

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)**

BVIHCV2022/0268

BETWEEN:

NYRON ERICKSON

Applicant

and

THE SUPERINTENDENT OF PRISONS

Respondent

Appearances: Mrs. Valerie Gordon with her Mr. Hugh Wildman, Counsel for the Applicant

Mr. John Black K.C. with him Mrs. Fiona Forbes-Vanterpool, Counsel for
the Respondent

2022: December 9

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DECISION ON BAIL APPLICATION

[1] **ASTAPHAN J: *"Life is as tedious as a twice told tale, Vexing the dull ear of a drowsy man"* William Shakespeare's King John.**

This is the fifth application for admission to bail made by the Applicant, Nyron Erickson, as is his Right to make; and this is the Court's Decision on that fifth Application by the Applicant to be admitted to bail. The Virgin Islands has no Bail Act. The Common Law governs Bail in these islands which comprise the Virgin Islands.

- [2] The Applicant has made four prior applications to be admitted to bail before the Magistrate's Court and the High Court. They were refused. This application before the Court is not an appeal of any of those unsuccessful applications, as indeed it cannot be, for reasons which will appear in this decision. This application is not a "review" of any of the former refusals, as indeed it cannot be. It is not a "renewed application" for bail, as indeed it cannot be. It is a new, distinct, separate and freestanding application by the Applicant for admission to bail.
- [3] The Virgin Islands has a written Constitution¹ ("the Constitution"). The Constitution is the fundamental underpinning of any application for admission to bail by an applicant, whether under a Bail Act, where there is one, or like here, under the Common Law. **Chapter 2, the Fundamental Rights and Freedoms of the Individual, Section 9**, provides the overarching mandatory declaration of the fundamental rights and freedoms of the individual in these Virgin Islands. **Section 15** guarantees the protection of the right to personal liberty, and **Section 16**, by its provisions secures to the individual the protection of law.
- [4] It is not in issue in this case that Section 15 is engaged by the circumstances of the Applicant.
- [5] The engagement of Section 16 of the Constitution was not canvassed by either Party's Counsel. While it does not impact the ultimate decision of this Court on the Application before it, it is necessary to state that Section 16 is engaged by virtue of the fact that the Applicant is being detained upon a Warrant issued pursuant to a request made by the Government of the United States for his extradition to that country, which request was premised upon an Indictment preferred against him by a Grand Jury for the United States District of the Virgin Islands, on charges on three Counts: one of International Money Laundering Conspiracy, and two of Bulk Cash Smuggling. The fact is that he is "charged with a criminal offence" which is [not "withdrawn"], and these facts trigger his Section 16 protections. This is so despite the fact that he is not charged with any offence in, and by these Virgin Islands

¹ The Virgin Islands Constitution Order 2007

("British"), as Section 16 does not restrict the words "charged with a criminal offence" to charges of criminal offences in, and by the Authorities of these Virgin Islands. I hasten to add, that the three preconditions set out in **Clifford and O' Sullivan (1921) 2 A.C. 370** and **Amand v Secretary of State for Home Affairs (1943) A.C. 147** which were adopted and applied by Chief Justice, The Rt. Hon. Sir Vincent Flossiac, Q.C., in the case of **Michael Glasford & Ors v The Commissioner of Police, Civil Appeal No. 8 of 1994**, in the Eastern Caribbean Court of Appeal, to determine whether an "*...order by way of refusal of the appellants' application for bail was an order made in a criminal cause or matter*" are present, and are equally applicable in assisting in the determination as to whether Section 16 is engaged.

[6] These preconditions are-

- (i) "*... that at the time of the filing or hearing of the application on which the order was made, a charge of crime punishable by a fine, imprisonment or otherwise had been or was about to be preferred against the applicant or some other person.*" The evidence of the Respondent in this application is that the Applicant had been Indicted by a Grand Jury for the District of the United States Virgin Islands upon charges of criminal offences, all of which are "*... punishable by a fine, imprisonment or otherwise.*". Indeed, it was that very Indictment which premised the arrest of the Applicant.
- (ii) "*The second precondition is that the application involved consideration of that charge of crime.*" The arrest of the Applicant was on a Warrant issued by a Magistrate which issue must have "*... involved consideration of that charge of crime...*", and certainly the subsequent proceedings all must have "*...involved consideration of that charge of crime.*" It need not be said that these present proceedings have involved such a consideration.
- (iii) "*The third precondition is that the direct outcome or result of the application was or might have been the applicant's or other person's trial and possible conviction and punishment by a court or judicial tribunal having or claiming jurisdiction to try, convict and punish for that crime.*" This is the stated purpose of the Applicant's detention by these Virgin Islands authorities,

