

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

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

CLAIM NO. BVIHCR 2020/0037

BETWEEN:

D. H.

Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Appearances: Mrs. Valerie Gordon, Counsel for the Applicant
Mr. Kristian Johnson, Crown Counsel for the Respondent

2022: February 4th, 10th, 17th
2022: March 2nd

JUDGMENT ON BAIL APPLICATION

[1] **FLOYD J:** This is an application for bail. The Applicant is a young man born on 13th July 2000. He is charged with serious offences including possession of a firearm with intent to endanger life, and unlawful and malicious wounding. He has been in custody for these offences since 12th December, 2019. Although he is an adult, he will be referred to in this Decision by his initials and no information will be provided which would identify him. This is necessary as references are made to his record as a juvenile and outstanding charges as a juvenile in this Decision. The withholding of his identity in those circumstances is therefore appropriate.

The Position of the Parties

- [2] Counsel for the Applicant submits that he is entitled to bail. It should be granted as he is a citizen of this territory, has a residence in Tortola and has been a student previously enrolled at a local College. There has been a delay in bringing his case to fruition, no date for trial has been set as yet and he is at risk due to COVID-19. The virus has affected both inmates and prison personnel at HM Prison Balsam Ghut. The Applicant has a pre-existing condition of asthma which makes him at higher risk, should he contract the virus.
- [3] An affidavit from the Applicant was filed with the court. It is submitted that the Applicant is not a flight risk. He has ties to the community and conditions can be imposed to deal with any concerns that may exist regarding potential interference with witnesses. He has been incarcerated for over two years without a date for trial. He is concerned about the presence of COVID-19 at HM Prison Balsam Ghut because he has a pre-existing condition of asthma that increases the dangers to his health, should he become infected. Reference was made to an Inmate Request Form filed in support. It indicates that in December 2021, the Applicant complained of acid reflux, stomach pain and chest pain. It sometimes causes him to experience shortness of breath.
- [4] Counsel for the Respondent relied upon an affidavit from Investigating Officer, D/C Dane Robin, regarding the facts of the case. A firearm was discharged, striking and injuring the complainant. The Applicant was described as a danger to the community. The charges are serious with a potential for a lengthy sentence if convicted. D/C Robin advised that the firearm used remains outstanding, and the incident occurred in a busy public area during daylight hours.
- [5] The Respondent submits that the Applicant was released on bail for another offence at the time this incident occurred. The Applicant concedes that the charge is Unlawful Sexual Intercourse with a Female Under Age 16. The alleged incidents occurred between 2017 and 2018. The Applicant was released on police bail for that offence (three counts) on 3rd September, 2019. Bail was set at \$10,000.00 with one surety being the Applicant's father. That bail order was formalized in Magistrate's Court on 16th August, 2021. Bail was increased to \$40,000.00 with one surety and a police reporting condition. Those charges relate to the Applicant as a juvenile. The Applicant also

has a criminal record for assault causing actual bodily harm. That record also relates to the Applicant as a juvenile. The Applicant is therefore a danger to the community and will not be bound by any bail conditions, submits counsel for the Respondent.

[6] In regard to this matter, the Applicant is charged as an adult. He received a bail hearing before a Magistrate and later, on 4th January, 2021, a bail hearing before this court. Counsel for the Applicant submits there has been a material change of circumstances relating to the passage of time constituting delay, as well as the COVID-19 virus and its health risks for the Applicant. Counsel for the Applicant took the position that the inordinate delay in dealing with this case since the last bail hearing, as well as the risks associated with incarceration and COVID-19, were cause for concern. To his credit, Counsel for the Respondent agreed that the grounds advanced would indeed constitute a material change in circumstances. That component of this Application has therefore been met and the bail hearing can proceed to be heard on its merits.

[7] As this Application proceeded over the course of three different dates, additional material was filed for the consideration of the court. That included an Affidavit from the Applicant's mother, D. F. She is employed at a local bank as an Assistant Manager. She confirmed that the Applicant has suffered from asthma from a very young age and has been variously prescribed becotide, ventolin, an asthma pump and a nebulizer. Asthma is a condition that runs in the family and resulted in the death of a cousin due to complications arising from improperly treated asthma. She is aware of ongoing and recent asthmatic attacks that the Applicant has suffered and she asserts that the Applicant is unvaccinated for COVID-19. She obtained a number of medical reports and records pertaining to the Applicant confirming his condition. D. F. avers that, if released, the Applicant will reside with his older sister in an apartment owned by D.F. at Lower Estate, Road Town, Tortola.

