Court may direct the defendant to appear at a time and place which the Magistrate’s Court could have directed and the recognizance of any surety shall be conditioned accordingly.

[7] Read in conjunction with section 8 (despite the appellant having been represented at the bail hearing before the magistrate) it would seem that what has been presented by section 10 of the Act is a right of appeal. However, in such circumstances, based on the language of section 10, the appeal does not necessarily limit the judge to a review of the learned magistrate’s decision. The section empowers the judge to grant or refuse bail or to vary the conditions. The judge is therefore entitled to consider the application de novo. However, given the circumstances of this case, it is also important to highlight some basic principles

relating to the conduct of bail hearings, whether before this court or the magistrate. This would assist in providing some guidance on the conduct of bail hearings in the future.

Conduct of Bail Hearings

- [8] As the Learned Magistrate rightly pointed out, the starting point here is to appreciate that the refusal of bail amounts to a derogation of the constitutional right to liberty. This is a right to which every citizen, resident or visitor to Anguilla is entitled and is not one which ought to be taken lightly. In the case of ***Thelston Brooks v. The Attorney General of Anguilla***³ the following was noted:

“... the exercise of a judge’s discretion in admitting an accused person to bail, calls for a balancing of the scales by weighing the interests of an accused person and his fundamental rights as guaranteed under the constitution on the one hand, and the interest of the rights and freedoms of others and the public interest, being the sole qualifications on the said rights, on the other.”

- [9] In the case of ***Phillip Stephens v. The DPP***⁴, the Supreme Court of Jamaica made the following observation at paragraph 9:

“It is common these days to hear attorneys say that the Bail Act creates a right of bail. I am not sure why this is said. It seems to me that the starting point has to be the Constitution of Jamaica... The liberty of the subject is such a fundamental right that the framers of the constitution thought that it should not be left to implication but rather should be expressly protected... the fact that this right has received the highest level of protection possible in a legal system which is located in a constitutional democracy with a written constitution, then any derogation from such a high ranking right must be justified by very, very cogent reasons.”

³ AXAHCR2006/0089

⁴ HCV 05020 OF 2006

[10] One cannot underscore enough the importance of the right to personal liberty. In liberal democracies such as ours, this right is afforded one of the highest-ranking protections in our legal system. The constitution creates an avenue to balance that level of protection against the public interest. However, what it does not do is create a police state where there is no burden on the crown to prove, within the requisite standard, that the person's liberty should be taken away prior to a conviction. Insofar as it relates to the role of the court, magistrates and judges must not pay lip service to this right. It is important to consider protecting the public against those who persistently and violently commit crimes. But the court must never shy away from its duty to properly and accurately interrogate the evidence so as to ensure that its processes are not abused and that these fundamental rights to which the citizen is entitled are not taken for granted.

[11] In the case of **Stewart Joseph v. The DPP**⁵ the court of appeal of Jamaica stated as follows:

[10] The judgment of Brooks JA in Huey Gowdie v R [2012] JMCA Crim 56 has laid down the methodology for bail applications. His Lordship stated that bail applications are to proceed in a coherent, rational and systematic way. The application must be carefully considered and reasons given for the refusal or grant of bail.

[11] The primary reasons for this systematic approach are (a) the fundamental rule is that prima facie every person is entitled to liberty and (b) every person is presumed innocent until found guilty whether by trial or plea. These fundamental norms are now guaranteed rights in the Charter of Rights. Indeed, under the new bill of rights, it is expressly stated that any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions 'unless sufficient cause is shown for keeping him in custody' (my emphasis).

⁵ [2014]GCCCD 1

[12] The court went on to state the following at paragraph 15:

“The consequence is that no citizen has to justify why he should be free. The common law established this and now the constitution provides for this. The burden is on those who want to deny him his fundamental human right to liberty to show why he should not be granted his freedom. The Jamaican Constitution of 1962 was based on the European Convention on Human Rights which itself came out the terrible conditions found in the death camps operated by the Third Reich of Nazi Germany and its allies and collaborators. The Europeans wanted to lay down base line conditions which should be met before a person is been deprived of his liberty. Jamaica made a deliberate decision to adopt many of these principles in its independence Constitution of 1962. In 2011, the legislature revised the Charter and strengthened the liberty provisions by adding section 14 (1) which provides that ‘no person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law.’ Reasonable in this context means grounds that the basis of the denial of liberty is not based on the any one’s subjective suspicions but objective conditions which make the deprivation of liberty justified. Not only must the grounds be reasonable but the mechanics of the process must be fair and that those procedures must be established by law.”