namely, to extradite him to the United States to face trial upon the said Indictment for which he may be convicted and punished by a United States Court which claims it has jurisdiction to do so. That this application, being an application for bail after that arrest, is part and parcel of the process which may lead to a conviction, engages that precondition.

- (iv) So that, applying these three preconditions, *mutatis mutandis*, to this Application vis-s-vis Section 16 of the Constitution, it is clear that the Applicant is a "...person charged with a criminal offence..." and is therefore entitled to the enumerated Section 16 protections. This, however, does not come to the aid of the Applicant on this Application, as there is no allegation of any Section 16 infringement, and the Applicant's current – and former – bail applications all honoured those Rights.

The Applicant's Submissions

- [7] The Applicant, through his Counsel Mr. Hugh Wildman, in his written and oral representations, and in his various affidavits in support of this Application, submits that there have been changes in his circumstances since his last application which warrant his release on bail. They are all set out in the affidavits which the Court has read and considered, and need not elongate this Decision by repeating them in full detail.
- [8] To paraphrase these submissions, he says that: (i) there is a lack of evidence to support his extradition and, Respondent's Counsel has conceded that there is no evidence against the Applicant; (ii) that his co-accused have had their cases dismissed With Prejudice (apparently for abuse of process by the Prosecutors), and this somehow undermines the Indictment upon which his extradition is sought; (iii) he has been incarcerated for a lengthy period of time already, and he will remain so incarcerated until the Privy Council has heard his appeal against the Judgement in his extradition hearing; (iv) that his health is deteriorating; (v) that his continued incarceration causes hardship for his family, particularly his young son who suffers

with a complex medical condition which requires the son to be treated by a Hospital in Florida, U.S.A.; and (vi) that he is not a flight risk.

The Respondent's Submissions

- [9] The Respondent, The Superintendent of Prisons, through his Counsel Mr. John Black, K.C., and through various affidavits and submissions, written and oral, forcefully submits that (i) this Court is devoid of jurisdiction to hear this application unless there has been a [material] change in circumstances since the last application for bail by the Applicant, which was refused; (ii) that this Court is bound by the findings of fact of the previous Courts which heard the earlier applications of the Applicant for admission to bail, and it is only a material change in circumstances that would permit this Court to entertain this Application, much less grant bail to the Applicant; and (iii) that in any event, the Applicant has not reached the threshold, on examination of the "changes in circumstances", which would admit him to bail.
- [10] Let me hasten to say that no disrespect is intended to either Counsel, or to their very exhaustive and erudite Submissions, and copious authorities cited therein, when I distill and extract what I take to be the essential issues before me, both from the Submissions, written and oral, and the cited cases.

Is this Court bound by the findings of fact by the previous Court which refused an earlier Bail Application and, must there be a Change in Circumstances before this Court can entertain a further Application for Bail?

- [11] The short answer to this quite novel submission, in the context of the Constitution and the Law as to bail in these Virgin Islands, is 'No'.
- [11.1] Mr. Black, K.C., has cited in support of this overarching submission a lavish menu of cases, - perhaps because it is the festive Christmas Season - amongst which were the following:

Nottingham JJ, ex parte Davies [1981] Q.B. 38, Divisional Court, U.K., interpreting a Bail Act;

The Matter of an Application for Bail by Raffique Chewitt, Dwayne Sandy and Noval Sayers SVGHCRB 2014/0027, etc. High Court, St.Vincent & The Grenadines

Steve Ferguson et al v Attorney General of Trinidad and Tobago, High Court, December 22, 2010, and in which HKSAR v Siu Yat Leung [2002] is cited as an authoritative discussion of the principles at Common Law relevant to successive bail applications.