[8] Sixty (60) pages of medical records were filed by Counsel for the Applicant. The material confirms that asthmatic symptoms began to be observed in January, 2001 when the Applicant was 6 months old. From 2001 – 2021, the Applicant received medical treatment for chest tightness, coughing, wheezing, chest pain, acute upper respiratory infections, respiratory distress and acute asthma attacks. The condition was diagnosed as asthma and the Applicant was eventually described in the

reports as being a “known asthmatic”. He was variously prescribed salbutamol, nebulizers, ventolin, prednisolone, and inhalers.

- [9] On the last day of submissions, the court received a report dated 16th February, 2022 from Substance Awareness and Drug Counsellor, Elroy Thomas, at HM Prison Balsam Ghut. The report confirmed that the Applicant has engaged in individual and group counselling since March 2020. The Applicant is described as being committed to a healthier lifestyle. A second report dated 16th February, 2022 from Walter Barrett, Restorative Justice Officer at HM Prison Balsam Ghut, was also filed by Counsel for the Applicant. That report confirmed the Applicant’s incarceration while awaiting trial since 16th December, 2019. The Applicant has successfully completed the Skills for Life Program, which includes a component for anger management. The Applicant has obtained special privileges and has held the position of Wing Cleaner for one year. He has also been employed in the prison laundry, has achieved an average behavioural assessment score, participated in general counselling, and indicated a desire to participate in the parenting of his son.

The Law

- [10] Having outlined the positions of the parties, I turn now to general principles. The entitlement to bail arises from the right to liberty and the presumption of innocence, which flow from the common law and the constitution, there being no Bail Act in the Territory of the Virgin Islands. **Section 15(2) of the Virgin Islands Constitution** indicates that no person shall be deprived of his or her personal liberty, save as may be authorised by law. **Section 16** confirms that anyone charged with a criminal offence is to be afforded a fair hearing within a reasonable time and shall be presumed innocent.
- [11] 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.
- [12] I am guided by these authorities and considerations as well as by seminal cases such as **Devendranath Hurnam v The State**¹, which speaks to the consideration of the rights of the individual, the accused person, along with those of the community, and the administration of justice.

¹ [2005] UKPC 49

The balancing of those considerations is further explored in another important case, **Thelston Brooks v The Attorney General and The Commissioner of Police**².

[13] These cases and others tell us that bail considerations are multifaceted and include:

- (a) Whether detention is necessary to ensure that the accused will appear in court as and when required.
- (b) Whether detention is necessary for the preservation of public order and the protection and safety of the public, including any witness in the proceeding.
- (c) Whether detention is necessary to prevent crime, based on a likelihood of the commission of other offences and the interference with the administration of justice.

[14] When making these determinations, the court will have a number of considerations, including:

- (a) The strength of the Crown's case.
- (b) The gravity of the offence.
- (c) The potential for a lengthy sentence upon conviction.
- (d) The Applicant's ties to the community, including family and employment.
- (e) Any record of conviction for the Applicant.

[15] The decision of a Bail Court will also have an impact upon the maintenance of confidence in the administration of justice generally. This was elaborated upon in the case of **R v St. Cloud**³. At **para 41**, the court reinforced the traditional bail considerations of whether detention was necessary to ensure attendance in court to be dealt with according to law and also whether detention was necessary in the public interest or for the protection and safety of the public, having regard to all of the circumstances including any substantial likelihood that the accused will, if she/he is released from custody, commit a criminal offence or interfere with the administration of justice. The Bail Court, must determine the apparent strength of the prosecution's case, consider the objective gravity of the offence, the circumstances surrounding the commission of the offence, the role played by the accused in the offence, and whether the accused would be liable to a significant sentence upon conviction. All of this must be considered while never overlooking the basic entitlement to be granted

² [2007] ECSC J0115-11

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

reasonable bail unless there is just cause to do otherwise, the right to liberty and the presumption of innocence. This involves balancing all of the relevant circumstances.

