

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COMMONWEALTH OF DOMINICA**

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

CLAIM NO: DOMHCV 0145 of 2022

BETWEEN:

J. A.

Applicant

and

THE CHIEF OF POLICE

Respondent

Appearances:

Ms. Cara Shillingford-Marsh, Counsel for the Applicant

Ms. Marie Louise Pierre-Louis, State Counsel for the Respondent

2022: November 1st, 18th, 23rd
December 2nd

JUDGMENT ON BAIL APPLICATION

- [1] **FLOYD J.:** This is an application for bail. The applicant was born in the Republic of Haiti. He is 44 years of age with a date of birth of 17th January, 1978. He is charged with sexual offences involving his daughter as the complainant. They are alleged to have taken place from January to December, 2021. The specific charges include unlawful intercourse with a person under age fourteen, indecent assault and incest. The applicant has been in custody for these offences since his arrest on 16th May, 2022. Bail was denied in Magistrates' Court on 27th May, 2022. Considering the age of the complainant in this case (she is not an adult), the fact that the charges are sexual in nature, and the complainant is related to the applicant, the applicant will be referred to by his initials only, so as not to provide any information that could identify the complainant.

The Position of the Parties

- [2] Learned counsel for the applicant submits that he is entitled to bail. It should be granted as he has resided in the Commonwealth of Dominica for 19 years. He has ties to the community. He has been married for 8 years and has 4 children. The child complainant was from a previous relationship and is now a ward of the state. She does not live in the same residence as the applicant and his family. The applicant is a farmer who, with the assistance of his wife, sells his produce at market. He is a person of good character with no criminal record. There has been a delay in moving this case forward as no formal disclosure has been provided to counsel for the applicant by the Office of the Director of Public Prosecutions. No date for hearing has yet been set.
- [3] Several affidavits were filed in support of the application. Ericson Robinson has known the applicant for over 5 years, and although he does not offer himself as surety, he speaks of the good character of the applicant. G. A. is the wife of the applicant. She will also be referred to by her initials only, so as not to lead to the identification of the complainant. She confirms the family situation for the applicant and that the complainant no longer resides with them. Cherilus Paul is a businessman who has known the applicant for over 5 years. He owns a tavern and lives alone in Bath Estate. Mr. Paul offers to have the applicant reside with him, if he is released. Bert Colaire has known the applicant for over 7 years and offers himself as a surety. He and his wife own property and have substantial funds. Documentary exhibits are attached to confirm that.
- [4] Counsel for the applicant takes issue with what she describes as bias against the release of the applicant based upon his nationality. It is submitted at **para 6** of the affidavit of the applicant, that in denying him bail, the learned Chief Magistrate referred to the applicant's status as a non-national, and intimated that it did not matter how long "*these people*" stayed, they could still "*up and disappear.*" Although the words were attributed to the court, no transcript was submitted to confirm that was indeed the statement. However, a document entitled Notes of

Evidence in the Magistrates' Court District "E" (Criminal Jurisdiction), dated 27th May, 2022, gave details under the heading, Court Decision. It indicated: *"Defendant is a Haitian national. Offence is of a serious nature. Bail denied as Defendant is a potential flight risk due to the possible penalty, if convicted, **and because of his nationality.**"* (emphasis added)

- [5] Counsel for the applicant submits that such a basis to detain is unconstitutional and discriminatory. Counsel submitted that Haitian nationals in Dominica had recently been prohibited from applying for extensions of stay, including work permits, although that policy was no longer in place. Learned counsel for the respondent agreed that there had indeed been such a policy from 2020 – 2021. This was confirmed in the affidavit of Neon Charles of the Office for the Regularization of Foreign Nationals at the Division of Labour and Immigration. Mr. Charles confirmed that from 2nd June 2020 – 5th January 2021, the government of Dominica suspended the issuance of work permits for Haitian nationals. The subject is a consideration, as counsel for the respondent submitted that the applicant's work permit had expired, and without an ability to work here, the risk of flight was increased.
- [6] The court was provided with a series of work permits for the applicant from 2012 – 2018. In 2019, the applicant applied for citizenship in this country while being the holder of a valid work permit. A receipt for that was filed with the court. The affidavit of Mr. Charles confirmed that the applicant applied for citizenship by letter dated 21st May 2019. Mr. Charles also confirmed that the application is still pending. From 2019 – 2020, the applicant held a produce seller's licence, and a copy of that document was submitted.
- [7] In 2021, the applicant paid the fee and applied for a work permit after the ban on such applications by Haitians was lifted. A receipt for that was filed with the court. No permit was issued, and counsel for the applicant submitted that the applicant's incarceration did not allow him to follow up on that request. The affidavit of Mr. Charles, however, indicates that although the application for a work permit was