The Queen v David Brandt MNIHCR 2019/2008, High Court, Montserrat

D.H v The Director of Public Prosecutions, BVIHCR 2020/0037, These Virgin Islands

R. (on the application of Morgan) v. Isleworth Crown Court, High Court, Queen's Bench Division

Knowles and Ors v The Superintendent of HM Prison Foxhill and Ors [2005] UKPC 17

Norris v Government of the United States of America [2008] UKHL. 16, United Kingdom House of Lords

Michael Glasford & Ors v The Commissioner of Police, Civil Appeal No. 8 of 1984

Glenville Nkomo Hodge and The Commissioner of Police AXAHCV 2020/0027

R v Secretary of State for the Home Department ex parte Turkoglu [1998] 1Q.B. 398, U.K Court of Appeal.

[11.2] None of the above cases are on the question of whether or not a Court hearing a bail application at Common Law is bound by finding of facts by a previous Court which had refused the Applicant bail. None establish any principle at Common Law that there is a threshold to be met – “change in circumstances” – before this Court has jurisdiction to entertain, hear and rule upon this extant Application.

[11.3] Except for **Knowles**, none of the Courts from which these judgments come are hierarchically binding on this Court. At best, they are persuasive only, and I am not persuaded that decisions on specific sections in Bail Acts which set out what the Courts in those jurisdictions must or must not do, create, add to, or amend the Common Law as to bail which governs these Virgin Islands.

[11.4] I am also not persuaded by the statements in **Ferguson, Leung, Hodge and Chewitt** that “changes in circumstances” are required for a Court hearing a bail application after a prior refusal of bail to be seized of jurisdiction, and that that Court is (a) bound by prior findings of fact, and (b) that Court only has jurisdiction when there are “changed circumstances”. The statements by the Courts in those cases with respect to the Common Law are made in passing, and without any analysis of what the actual Common Law position is, or *relevant* authorities examined. They appear to have been prepared to assume that the Common Law included those requirements and commands without citing any authority for, or discussion and analysis of that assumption. They merely assumed it to be the Common Law. I decline to follow those assumptions. The Common Law as to bail, as set out in Archbold's 36th Edition, which is the Law on Bail for these Virgin Islands, **does not include** either the alleged binding nature of prior findings of fact, or that there must be “changed circumstances” before a Court hearing a subsequent application for bail, where bail has previously been refused, has jurisdiction to grant or refuse bail – which is, of course, a discretionary exercise by the Court. And, I have been presented with no authority which evinces those alleged Common Law Principles.

[11.5] In **Ferguson**, the Judge cited from “...Corre and Wolchover: Bail In Criminal Proceedings where the authors articulate a useful summary of the law on this matter: [new considerations]. The practice of making weekly bail applications *provoked the extra-curial declaration by Archer J* [italics supplied] (as he then was) that it would be proper in the interests of both ‘comity and common sense’, for the bench to honour the bail decision originally made unless circumstances had changed (see *The Magistrate*, March 1980). Inspired by this comment, the justices of Nottingham agreed in March 1980 that they would apply a new *policy* [italics supplied] to repeated bail applications. They decided that, on and after the third consecutive application, if previous applications had been refused, they would refuse to consider bail unless the defendant could show ‘new circumstances’. The policy of allowing two bites at the cherry was devised to deal with the fact that bail applications made on the first appearance of a defendant in custody are usually based on instructions taken at short notice at the police station or at court. With little

or no opportunity for the defence legal representative to make full inquiries... A challenge to the policy was mounted in **R v Nottingham Justices, ex parte Davies [1980] 2 ALL ER 775**.... The Divisional Court accepted that the fact that a bench of the same or a different constitution had refused to grant bail on one or more previous remand hearings did not absolve the bench on a subsequent occasion from considering whether the accused was entitled to bail, whether or not an application was made. However, the court held, this did not mean that the justices should ignore their own previous decision or a previous decision of their colleagues. On those occasions, the court would have been under an obligation to grant bail unless satisfied that such exception has been made out.” What “exceptions” are being referred to? Clearly, those contained in the U.K. 1976 Bail Act which were engaged in that application. That Act has no application in these Virgin Islands.