[16] In a case such as this, when there has been a previous bail application, the court must first determine whether there has been a substantial change in circumstances. The 2015 edition of **Archbold's at 3-25 & 3-26** indicates that, generally, a court is not bound to entertain an application for bail after it had previously been refused unless it is satisfied that there has been a material change of circumstances. A decision to refuse bail presupposed the court had found as a fact that there were substantial grounds for believing one of the events described would occur. At subsequent hearings, the court need not hear arguments of fact and law heard previously, unless there has been such a change of circumstances as might have affected the earlier decision.

[17] In the interests of justice, the occurrence of intervening or subsequent events, as they pertain to bail, require review. That approach has been confirmed in several regional cases and beyond. Cottle J. stated **In the Matter of an Application for Bail, by Raffique Chewitt, Dwaine Sandy & Noval Sayers⁴ at para 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.

[18] Similarly, Persad J. in the case of **The Queen v David Brandt⁵ at para 4** held that the Defendant would have to satisfy the court that there had been a change of circumstances since the last bail hearing, before the court could even begin to consider the merits of whether bail should be considered.

Analysis

[19] Once a decision is made to detain, there is no open-ended discretion for the court to review and vary that decision. The court must determine whether it is appropriate to exercise the power of review.

⁴ SVGHCRB 2014/0027, 2015/0028, 2016/0030

⁵ MNIHCR 2019/0008

That will only be appropriate where there is admissible new evidence showing a material and relevant change in the circumstances of the case. In this case, counsel for the Applicant has presented additional evidence that was not previously known and was not before the court at the last bail hearing. A great deal of time has passed since the last bail application and the case has not yet been listed for trial. Counsel for the Applicant has also cited, as a ground for consideration, the COVID-19 pandemic and its effect upon the Applicant at HM Prison Balsam Ghut. The prison has been closed to visitors and cases of infections have been confirmed in both inmates and prison staff. Prisons are, by their very nature, places where people interact in close proximity. Crowded conditions exist. The risk of infection is therefore heightened. It does not appear that the Applicant has contracted the virus, although it is submitted that he has a medical condition, asthma, and is therefore at elevated risk. All of this must be considered. Does this new evidence reach the standard of a material change in circumstances? I am satisfied that it does and counsel for the Respondent has conceded that position.

[20] I have already set out general bail considerations at some length. I take all of those into account. The facts in this case are very serious. They include the discharge of a firearm in a public place in broad daylight. As was confirmed at the previous bail hearing, three shots were fired with two striking occupied motor vehicles and a third striking the victim. The use of a firearm in a violent incident heightens the concern of this court. That concern is increased further by the fact that the gun in question was never recovered, remaining outstanding and potentially available. I bear in mind, however, that none of the evidence in this case has, as yet, been tested.

[21] The fact that a person was struck by a bullet and injured is a very serious feature of this case. The incident apparently occurred in a busy public area. Fortunately, the victim survived. The court notes that no medical report was submitted and nothing other than a reference in the police affidavit to the complainant being injured in the course of the incident was provided. The extent of the injuries to the victim are therefore unknown. One would hope that if substantial injury had occurred, further information would have been provided. None the less, the allegations remain serious.

[22] In light of the severity of the facts, it is obvious that the potential for a substantial sentence, including incarceration if convicted, exists.