received on 3rd June 2021, it was denied because the application did not contain proof of a return ticket to his country of origin, and the applicant was so advised by letter dated 25th June 2021. It is curious that, despite a multitude of documents pertaining to the applicant's file with the Office for the Regularization of Foreign Nationals attached to the affidavit of Mr. Charles, the denial letter advising the applicant of this decision is not there. In a supplementary affidavit, the applicant stated that he never received a letter indicating that his 2021 work permit application had been denied. In the past, his work permits were issued without the necessity of showing a return ticket to Haiti. If released on bail, he would of course reapply with the requisite material.

- [8] While counsel for the applicant admits that, without a valid work permit, the applicant is unable to engage in any occupation for profit or reward, according to **s. 27C of the Immigration and Passport Act¹**, he will, nonetheless, be able to continue farming for the purpose of providing sustenance for himself and his family. His wife may also continue to sell the farm's produce at market. The applicant, it is submitted, has done all that he can to maintain his status in Dominica.
- [9] Counsel for the applicant relied upon the case of **Jesper Qvist v The Commissioner of Police and The Superintendent of Prisons²**, which involved a Danish citizen as the accused applicant for bail. The court in that case was also directed to the unreported decision of **Malcolm Maduro v The Commissioner of Police³**, wherein the learned Justice Hariprashad-Charles held that it was not enough to say that a person was from another jurisdiction. The test is whether the person will appear for the trial. In the **Qvist** case, the applicant was granted bail.
- [10] Counsel for the applicant also referred to the case of **Quincy McEwan v The Attorney General of Guyana⁴**, in submitting that the constitution protects against

¹ Chap. 18:01

² Claim No. NEVHCV 2012/0136

³ Claim No. BVIHCV 2006/0262

⁴ [2018] CCJ 30 AJ

policies which are discriminatory in their effect. At **para 64**, the court stated that “*at the heart of the right to equality and non-discrimination lies a recognition that a fundamental goal of any constitutional democracy is to develop a society in which all citizens are respected and regarded as equal.*”

- [11] Learned counsel for the respondent submits that because the applicant is a non-national, the risk of absconding is high. This, despite his 19 years of residency in Dominica. Further, his residency has not been regularized, as his work permit has expired. The basis for the respondent’s submission that the applicant should be detained, was that he is a flight risk. Reliance was had upon the affidavit filed from Cpl. Gemma Louis, the investigating officer in this case. It confirms that the complainant has been removed from the home of the applicant and is a ward of the state.
- [12] The police affidavit goes further. It refers, at **para 8**, to the “*porous*” borders of Dominica and “*several matters...in respect of Haitian Nationals illegally migrating to the islands of Guadeloupe and Martinique.*” The court is at a loss to find relevance in that statement. The affidavit goes on to refer to Immigration Department Inspector St. Rose, advising of a record this year of “*one illegal exit and two illegal entry (sic) by Haitian Nationals.*” No affidavit is submitted from that Inspector, and the court again struggles to find relevance in such a statistic to this case. The affidavit continues, at **para 9**, referring to Insp. Anthony Lawrence, advising of the interception of “*17 attempted illegal exits by Haitian Nationals on the northern side of the island.*” Reference is then made to Cpl. Derrick Prince, advising of the interception of “*21 attempted illegal exits by Haitian Nationals on the southern side of the island.*” No affidavits are tendered from either of those officers and the court questions the relevancy of such information to this bail hearing. Finally, the affidavit refers not only to the serious nature of the charges, but boldly asserts, at **para 16(i)**, that an inference should be drawn that the applicant “*will abscond based on the illegal migration patterns of Haitian Nationals in Dominica.*” Such a contention is very troubling.

The Law

- [13] Having outlined the positions of the parties, the court turns to general principles. The entitlement to judicial interim release or bail, arises from the right to liberty and the presumption of innocence. In Dominica, this flows from the **Bail Act** and the constitution. **Section 1(a)** of the **Constitution of the Commonwealth of Dominica**, indicates that every person in Dominica is entitled to fundamental rights and freedoms including life, liberty, security of the person and the protection of the law. **Section 3(1)** confirms that a person shall not be deprived of his personal liberty save as may be authorized by law and **s. 3(5)** confirms that anyone arrested or detained in relation to a criminal offence, and not tried within a reasonable time, is entitled to release, either unconditionally or upon reasonable conditions.
- [14] The presumption of innocence and the liberty of accused persons are entrenched at the pre-trial stage by the right not to be denied reasonable bail without just cause. This is confirmed in the governing legislation.
- [15] **In the Matter of the Criminal Procedure Code CAP 77 of the Revised Laws of Grenada Section 52; In the Matter of an Application of Teddy McDonald to be Admitted to Bail**⁵, the learned Justice Alleyne, as he then was, reminded us that the antecedents of the provisions of our constitutions included, not only the common law, but also the **European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 5** of the **European Convention**, he observed, at **para 13** of the decision, is almost identical to **s. 3** of the Grenada Constitution (which in turn is almost identical to **s. 3** of the Dominica Constitution). At **para 15** of the decision, it is confirmed that the deprivation of a person's liberty must fall within the limited categories set out in **Article 5(1)**, and fulfill three