I repeat that, in **Davies**, it is the Bail Act 1976 that was being interpreted by the English Divisional Court, not the Common Law. Further, I am unaware of any case – and none has been cited to me – which says that “policy” adopted by “Justices”, either changes the Common Law, or becomes binding precedent on the Eastern Caribbean Supreme Court jurisdictions without some statutory intervention. The Divisional Court in **Davies** is not a court which binds this court, more so the Justices of Nottingham by their adopting *the “extra curial declaration” of a High Court Judge in England and making it a “Policy.”* (By way of observation, I would have thought that, like the Law is the exclusive province of the Judicial Branch of Government, Policy is the exclusive province of the Executive Branch of Government, which is legislated exclusively by the Legislative Branch of Government into Laws, and which Laws are, in turn, exclusively interpreted and applied by the Judicial Branch, of which the Nottingham Justices were a part, This separation of powers doctrine plays no part in this decision.)

- [11.6] Mr. Black, K.C., in his Notice of Objection filed on 7 November, 2022, at page 3, paragraph 9, makes this claim: “In the Trinidadian case of **Steven Ferguson et al v Attorney General of Trinidad & Tobago** ..., the court cited with approval the case of **HKSAR v Siu Leung** ..., in which Justice McCoy J discussed the principles

at common law relevant to successive bail applications at paragraphs 14-16 of the judgment as follows:

"Principles at common law: successive bail applications:

Until 1994, s. 12B of the Criminal Procedure Ordinance provided: If an accused person is refused or denied bail by the court or a judge, he shall not thereafter be entitled to make a fresh application for bail: (a) Before the commencement of his trial, except to the court or a judge and only if he satisfies the court or judge that since the refusal or denial, there has been a material change in relevant circumstances; (b) During the trial, except to the court conducting his trial. That section was simultaneously repealed by the enactment of the new Pt. 1A of the Criminal Procedure Ordinance. By the former s. 12B, a further application for bail could not be made without 'a material change in relevant circumstances'. *In my judgment, that repealed statutory test was and is declaratory of the true common law position for the determination of a repeated bail application before the Court of First Instance."*

- [11.7] Respectfully, not a scintilla of authority is cited, or indeed referred to, by McCoy, J, for his assertion of what "... the true common law position" is. He relies on his judgment alone for this. He did not give any authority for this "judgment"; he provided no reasoning or analysis for his statement. And, the "fact" that the court in Ferguson "cited [it] with approval ..." does not elevate the statement of Justice McCoy to the level of the Common Law.
- [11.8] Mr. Black, K.C., further relied on the case of **Chewitt et al**, a bail application made to the High Court in St. Vincent & the Grenadines, for the proposition that there must be a change in circumstances before a bail application can be "renewed". What, therefore, did the Learned Judge say in that case?

"[9] It is important to bear in mind that this is an application before the High Court to be admitted to bail in circumstances where a similar application has already been refused.

[10] As I understand the applicable rule, an unsuccessful application for bail to the High Court cannot be renewed unless there is a change in circumstances relative to the application for bail of existing circumstances which had not been previously drawn to the attention of the bail court."

[11.9] What is discernably absent from the Court's statements is any authority, or reasoning for that understanding, which I respectfully decline to adopt.

[11.10] The Learned Judge then went on, at paragraph [13] to cite the case of **R v. Slough Justices, ex parte Duncan (1982) 75 Cr. App. Rep. 364**, where at page 388 Lord Omrod LJ states that "*Before the discretion to refuse bail arises the court has to be satisfied that there are substantial grounds for believing that one of the events ... will happen...*" What "events" was he referring to? The "events" set out in the Schedule to the Act that was being interrogated? Yet another authority cited where the learning comes from the interpretation of a statute for bail. These Virgin Islands have no Bail Act of any kind, therefore those cases are of no relevance, (even for the moment ignoring the fact that they are not courts which bind this Court) to this Court's application of the Common Law to bail applications in these Virgin Islands.

[11.11] Next, Mr. Black, K.C., in his submissions of 7th November, at page 4, paragraph 6, cites the Anguillan High Court case of **Glenville Nkomo Kenyatta Hodge and the Commissioner of Police, AXAHCV 2020/0027**. In that case the Learned Judge, at paragraphs 23 and 27 of the judgment, referred to the same considerations which come from the cases on statutory bail applications. Hodge does not help the Respondent. It cannot enhance the Common Law applicable to bail.

