

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

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

CLAIM NO: BVIHCV 2021/0342

BETWEEN:

DANNY DENNEVIL

Applicant

AND

THE COMMISSIONER OF POLICE

Respondent

Appearances: Mr. Stephen Daniels, Counsel for the Applicant
Ms. Kellee-Gai Smith, Crown Counsel for the Respondent

2022: January 4th, 5th, 7th & 12th

JUDGMENT ON BAIL APPLICATION

- [1] **FLOYD J:** This is an application for bail. The Applicant is 31 years old. He is charged with three counts under the **Immigration & Passport Act**, including Illegal Entry, Harboursing and the Facilitation of Illegal Entry by multiple persons. The migrants were males and females from Haiti, Venezuela and Brazil. The Applicant has been in custody for these offences since his arrest and was remanded to HM Prison, Balsum Ghut, on 30th November, 2021, after bail was denied in Magistrate's Court.
- [2] The Applicant submits that he is entitled to bail. It should be granted as he is a BVI Belonger. He has a residence in Long Bush, Tortola and has friends and family there, including a wife and his mother. He has no criminal record. He has a trade as a carpenter and is employed at EMC General Contractors.

- [3] An Affidavit was filed from the Applicant's mother, Florida Dennevil-Todman, as the prison had been closed to all visitors except those with a recent COVID test. The Affidavit sets out the general details of the Applicant as noted above. An Affidavit from a proposed surety, Kendald Fanord, was also filed. Mr. Fanord owns real property in West Central BVI, as confirmed by an attached Land Registry document. The property is valued at or about \$300,000.00. Mr. Fanord therefore has reasonably recoverable assets. He has no criminal record, knows the Applicant well and understands the duties of a surety.
- [4] The Applicant denies that he is a flight risk. It is indicated that he will abide by all bail conditions imposed. The Applicant is concerned with the length of time it will take to resolve the charges and he therefore seeks bail.
- [5] The Respondent relied upon the Affidavit of D/I Kendrick Davis and oral submissions, as this matter was brought on by way of Certificate of Urgency. The Respondent describes the Applicant as a flight risk. The charges are serious. There is strength to the Crown's case in that 14 illegal migrants were found in an apartment on 24th November, 2021. They were transferred to a detention facility. On 25th November, 2021, the Applicant and a co-accused were observed by police at the door of one of the migrant's rooms. They were taken into custody. Two migrants gave witness statements implicating the Applicant in their transport and entry. The statements indicate that the Applicant and a co-accused brought the migrants into Tortola from a distance of some 20 miles offshore for cash money. The plan was to transfer the migrants to the USVI. The police are continuing to search for the boat that they believe was used by the Applicant and the co-accused. A video was discovered that shows the Applicant and a co-accused on board a "Go-Fast" boat.
- [6] The Applicant's cell phone was confiscated and searched. Images of Western Union money transfers were located as well as an image of the Applicant's driver's licence which was used to identify the recipient of the wire transfers. That corresponds to utterances he made to police. Under caution, the Applicant admitted to providing food to the migrants and communicating with their families in order to receive money transfers to facilitate the movement of the migrants to St. John, USVI.