⁵ [2000] ECSCJ No. 185

conditions: It must result from a procedure prescribed by law, be based on a legal provision, and satisfy one of the relevant material criteria cited therein.

[16] The domestic law applicable in this case is the **Bail Act**⁶, the provisions of which, as Alleyne J. points out at **para 17** and following, must be read, and interpreted in such a way “*as to ensure that the full benefits of the constitutional provisions are enjoyed.*” The sections must be interpreted, therefore, as requiring a fair and proper procedure, free from arbitrariness, and which recognizes the presumption of innocence and the fundamental right to personal liberty. The interpretation must be liberal and generous, “*and ensure that the full benefits of the constitutional provisions are enjoyed.*” This presupposes a right to be admitted to bail, which can be withdrawn, after a fair and proper judicial inquiry, free from arbitrariness, upon cause being shown. This decision explains the interplay between the constitution and applicable legislation, such as the **Bail Act**. The fundamental right to liberty is therefore enshrined and continues.

[17] As noted, the right to bail is codified in the **Bail Act**. The court is guided by that legislation. **Section 4** describes the right to bail generally. Certain restrictions are enumerated at **s. 4(3)**. It is stated therein that a person who is charged with a serious offence, or who has been previously convicted of an offence punishable by imprisonment, is not entitled to bail as of right, and shall not be granted bail, unless that person satisfies the court that there is just cause for doing so, in all the circumstances. Offences to be considered as serious are enumerated at **s. 7**. Additional serious offences are listed in **Schedule 1**. However, **Schedule 1** refers to police bail under **s. 5(12)**, and therefore is not applicable in this case. The applicant is not charged with a serious offence listed in **s. 7(1)**, nor has he been convicted previously of an offence punishable by imprisonment. The onus remains, therefore, on the respondent, the prosecutor, to show cause why the detention of the applicant, the defendant, is justified. Reference is then made to **s. 6**, which sets out considerations a court may have to refuse an application for bail, where the applicant is charged with an offence punishable by imprisonment.

⁶ 2020 Act 20

- [18] Under **s. 6(1)**, the court may refuse bail if satisfied that the defendant will, if released, fail to surrender into custody; will commit an offence while on bail; will interfere with witnesses or evidence; or will otherwise pervert the course of justice. The court may also refuse bail if satisfied that the defendant should be kept in custody for his own protection; for the protection of the community; if he is a child, for his own welfare; for the preservation of public order; is serving a sentence; it has not been practicable to obtain sufficient information for want of time; the production of a report or further inquiries are necessary, and requires detention; has previously breached conditions of bail; has no fixed address; or has given misleading information as to his name, address or identity.
- [19] In the exercise of its discretion to grant or refuse a bail application, the court shall have regard to the factors set out at **s. 6(2)**. This includes the nature and seriousness of the offence and the probable method of dealing with the defendant if convicted; the character, antecedents, associations, and community ties of the defendant; the defendant's record of complying with bail previously; the strength of the evidence against him; and the length of time the defendant would spend in custody if bail was refused.
- [20] Under **s. 4(4)**, where bail is granted, the conditions of bail shall be reasonable.
- [21] If a court grants bail then, according to **s. 8(2)**, it may require security from the defendant or someone on his behalf, such as a surety, to ensure her/his attendance and surrender into custody. The considerations of bail with sureties are set out at **s. 10**, and a non-exhaustive list of possible conditions of bail are set out at **s. 8(3)** and **s. 8(5)**.
- [22] All of this is similar to, but now supersedes, the traditional principles and considerations of bail found in the authorities and seminal cases, such as **Devendranath Hurnam v The State**⁷, which speaks to the consideration of the rights of the individual, the accused person, along with those of the community,

⁷[2005] UKPC 49

and the administration of justice, and **Thelston Brooks v The Attorney General and The Commissioner of Police**⁸, which further explores the balancing of those considerations.