[11.12] Mr. Black, at page 5, paragraph 12 of the said submissions makes this statement: "It therefore follows that this court is bound by the finding of fact regarding the risk of the applicant absconding unless there exists a material change in circumstances or some new material before the court alleviates this risk. This is the essence of the point was well made (sic) by Lord Donaldson in ex parte Davies:

"...It follows that on the next occasion when bail is considered the court should treat, as an essential fact, that at the time when the matter of bail was last considered,

Sch 1 circumstances did exist (emphasis added). Strictly speaking, they can and should only investigate whether that situation has changed since then ... but the starting point must always be the finding of the position when the matter was last considered by the court ..."

On this I say three things: Firstly, there has been no statutory intervention in the Common Law position on bail in these Virgin Islands, and therefore the unadulterated Common Law applies; Secondly, Davies is a judgment of the Divisional Court of the U.K. which is not binding authority on this court, and thirdly, to *what Schedule 1 is Lord Donaldson referring?* The Common Law? An Act of Parliament?

[11.13] For all of the above reasons, I find that, as a matter of Law, Mr. Black, K.C.'s numerous commands that this Court is bound by the findings of fact by the previous Court, and that "a change in circumstances" must exist before this Court can entertain a new bail application, have no bearing on the Common Law position as to bail, in these Virgin Islands. Mr. Black's submissions are, in my judgment, erroneous.

[11.14] In conclusion on this point, Mr. Black, K.C.'s submissions, to use his own contumelious words addressed to this Court when this Court posited an alternative interpretation to that of the Respondent of the Affidavit evidence of the Police regarding the Applicant being a flight risk, "...*makes no sense*..."

[11.15] Such non-statutory invasions of the Common Law which governs bail applications in these Virgin Islands, in the context of the fact that there is no appeal from a decision on a bail application, (**Glasford, section 30 (2) of the Eastern Caribbean Supreme Court (Virgin Islands) Act**), and of the overarching commands of Sections 15 and 16 of the Virgin Islands Constitution, (notwithstanding permissible derogations, none of which is applicable to this discussion), would render those Constitutional Rights otiose, and permit the impermissible reality that a person who is refused bail on one application is bound by previous findings of fact on another later distinct application, and, unless some "change in circumstances" arise, he or she is condemned to the dungeons of incarceration until his or her matter is

completed. That is a voyage upon which this Court will not embark by way of impressment. (I do accept, however, that, at Common Law, a change in circumstances since a last application for bail had been refused, is to be taken into consideration *in deciding on a new application whether or not to grant bail*).

[11.16] That compendious submission of the Respondent, without binding authority, is an unacceptable proposition of what the Common Law is in the Constitutional context of these Virgin Islands.

[11.17] I, therefore, Rule that, as a matter of Law, this Court is not bound by prior findings of fact made by any other Court of co-equal jurisdiction, and this Court is not precluded from hearing a new Application for bail "unless there are changed circumstances".

[11.18] I am therefore required to decide this application on the Common Law principles, which are conveniently set out in Archbold's, 36th Ed. They are at paragraph 203, page 71:

"203 The proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial ...,

The test should be applied by reference to the following considerations:

- (1) The nature of the accusation. ...;
- (2) The nature of the evidence in support of the accusation ...;
- (3) The severity of the punishment which conviction will entail ...;
- (4) Whether sureties are independent, or indemnified by the accused person, ...;

The Nature of the Accusation

[12] The Applicant is charged upon an Indictment issued by the Grand Jury for the United States District of the United States Virgin Islands on three (3) Counts; **Count One:** International Money Laundering Conspiracy; **Count Two:** Bulk Cash Smuggling; **Count Three:** Bulk Cash Smuggling. These are, by any measure, very serious offences of which the Applicant stands accused, and this consideration ranks high.

The nature of the evidence in support of the accusation

- [13] The evidence against the Applicant can be gleaned from the Request from the United States Department of State to the Governor of these Virgin Islands dated 12th November, 2019, and the Indictment issued by the Grand Jury in the District of the Virgin Islands, Division of St. Thomas and St. John, along with an Arrest Warrant a United States District Judge(Public Documents: s. 138 of the Evidence Act) each of which are exhibited as Tab 12 to the Respondent's Notice of Objection filed on 7th November, 2022. This evidence, though not in the form of affidavit evidence, is, on balance, compelling. One would not expect the United States of America Department of State, in an official diplomatic request predicated upon a Treaty, to be anything but forthright with respect to the information provided to the receiving country. I, therefore, accept the statement of the State Department with respect to the facts which premised the Request for extradition of the Applicant, along with the Indictment and the Warrant as a sufficient factual basis of the evidence which undergirds the charges brought against the Applicant. This consideration ranks high.