- [23] The court is troubled by the fact that the Applicant not only has a recent record for a crime of violence, but he was apparently released on bail at the time of this offence. Can this court be assured that, if released, the Applicant will abide by bail conditions? At the time of the first High Court bail application in this case, very few details were provided as to the record for the Applicant and his outstanding charges. We now know that both matters relate to the Applicant as a juvenile. That is a consideration. We also know that the conviction of 26th September 2019 for assault causing actual bodily harm, resulted in a sentence of 200 hours of community service. The indication from counsel was that the bodily harm was not serious in nature and that is reflected in the sentence. Therefore, although the Applicant has a previous record, it is as a juvenile and although it is a crime of violence, the nature of the offence is of a lesser severity. Those are all relevant considerations for this court.
- [24] The outstanding charges are serious, being of a sexual nature and involving a girl under the age of 16. Those charges relate to the Applicant as a juvenile and that is a consideration. The court notes that although the Applicant received bail for that matter, the terms of release were restricted to the use of a bond with surety, the surrender of travel documents and police reporting. What is being proposed in this case is significantly greater, as it should be. However, no application was made to combine all of the outstanding charges for the purpose of this hearing. Therefore, if bail is granted in this case, the Applicant will unfortunately be subject to two separate orders, each with its own conditions.
- [25] This court considers the Crown's case, on its face, to have merit. From the previous bail hearing in this case, the court notes that there are apparently several civilian witnesses who know both the Applicant and the Complainant. One witness gave a statement that he saw the Applicant produce a gun from his waistband. Three gunshots are then heard, and the vehicle the witness was operating is struck. The witness had a clear view of the Applicant at the time. The witness then came upon the wounded Complainant. Counsel for the Applicant, however, reminds us of the vagaries of identification evidence and that identification will be a live issue in this case.
- [26] The Applicant is a young man. He has a short criminal record and it is as a juvenile. He has ties to the community, being a citizen of this Territory with family close by, including his mother. He has, in the past, been enrolled at a local College. He has made progress while incarcerated, successfully

completing counselling and achieving privileges allowing him to work within the prison setting. He suffers from asthma and is incarcerated in a facility where COVID-19 has been confirmed. This court is aware that members of the inmate population as well as prison staff have recently tested positive for COVID-19. This has led to a restriction on visitors, including legal counsel, and on programming. However, beyond that, nothing was provided to the court in relation to measures designed to deal with the risks associated with COVID-19 having been implemented at HM Prison Balsam Ghut, in particular, as it may relate to inmates at greater risk of infection owing to pre-existing conditions. Material was filed to confirm the medical condition of the Applicant and his hospital attendance. The health factors for the Applicant are well documented. He is a known asthmatic with a long history of medical problems relating to that condition. The Applicant's asthma, being a respiratory condition, apparently makes him vulnerable to the effects of COVID-19. The Centers for Disease Control and Prevention (CDC), the national public health agency for the United States, is a respected source of general information on COVID-19 and related conditions. The CDC advises that people with moderate to severe or uncontrolled asthma are more likely to be hospitalized from COVID-19. When people with asthma contract respiratory infections like COVID-19, it can trigger their asthmatic symptoms. Therefore, asthmatics are at risk of developing more severe reactions or outcomes from COVID-19. Access to regular medication is a factor. The Applicant has had 3-4 hospital admissions since being incarcerated. His prescribed nebulizer has not been refreshed and is apparently overdue. He did receive medication of some sort following his recent hospital attendance on 15th January 2022.

- [27] Affidavit evidence was filed to confirm a plan of release. The Applicant can resume employment with Mr. Roy Garraway. He can reside with his older sister in an apartment owned by his mother in Lower Estate, Road Town. Oral submissions from counsel for the Applicant indicated that Mr. Keon Simmons has cash in the bank from an inheritance amounting to \$89,000.00 and the aforesaid Mr. Garraway is a businessman and property owner willing to not only employ the Applicant but act as a surety. In light of the very serious charges and factual allegations, not the least of which is the use of a firearm in the commission of the alleged offences, a plan of bail with the assistance of one or more sureties is essential. With charges as serious as these, the court must be provided with and give careful consideration to what is being proposed to facilitate release and provide ongoing support for the Applicant.