- [7] Complicating matters for the Applicant is the fact that he has outstanding charges. On August 11, 2020, the Applicant and a second person were seen travelling in a dinghy boat from the USVI to Tortola. They were intercepted and charged with Breaching Curfew and Illegal Entry. No migrants were involved and no contraband was seized from the Applicant at that time. Later in August 2020, the Applicant was released on bail. A surety provided a \$40,000.00 bond (not the same person as the surety proposed in this case) and conditions included reporting to police. Bail was, however, revoked in Magistrate's Court when the Applicant appeared on these new charges. Counsel for the Applicant therefore filed a supplementary or amended Application so that this Court could consider the issue of bail for all of the charges that the Applicant now faces.
- [8] From the Affidavit of the Applicant's mother, it appears that she and therefore the Applicant, are aware that this case involves allegations of the harbouring and illegal entry into the Territory of the Virgin Islands of 28 people between 20th – 23rd November, 2021.
- [9] This Application for Bail was adjourned on 5th January, 2022 until 7th January, 2022 so that the Applicant could amend his pleadings to include bail not only for his current charges but also the outstanding charges. During the intervening time period, Counsel for the Respondent obtained a second police Affidavit from D/I Davis. This second Affidavit was filed on 6th January, 2022 at 15:14 and indicated that the Applicant was previously granted bail with a surety in the amount of \$40,000.00, he was to be of good behaviour and was to report to the Road Town Police Station every Wednesday between 6:00 am and 6:00 pm. Trial in that case had actually commenced and was adjourned to continue on 19th January, 2022. Most importantly, D/I Davis discovered that the Applicant had not signed into the Road Town Police Station Bail Book since 7th October, 2020. The Bail Application was again adjourned until 12th January, 2022, so that counsel for the Applicant could consult with his client and take fresh instructions.
- [10] Today, when the hearing resumed remotely, counsel for the Applicant called his client to give evidence, in particular, as to why he did not report as required. Due to COVID restrictions at HM Prison, an Affidavit could not be obtained from the Applicant on the issue. The Applicant confirmed that he is a carpenter/painter working for EMC Contracting at Oil Nut Bay, Virgin Gorda. He has worked there since 2016. He has attended Court regularly, as required. He acknowledged all of his

bail conditions, including reporting. He said that he reported in 2020, including November and December, although he missed once. He began to neglect his reporting as he was working overtime. His hours therefore varied but he was arriving in Road Town at 6:30 – 6:40 pm, sometimes 7:00 pm. The latest he reported to police was 8:00 pm. He confirmed the reporting procedure involved him presenting identification and signing his name, date and time. An officer would co-sign. On one occasion he was told by a police officer that since he had been seen and the officer knew him, it would be alright if he did not always report. As for 2021, the Applicant stated that he signed in “a couple of times.” The lockdown or shutdown that occurred in 2021, affected his work hours and it appeared that he actually worked fewer hours for at least some of that time. The Applicant acknowledged that he made no effort to vary his bail, including his reporting frequency and times.

- [11] The charges are serious. The Respondent’s police Affidavit describes the operation as a “multi-national human trafficking/smuggling scheme” for monetary reward. There are two co-accused. One has been granted bail and one has been denied bail. The Court notes that People Smuggling is inherently serious. It is made even more so in times of a public health crisis relating to the COVID-19 pandemic, when untested people enter or pass through a country or Territory. The fact that this incident took place at sea with the use of a boat apparently created concern on the part of the Magistrate and that is echoed by the Respondent. The Respondent submits that the Applicant has access to boats based upon the witness statements, the video and the outstanding charge involving a dinghy boat. That is an understandable concern as it relates to the risk of flight by the Applicant. The Respondent submits that the dual citizenship of the Applicant (having been born in the Dominican Republic) and the potential for a significant penalty, are also cause for concern in relation to flight and the appearance in court by the Applicant if he is released on bail. The Respondent refers to the serious nature of the offence, which causes harm not only to the migrants involved but to the state they enter. The Respondent submits that the inability of the Applicant to keep the peace while on bail for similar offences and his failure to report as required, are indications that he will not abide by conditions if released again.

THE LAW

- [12] Having outlined the positions of the parties, I turn now to established principles. The entitlement to bail arises from the general right to liberty and the presumption of innocence which flows 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.
- [13] The presumption of innocence and the liberty of accused persons is entrenched at the pre-trial stage by the right not to be denied reasonable bail without just cause.
- [14] 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. The balancing of those considerations is further explored in another seminal case, **Thelston Brooks v The Attorney General and The Commissioner of Police**².
- [15] 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 protection and safety of the public, including any witness in the proceeding, **c)** Whether detention is necessary, based on a likelihood of the commission of other offences or the interference with the administration of justice.
- [16] 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 convictions for the Applicant.