The severity of the punishment which conviction will entail

- [14] Conviction on any of the three (3) Counts which the Applicant faces would entail imprisonment and forfeiture. Conviction on two (2) or all three (3) Counts increases the severity of the punishment the Applicant would face. This consideration ranks high.

Whether sureties are independent, or indemnified by the accused person

- [15] This consideration is engaged, but there is no evidence before me as to the independence of the proposed sureties, save that the Applicant appears to have submitted that suitable persons would stand surety for him, if he is admitted to bail. He has not informed the Court who these potential sureties would be, and the Court has no way to assess whether or not they would be independent, or indemnified. This consideration ranks neutral.

Is it probable that the Applicant will appear at any Court Hearing, or other ordered attendance, if he is admitted to bail? Concomitantly, are there any conditions this Court can impose to ensure such attendance?

- [16] This is the core issue which this Court must consider and I must now address the facts which are before me. They are to be gleaned from the Affidavits of the Applicant, and from those of Detective Inspector Gilbert Charles and John Wilcox for the Respondent.

The Evidence

- [17] I do not propose to recite all the evidence that has been filed in this case. I will refer only to that which, in my judgment, is salient to the issues before me.
- [17.1] I have, at paragraphs 7 and 8 above, set out the essence of the facts put forward by the Applicant. They are the components of what Mr. Wildman submits are "changes in circumstances".
- [17.2] *The lack of evidence proffered by the authorities in support of the Indictment, and therefore his extradition.* As stated before, at paragraph [13] above, there is evidence of the offences with which the Applicant is charged, which evidence is, by its nature, sufficient, on the balance of probabilities, to satisfy this Court of its seriousness and quality, without necessarily performing any impermissible analysis of it. The evidence exists, and it *is not* trifling.
- [17.3] *The fact that the co-accused have had their cases dismissed by the United States Court With Prejudice is somehow indicative of the lack of evidence and/or a viable case against the Applicant.* As I understand it from the submissions of the Respondent, that dismissal arose out of a procedural defect chargeable to the prosecutors in that case, and was not a dismissal on the merits. In any event, without more, this Court is not prepared to assume that the evidence upon which the Indictment against the Applicant is issued will either result in a conviction, or an acquittal, for the purposes of this exercise of the Court's discretion. That is not a matter for this Court. This submission is devoid of merit.

- [17.4] *The length of time which the Applicant has been incarcerated on remand is over two years and 3 months, and with the Privy Council appeal in the future, that time will be even greater.* The length of time of remand, though an important consideration, is not, by itself, a basis to admit to bail. It is but one of the considerations which a court will engage in deciding whether or not to admit an applicant to bail. In this instance, I do not consider, in all of the circumstances, the period of incarceration to be at the level which would make it constitutionally abhorrent, particularly because the Applicant has himself contributed to the length of time by virtue of his application for Leave to appeal to the Privy Council. While that is his right, it would be illogical to permit the time added by virtue of that appeal process to uplift the significance of the overall time on remand to date. I decline to do so.
- [17.5] *The Applicant says that his health is deteriorating, and that he is not afforded proper medical services in prison.* I have read his affidavits, and that of John Wilcox for the Respondent. It is clear to me, and I so find as a fact, that the Applicant is being permitted access to the best available medical treatment in these Virgin Islands, even while incarcerated. He has in fact been permitted to go into Road Town – with Prison Officers and necessary security – to seek medical attention. There are Doctors in attendance at the prison on a weekly basis. There are nurses in attendance. If there is a medical emergency, it is attended to appropriately. I do not accept that the Applicant's health is deteriorating because he is not afforded adequate and appropriate medical treatment by the Prison. Where the evidence of the Applicant conflicts with that of Mr. Wilcox on this issue, I prefer, and accept, that of Mr. Wilcox. This submission does not avail the Applicant.
- [17.6] *That the Applicant's continued incarceration causes hardship to his family, particularly to his young son who suffers with a complex medical condition which requires treatment in a medical facility in Florida, U.S.A.* The condition of the Applicant's son is sad, and is painful to all who are parents. This Court fully understands the deep concern of the Applicant on this point. What the Court is not clear on is this: is it the Applicant's position that if he is released on bail his son's ability to access proper treatment for his condition will be enhanced? Is it that he