- [28] A surety will often assist 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. Information in that regard was provided to the court. Similarly, medical evidence to support the condition asserted by the Applicant that makes him susceptible to the health risks associated with COVID-19 was provided.
- [29] The COVID-19 pandemic must not be treated as a freestanding ground in favour of release but rather as part of the totality of the circumstances informing the inquiry. The court must recognize the potentially harmful health impact on detained persons in an institution, while at the same time exercising the balancing required to sustain its fundamental role in the administration of justice and the protection of the public. It is, of course, in the public interest to limit the spread of COVID-19. The court notes that one of the main strategies advocated by public health officials to combat the spread of COVID-19 is social distancing and self-isolation. That strategy is problematic in penal institutions where inmates may not be housed in single cells, meals and exercise may be taken together, and congregation occurs. Moreover, the institutional response can be expected to result in the restriction of privileges and programming available to inmates in detention, making the circumstances of detention even more burdensome than would ordinarily be the case. Indeed, substance abuse counsellor Thomas, in his report, confirmed the interruption of counselling sessions as a result of the COVID-19 outbreak at HM Prison Balsam Ghut. The health risks of the COVID-19 pandemic, and the institutional response, are matters that are certainly relevant to the impact of ongoing detention on the physical and mental health of the Applicant. This does not mean, however, that the Applicant should be released if it is determined that his detention is required on any of the traditional grounds for bail.
- [30] Judicial interim release requires the Court to be confident that, amongst other things, the accused will not flee the jurisdiction and fail to attend court. After reviewing all of the material filed and upon hearing the submissions of counsel, I have no such concerns. Even considering the strength of the Crown's case and the serious nature of the charges, I do not believe the Applicant to be a flight risk, owing to his close connections to this community. Counsel for the Respondent, to his credit, did not urge this basis for detention upon the court's consideration.

- [31] Turning to the second ground, what I would call the public safety component, I must consider whether there is a substantial likelihood that the Applicant, if released, would interfere with the administration of justice, commit further crimes and generally interfere with the public peace. With the COVID-19 situation, the court must also take into account and consider how it may impact the health concerns of a detained accused. Based upon the material placed before the court in this case, I am satisfied that there are serious COVID-19 concerns which affect the result of this Application. COVID-19 concerns in an institutional setting will not, however, warrant release from detention in the absence of an adequate release plan. Such a plan has been put forward in this case. Potential sureties have been presented. Cash money and property are available through those sureties.
- [32] I also take into account the nature of the record for the Applicant as well as the outstanding charges. All of that pertains to the Applicant as a juvenile. This Application pertains to the Applicant, charged for the first time, as an adult. Although the allegations of his committing an offence while on bail are troubling, and would require strict conditions if released, it does not automatically rule out release. The court notes the positive strides that the Applicant has made while incarcerated. Counselling has been completed and privileges have been afforded to him. The Applicant has been in custody on these charges for over two years with no date yet set for trial. His continued incarceration is therefore prejudicial to him and his right to liberty, the presumption of innocence and his right to a fair hearing within a reasonable time, as mandated both constitutionally and at common law. That delay alone does not justify his release. But it is another consideration in the overall review of this Application.
- [33] All of this, coupled with the Applicant's health risk related to COVID-19 and his asthmatic condition in a custodial setting, militate towards release. To release the Applicant in these circumstances would not erode public confidence in the administration of justice. Preventing the commission of further offences and ensuring the protection and safety of the public, including witnesses, must be ensured. Although the Applicant has been previously granted bail as a juvenile, I am satisfied that any concerns can be alleviated with strict terms of bail and the use of sureties, and that he can be released as an adult.

[34] 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 \$75,000.00 with a cash component of \$25,000.00. 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 Road Town 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 Lower Estate, Road Town, Tortola.
- (c) The Applicant shall remain in his residence daily between the hours of 8:00 PM and 6:00 AM except for medical emergencies involving himself and only after having notified the Royal Virgin Islands Police Force of such emergency.
- (d) The Applicant shall present himself within five (5) minutes of a police request made at any time when he is required to be in his residence and ensure that the police have access to the door of his residence to enable such bail compliance checks to be conducted.
- (e) The Applicant shall not contact or communicate in any way either directly or indirectly by any physical, electronic or other means with any Crown witness in this case.
- (f) The Applicant shall not be within 100 feet of any Crown witness in this case, nor any place where any Crown witness lives, works or goes to school.
- (g) 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.
- (h) The Applicant shall not possess or apply for any licence, authorisation or registration certificate for any such weapon referred to above.
- (i) The Applicant shall remain within the Territory of the Virgin Islands.
- (j) 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.
- (k) The Applicant shall not apply for a passport or any other travel permits or documents while this case remains outstanding.

- (l) The Applicant shall keep the peace and be of good behaviour.
- (m) A breach of any of the terms of this Recognizance of Bail shall result in the immediate revocation of bail, and the associated bond and cash component shall be subject to estreatment proceedings.

Richard G. Floyd
High Court Judge

By the Court

Registrar