[13] This court recognizes, as did the learned magistrate, that the public’s sentiment against the rising levels of gun crime is a major and significant issue. The public interest is an important factor to take into account and the constitution itself provides that a court of law can deprive someone of this liberty if the correct circumstances arise. However, as was stated in the cases referred to above, the onus is not on the appellant, but on those who seek to deprive him of his liberty to prove that the court’s discretion should be exercised in favour of a derogation of his constitutional rights.⁶ Insofar as that is the case, I express concern in this written decision, with the manner in which such rights are being addressed when balanced

⁶ See paragraph 18 of the judgment in Thelston Brookes.

against the need to protect the public from serious levels of violent crimes. It would seem that the courts need to be ever more vigilant with respect to their role in upholding the constitution and demand that proper and adequate procedures be followed in order to ensure that their processes are not being abused. In ***Stewart Joseph v. The DPP*** the court of appeal of Jamaica went on to note as follows:

The methodology outlined by Brooks JA cannot be improved upon by this Court and so only a summary will be given. Time reading and applying paragraph 21 of his Lordship's judgment is time well spent. In succinct terms the steps are:

- a. allegations laid before the court;***
- b. are there substantial reasons for refusing bail? Hearsay is admissible. Another name for reasons, in this context, is risks. To rephrase the requirement: what risks have been identified which would make it appropriate to deny bail.***
- c. even if there are substantial risk the court must proceed further to determine whether there are conditions which can imposed that are sufficient to manage the identified risks;***
- d. it is only after the court has concluded that the identified risks cannot be managed by appropriate conditions then a refusal of bail is justified. To use the constitutional language, if the risks can be adequately managed then there is 'sufficient cause has not been shown' to justify continued detention.***

[14] As was noted in that case, it is not that this court wishes to place a greater burden on the limited time and resources available to the summary courts as well as the police. However, courts of first instance must ensure that proper procedures are put in place and followed when exercising a discretion such as one which deprives a citizen of his or her constitutional

rights. Courts of law do not take liberties away without evidence upon which to base the decision and in a court of law, evidence is generally to be given on oath. Even at the early stage of a search or an arrest warrant, information is taken on oath. I fail therefore to see why a bail hearing should be any different when one considers the length of time in which an un-convicted person may be deprived of his liberty on account of a denial of bail. With the exception therefore of public documents or documents which form part of the court's record, the practice of evidence being given from the bar table by police prosecutors, without an opportunity for cross examination, inevitably shifts the burden to the appellant to prove that he should be admitted to bail and is a practice which must be brought to an end.

[15] This court endorses the standard approach approved by the court of appeal of Jamaica. Allegations must first be laid before the court and substantial reasons be given as to why bail should be denied. I would add that such reasons should be attested to by the investigating or other assigned officer on oath. It need not be elaborate as in the case of an actual criminal trial. But it must be sufficient to hold the state accountable for the allegations being made if that time arises. Hearsay evidence is admissible at this stage in the process. Once the information is before the judicial officer, a risk assessment is to be done in order to determine whether, on a balance of probabilities, there is sufficient evidence to show that the defendant will abscond, interfere with an investigation or perhaps continue to commit offences whilst on bail. The judicial officer may also consider protecting the public and the defendant himself if there is sufficient evidence to justify this. Once that exercise is conducted, the officer must then consider whether there are conditions which can be put in place to mitigate those risks if the defendant is to be placed on bail. It is only if those conditions are insufficient should the defendant be denied bail. The burden is, however, not on him to prove this. But he may wish to present evidence to assist with this process.

[16] I thought it important to highlight these issues, not as an attempt to criticize but to encourage a different approach. One cannot help but observe that with the rising levels of crime comes a natural propensity to seek tougher and more stringent approaches to dealing with those who are accused of crime. There is nothing wrong with this, and the public quite rightly demands more from the legal system. However, in times like these, the justice system needs to also be ever more vigilant in ensuring that constitutional rights are observed and to guard

against the possibility of miscarriages of justice occurring. It is not only proper, but imperative, that the system continues to demand the observance of due process when significant rights of the citizen may be undermined.