[23] These cases and others tell us that bail considerations are multifaceted, and include whether detention is necessary to ensure the defendant will appear in court when required; whether detention is necessary for the preservation of public order and the protection and safety of the public, including witnesses; and whether detention is necessary to prevent crime, based on a likelihood of the commission of other offences. The terms of the **Bail Act** reflect this case law.

[24] Just as in the **Bail Act**, the leading cases direct the court, when making bail determinations, to have a number of considerations, including the strength of the prosecution's case; the gravity of the offence; the potential for a lengthy sentence upon conviction; the defendant's ties to the community, including family and employment; and any record of conviction. All of which is to say that the **Bail Act** draws upon sound legal principles, which this court is guided by.

[25] The decision of a Bail Court will also have an impact upon the administration of justice generally. On this point, the case of **R. v St. Cloud**⁹, from the Supreme Court of Canada, is instructive. Consideration, it was held, should be given to whether the detention of an accused is necessary to maintain confidence in the administration of justice. At **para 86**, the learned Justice Wagner, as he then was, stated that public confidence in the administration of justice “*may be undermined not only if a justice declines to order the interim detention of an accused in circumstances that justify detention, but also if a justice orders detention where such a result is not justified.*”

[26] The court, at **para 70**, confirmed that the general rule is the release of an accused person, and the exception is detention. The basic entitlement to be granted

⁸[2007] ECSC J0115-11

⁹[2015] 2 S.C.R. 328, 321 C.C.C. (3d) 307

reasonable bail unless there is just cause to do otherwise, rests on the cornerstone of criminal law, namely the presumption of innocence.

Analysis

- [27] The court has already set out general bail considerations at some length and takes all of those into account, as well as the material filed and the submissions of counsel. The allegations in this case are very serious, involving as they do, sexual contact with a young person by an adult. The charges carry the potential for a significant term of imprisonment upon conviction. However, none of the evidence in this case has, as yet, been tested. Further, despite the assertion at **para 6** of the affidavit of Cpl. Lewis, that the respondent has “*overwhelming evidence against the accused in the matter,*” little or no evidence was presented by the respondent in order to assess the strength of the State’s case. Indeed, counsel for the applicant has yet to receive disclosure.
- [28] Counsel for the applicant urges the court to consider the length of time the applicant will have to wait for his case to be heard. In this jurisdiction, it is submitted, cases often take years to make their way through the preliminary hearing stage to the High Court, and then on to trial at that level. This court has indeed noted the delay in matters reaching a conclusion in this jurisdiction. Therefore, there appears to be great potential for the applicant to spend a significant amount of time in custody, if bail is not granted.
- [29] The defendant is a person without criminal record and is of good character. There is no evidence that he has failed to fulfill any bail conditions in the past. Although not a citizen of this country, he has resided here for many years, married, and had children. He has a fixed address with his family in Dominica, and has friends, including those who will offer him a place to live if released, and are willing to act as surety to facilitate that release. He has had employment as a farmer, cultivating the land, even though he currently is without a work permit. He has made

application for both a work permit and citizenship. Although the work permit has apparently been denied, no determination has been made regarding citizenship. Part of the delay in that process can be attributed to a government policy that prevented Haitians from renewing or extending work permits. The applicant cannot be faulted for that. It is apparent that any produce that is harvested would feed himself and his family, and may be taken to market and sold by his wife, perhaps allowing the family to earn a living, while another application for a work permit is made, and the application for citizenship is pending. All these factors are considered, pursuant to **s. 6(1)** and **s. 6(2)** of the **Bail Act**.

[30] It is clear that the applicant has significant ties to the community by way of family, friends, past employment, and residence. All of this, despite being a non-national. He is not a citizen of Dominica. He is a citizen of the Republic of Haiti. Counsel for the respondent submits that the applicant is at significant risk of flight if released, not only because of the serious nature of the charges and the potential penalty if convicted, but significantly, because he is Haitian and because there is a pattern of illegal migration by Haitians. Such an assertion is simply without merit and the court is surprised that such a basis to deny bail would be raised by the State. To suggest that the court should consider denying bail to an individual based upon his nationality and to submit that because other citizens of that country may have crossed borders without permission, he is likely to do the same, is simply not appropriate.

[31] Applications for bail are considered on a case-by-case basis. The facts are examined, as are the individual characteristics of the applicant. It would be wrong for the court to make any generalizations regarding citizens of a particular country and somehow attribute that to the applicant, let alone consider it as a reason to detain. Race or nationality have no place as a basis to deny bail.