needs to be on bail to take his son to the medical facility in Florida? I have been unable to glean from his affidavits how exactly the Applicant's son's condition would be improved by his admission to bail, save and except that it is a given that both the Applicant and his son would no doubt be happy to be with each other. (It appears from the Applicant's affidavits that the son has access to medical care notwithstanding the Applicant's incarceration). But, that is not a valid consideration for this Court on this Application. It is quite misfortunate that the child, through no fault of his own, finds himself in these circumstances. There is no evidence before me which can lead me to the conclusion that the Applicant's release on bail is the only way his son will be able to receive adequate and proper medical care. It appears that the son is already receiving adequate medical care, even with the Applicant on remand. In my judgment, this ground does not assist the Applicant.

[17.7] *That he is not a Flight Risk: Will the Applicant attend Court as and when required to do so? ("Is it probable that the [Applicant] will appear [in court]"?)*

[17.8] The Applicant, in his Affidavits, says that he was unaware that the Police were seeking him since January, 2020; that they had indeed had a Warrant for his arrest issued. He claims that he moved around Tortola freely and undisturbed by the Police up until he surrendered himself to the Police on August 30, 2020. He says that he in fact travelled from Tortola to St. Maarten, quite openly, and was not intercepted by the Police who had ample opportunity to do so if they wished. He returned to Tortola from St. Maarten he says. The Police knew where he resided. Where he worked. He was not hiding. He was not evading the Police. Implicitly, he is saying that, if in fact he was trying to evade the Police, why would he have returned to Tortola? Why would he not have fled on one of the boats the Police say he owns? He had ample opportunity to do so prior to turning himself in on August 30, 2020, but he did not flee. This is in essence what he is saying in his affidavits. He didn't flee then; he will not flee now.

[17.9] The Respondent says differently. Affidavits of one David Moore, Det. Sgt., was filed, as was one by Det. Insp. Gilbert Charles. Moore says that the Warrant was issued on 17th January, 2020, and on 18th January, 2020, at about 1:00 a.m., the Police

attended at Curve Night Club – presumably to apprehend the Applicant, for he does not say – and as they approached the entrance to the club one Deverson Williams spoke to the Applicant who immediately jumped into a jeep driven by one Mustafa Claxton, which jeep then sped off from the scene.

[17.10] Moore deposes that at 6:00 p.m., on said 18th January, 2020, the Applicant chartered a plane and flew from Beef Island to St. Maarten. He also alleges that at 3:15 p.m., on that same day he saw the Applicant board one of his boats at Sopers Hole, along with a person he did not recognize. The boat travelled east along the south coast of Tortola and went out of sight. Moore avers that the Applicant has many boats, including power boats of great speed and endurance. He has a boat yard. Moore exhibits photographs of this boatyard with boats in it. I think that this is intended to emphasize the Respondent's submission that the Applicant can avail himself of ready seaborne transportation to exit these islands, should he wish to do so while on bail.

[17.11] Mr. Moore further avers that the Applicant has associates in Trinidad and Tobago, St. Vincent, Dominica, Dominican Republic, Anguilla, St. Maarten and, St. Kitts, which islands are accessible by some, or one of his many boats.

[17.12] Det. Sgt. Moore further states that on 24th January, 2020, the Applicant was seen in Anguilla by a member of the Royal Anguilla Police Force. There was no record of a lawful entry into Anguilla by the Applicant, according to the Records of the Department of Immigration for Anguilla. If this is accepted as fact, which I do so accept it to be as it is not diminished by the Applicant's affidavit evidence, this is strong evidence of the Applicant's resourcefulness and ability to evade Border Security.

[17.13] According to Det. Sgt. Moore, when on 14th April, 2020, Police attended at a house in Belmont Estate to apprehend the Applicant, he escaped via a rear window and successfully evaded capture.