Admission to Bail

- [17] Section 3 of the **Bail Act** governs the principles which a court must consider in granting or refusing bail. The section states as follows:

3. (1) Where the offence or one of the offences in relation to which the defendant is charged or convicted is punishable with imprisonment, bail may be denied to that defendant in the following circumstances—

(a) the Court or police officer is satisfied that there are substantial grounds for believing that the defendant, if released on bail would—

- (i) fail to surrender to custody;***
- (ii) commit an offence while on bail; or***
- (iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;***

(b) the defendant is in custody in pursuance of the sentence of a Court;

(c) the Court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this section for want of time since the institution of the proceedings against the defendant;

- (d) the defendant, having been released on bail in or in connection with the proceedings for the offence, is arrested in pursuance of section 13*
- (e) the defendant is charged with an offence alleged to have been committed while he was released on bail:*
- (f) the defendant's case is adjourned for inquiries or a report and it appears to the Court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody.*
- (g) the Court is otherwise satisfied that there are compelling reasons why the defendant should not be admitted to bail in the circumstances.*

[18] These are generally the grounds upon which bail may be denied. As I have stated earlier, there must be evidence presented to the judicial officer in order to substantiate any of the grounds outlined in the section. Where the crown seeks to deny bail, evidence must generally be presented, preferably on oath to support this request. Exceptions can obviously be made in circumstances where the court's own record may substantiate the grounds upon which bail may be denied. For example, a defendant's antecedent history or a previous history of absconding. In other circumstances, such as relating to the police investigation for example, evidence should be given on oath.

[19] Section 3 of the **Bail Act** goes on to outline the various factors which the court must consider in determining whether the criteria in section 1 has been met. Those factors are as follows:

- (a) the nature and seriousness of the offence;*
- (b) the defendant's character, antecedents, association and community ties;*
- (c) the defendant's record with regard to the fulfilment of his obligations under previous grants of bail;*

- (d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having failed to surrender to custody;**
- (e) whether the defendant is a repeat offender, that is to say, a person who has been convicted on three previous occasions for offences which are punishable with imprisonment; or**
- (f) any other factor which appears to be relevant including the defendant's health profile.**

[20] The Act also states that the court may deny bail if it is satisfied that the defendant should be kept in custody for his own protection or where he is a child or young person, for his own welfare.

[21] In the circumstances of this case, the defendant is jointly charged with a co-accused for very serious offences. These are offences which have created a public outcry in Anguilla. There is no doubt about that. He, however, has no previous convictions and nothing has been presented to this court to suggest that the case has been adjourned for any further enquiries. The strength of the evidence has not been canvassed before me. He states in his affidavit that he is not the owner of the house in which the firearms were found. The owner of the house has in fact been charged as a co-accused and was granted bail.

[22] In his affidavit the appellant also states that at the bail hearing before the magistrate, the police prosecutor stated the following in his objection to bail:

"Our instructions are to oppose the firearm and ammunition offences. The Defendants have ties to St. Kitts and are boat owners. That raises the likelihood of absconding. Secondly, while the offences before the court are for possession simpliciter, possession of firearm and ammunition, as a result of those charges, subsequent lines of inquiry are open and if granted bail the Defendant can obstruct the investigation. We contend that they are not suitable candidates for bail."

- [23] With great respect to the learned officer, this is not the way in which a hearing of this nature is to be addressed. The defendant states in his own evidence that he is not a boat owner and I have not been presented with any evidence to substantiate this. If such an allegation is to be made at a hearing of this nature, even before the magistrate, then more evidence is required in order to determine whether, on balance, this assertion is even true. In terms of the further lines of inquiry which are being made, this court appreciates that in the early stages of an investigation there may be compromises which may occur if those lines of communication are revealed. But that does not mean that a bald statement of this nature is enough to substantiate this.
- [24] Mr. Herbert goes on in his affidavit to state that he has no ties to Saint Kitts and is not a resident or a citizen in that country. Surely, if such an allegation is to be made by the police, then more evidence is required than such a narrow statement from the police prosecutor. Mr. Herbert states that he is a citizen of Anguilla, with deep roots in this country and this evidence has not been controverted.
- [25] In the circumstances of this case therefore, I can see no reason to deny bail to the appellant. Bail was therefore granted on terms and conditions which were set out in the order of the court dated 5th June, 2024. There is no need to repeat those conditions in full in this written judgment. It is hoped however, that we can go some way in ensuring that proper protocols and procedures are put in place to ensure that due process and the rule of law are not taken for granted as the judiciary does its own part in addressing the concerns of the public with the increased levels of crime and violence which currently occur in our society. This concern, however, must be balanced with an observance of the constitutional rights of the citizen and the rule of law.

**Ermin Moise
High Court Judge**

By the Court

Registrar