[32] The **Constitution of the Commonwealth of Dominica** is an overarching document that entitles every person in Dominica to fundamental rights, including life, liberty, security of the person and the protection of the law, regardless of race,

place of origin, political opinions, colour, creed or sex. The applicant is entitled to that protection.

[33] Affidavit evidence was filed to confirm a plan of release. The applicant can apparently resume his farming existence. His lack of a work permit may be offset by the production of food for his family and the ability of his wife to take the produce to market for sale. He has no formal employment. He can reside with Cherilus Paul in Bath Estate. This has the attraction of surety supervision, and a residence without the presence of children. That is appropriate, given the allegations. Submissions of counsel for the applicant and material filed, confirm proposed sureties with financial assets and real property. In light of the very serious charges and factual allegations, a plan of bail with the assistance of one or more sureties is essential. With charges as serious as these, the court must carefully consider what is being proposed to facilitate release and provide ongoing support for the applicant. As already noted, the use of sureties in the bail process is outlined at **s. 10** of the **Bail Act**. A surety will often assist in a bail application. If found to be acceptable, a surety has a significant role to play in the bail process. It is a serious commitment that assists in the supervision of the applicant, and seeks to ensure compliance with bail conditions.

[34] A judicial interim release application requires the Court to be confident that, amongst other things, the applicant will not flee the jurisdiction and fail to attend court. After reviewing all the material filed, and upon hearing the submissions of counsel, the court has no such concerns. Although the applicant is not a citizen of this country, he has resided here for a long time, and has applied for citizenship. He has friends, family, a residence, and has had work when permitted. Even with the serious allegations and the potential for a significant sentence if convicted, the court does not find the applicant to be a flight risk, owing to his close connections to this community. The risk of flight was the main consideration counsel for the respondent urged this court to consider. Nevertheless, the court must go further, pursuant to **s. 6(1)** of the **Bail Act**.

[35] Turning to the other enumerated grounds, the court must consider whether there is a substantial likelihood that the applicant, if released, would commit further offences. He has no criminal record, and no evidence was tendered to suggest any concern in that regard. Will the applicant, if released, interfere with witnesses, or otherwise pervert the course of justice? Again, no evidence was presented to support such a belief. The complainant has been removed to a place of safety and is under the care of the state. No other witnesses, besides the investigating officer, were identified by the respondent. Nothing was presented to show that there is a need to detain the applicant for his own protection, the protection of the community nor the preservation of public order. The applicant has no convictions for failing to comply with conditions of release in the past, and he has a residence available to him if released. A bail plan has been put forward in this case. Potential sureties have been presented. Cash money and property are available through those sureties.

[36] The court is satisfied that any concerns surrounding the release of the applicant can be alleviated with strict terms of bail and the use of sureties, and that to do so, would not reduce public confidence in the administration of justice.

[37] For all of these reasons, the respondent has failed to show cause why the applicant should be detained, and this application for bail is hereby granted. The applicant is therefore released on a recognizance of bail. Bail is set in the total amount of \$50,000.00 bond with no cash deposit. There shall be two suitable sureties. The applicant shall be bound by the following conditions:

- (a) The applicant shall report to and sign in at the Roseau Police Station every Monday, Wednesday, and Saturday, between the hours of 6:00 AM and 6:00 PM, commencing immediately upon his release from custody.
- (b) The applicant shall reside at Bath Estate, Dominica with Cherilus Paul.

- (c) The applicant shall not contact or communicate in any way, either directly or indirectly by any physical, electronic, or other means, with any State witness in this case, in particular, the complainant.
- (d) The applicant shall not be within 100 feet of the complainant, nor any place where the complainant lives or goes to school.
- (e) The applicant shall not be in the company of any child under the age of 14 years unless in the presence of one surety or an adult over the age of 18 years who is aware of these charges.
- (f) The applicant shall not possess any weapon, firearm, pellet gun, flare gun, imitation firearm, prohibited weapon, restricted weapon, bladed weapon, ammunition or explosive substance, or anything designed or intended to be used to cause death or injury.
- (g) The applicant shall not possess or apply for any licence, authorization, or registration certificate for any such weapon referred to above.
- (h) The applicant shall remain within the Commonwealth of Dominica.
- (i) The applicant shall deposit his passport and any other travel permits or documents with the High Court Registry Office, immediately upon his release from custody.
- (j) The applicant shall not apply for a passport or any other travel permits or documents while this case remains outstanding.
- (k) The applicant shall keep the peace and be of good behaviour.
- (l) A breach of any of the terms of this recognizance of bail shall result in the immediate revocation of bail, and the associated bond shall be subject to estreatment proceedings.

Richard G. Floyd
High Court Judge

By the Court

Registrar