[17.14] The Applicant denies this. He says he knew nothing about the Police seeking him. Yet, Mr. Moore exhibits copies of major publications in these Virgin Islands for the

dates 12th February, 2020, (Virgin Islands News Online); 13th February, 2020, (BVI News); 12th February, 2020, (BVI Platinum News); 20th February, 2020, (BVI Beacon); 13th February, 2020, (The Virgin Islands Consortium); 12th February, 2020, (284 Media); 9th July, 2020, (BVI News); 10th July 2020, (RVIPF Facebook page); 10th July, 2020, (284 Media); 10th July, 2020, (BVI Platinum).

[17.15] Det. Sgt. Moore further deposes that on 12th July, 2020, Police went to premises at Georges Northside in search of the Applicant. He evaded the Police by "scaling down a hosepipe from a second floor balcony." This, according to Moore, was in the media of 16th July, 2020 – BVI News, Virgin Island News Online, BVI Platinum News and JTV Channel 55 Facebook page. He exhibits these headlines at exhibit "D.R.M. 7" to his affidavit.

[17.16] Mr. Moore speaks of communications in July, 2020, with Counsel who said that they were representing the Applicant, who they wanted to arrange his turning himself in. So, if Counsels' word can be relied upon, it is July, latest, that the Applicant knew he was being sought by the Police. That is his best case scenario.

[17.17] As alluded to earlier, the Applicant denies all this. He says he never knew the Police were looking for him. They could easily have found him if they wanted. He was moving freely and openly around, outbound and into Tortola. He turned himself in when he found out he was being sought.

[17.18] When he did turn himself in on 30th August, 2020, his co-accused had had their cases dismissed With Prejudice by the U.S. Court on the ground of some prosecutorial act or omission.

Decision

[18] I find it difficult to accept the evidence of the Applicant with respect to him not knowing that he was being sought by the Police from January, 2020, up to shortly before he surrendered. The evidence of Det. Sgt. Moore shows that the Media were engaged by the police to spread the word throughout these Virgin Islands – and beyond, given the ubiquity of the internet. On the balance of probabilities, I accept

the evidence of Det. Sgt. Moore that Police tried on at least two occasions to apprehend the Applicant, but that he evaded them.

[18.1] It is beyond doubt that the Applicant has access to the means to leave the Jurisdiction of this Court should he wish to do so while on bail. I accept Det. Sgt. Moore's evidence on this fact.

[18.2] I also accept the evidence of Det. Sgt. Moore that the Police had been trying to find the Applicant since January, 2020, when the Warrant was issued.

[18.3] Then there is Det. Sgt. Moore's evidence – apparently unchallenged – that the Applicant was seen by the Police in Anguilla without there being any Record of his Lawful entry into Anguilla. This speaks volumes. If he was in fact in Anguilla, and so without there being a Record of lawful Entry, this enhances the Respondent's concerns about the Applicant's ability – and resources – to move undetected, like the Scarlet Pimpernel.

[18.4] Then there is the fact that the Governor's Extradition Order was upheld by the Court - which decision is under appellate challenge. This circumstance provides incentive to the Applicant to become unreachable, as there is no guarantee as to his success on that appeal. That is indeed a "changed circumstance", but not in the Applicant's favour.

[19] In all of the circumstances, having given due consideration to the matters deposed by the Applicant in his many affidavits, and by the Respondent through Det. Sgt. Moore, Det. Insp. Charles and Ag. Superintendent Wilcox, and to the Submissions of Counsel for the Applicant, singularly, and compendiously, and taking them in the round, I am not, on the balance of probabilities, satisfied that if the Applicant is admitted to bail that it is probable that he would appear at Court when he is required to do so. I find, on the evidence which I accept to be true – that of Det. Sgt. Moore and Det. Insp. Charles – that the Applicant is probably more likely to depart the jurisdiction of this Court, if admitted to bail. It is not, in my judgment, probable that the Applicant will appear in Court when ordered to do so. In fact, I am of the

considered opinion that it is highly improbable that he would so appear, based on the evidence before me.

[20] There are no conceivable conditions, short of remand, which can be attached to a grant of bail which would, in my judgment, make it probable, on the facts of this case, that the Applicant will appear at Court when required to do so.

[21] Therefore, the Applicant's Application to be admitted to bail is refused.

[22] There is no order as to Costs.

Thomas W.R. Astaphan K. C.
High Court Judge (Ag.)

By the Court


Registrar