¹ [2005] UKPC 49

² [2007] ECSC J0115 – 11

[17] 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, it was noted, 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, the court held, must be considered while never overlooking the basic entitlement to be granted 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. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice.

ANALYSIS

[18] The Respondent submits that the Applicant is a flight risk. He is also a risk to interfere with witnesses and with public order generally. However, we know that liberty is a fundamental right coupled with the presumption of innocence, and the burden rests with the Crown to justify detention. Accused persons are presumed innocent and the corollary of that presumption is the right to bail on reasonable terms. The Court notes that, in light of the serious facts and the state of the legislation, it is obvious that the potential for a substantial sentence, including incarceration if convicted, exists. The Crown's case must be considered and it has strength and merit, based upon witness statements, utterances by the Applicant and evidence found on his phone. The Court notes that the Applicant was cooperative with police, providing his phone pass code and giving a statement under caution, which appears to be inculpatory.

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

- [19] I have already set out general bail considerations at some length. I take all of those into account. Clearly, in this case, the Applicant has ties to the community through his family and friends, his home and his occupation. However, there is more for the Court to consider on the issue of flight risk and court attendance if released. It appears that the Applicant has a relationship with boats and boating, although no evidence was tendered that relates the Applicant to a particular vessel or ownership in one. I bear in mind that none of the evidence for either side has, as yet, been tested. Access to boats, however tenuous, increases the risk of flight due to the geography and the physical setting of the Territory of the Virgin Islands.
- [20] The Applicant has ties to the community, being a Belonger of this Territory with family and friends close by. He apparently enjoys their support, as evidenced by the Affidavits filed and submissions from counsel. He has dual citizenship but there is no evidence of any ongoing or recent connection to the Dominican Republic. His life appears to be based in and revolves around this Territory. He has no record of previous convictions and is therefore a person of good character. However, he has outstanding charges and that causes concern for the Court. The fact that the Applicant has been at large on bail previously must be carefully considered but it must not be considered as a complete bar to release. The Court must examine the nature of the outstanding charges and the terms of release previously. Although there is similarity between the charges, they can be distinguished. Although the Applicant was charged with Illegal Entry last August, it did not involve any allegations of people smuggling nor indeed the importing of anything illegal. The terms of his release were suitable but not terribly onerous.
- [21] In fact, the terms of release for the Applicant previously, were quite minimal. He was required to be of good behaviour and to report to a police station once a week. It turns out that he did neither for any length of time. Although he remains innocent of the new charges, they nevertheless allegedly took place while the Applicant was on bail. Although that is troubling, the Court must consider whether it could be dealt with by way of increased and stricter bail conditions. The fact that the Applicant failed to comply with his bail condition to report to a police station for over one year is simply outrageous. It demonstrates a clear and ongoing determination to disregard the order of the Court. The Applicant was aware of his reporting obligations. He made no effort to vary the conditions. He blamed his tardiness on increased work hours and receiving certain instructions from police.

However, his testimony is not borne out by the facts. The police checked the reporting book and there is absolutely no record of any reporting after October, 2020. The Applicant was employed in the same position when he was granted bail. If his work hours changed, it was incumbent upon him to either continue to report or seek a bail variation. He did neither.

[22] What is almost equally shocking, is the inability of the police to notice this failure to comply and respond to it. Apparently, no police officer checked the Road Town Police Station Bail Reporting Book in this case until D/I Davis “perused” the book in response to this Bail Application. Not only did the police fail to check the Bail Reporting Book on an ongoing basis, they even failed to do so once the trial on the charges for which the Applicant should have been reporting, began. One can only speculate that had the police consulted the book at any point within the last year, they might have noted the Applicant to be in breach and dealt with it, as they should have. Perhaps the Applicant would have therefore been apprehended for breaching his bail and perhaps steps would have been taken to revoke his bail sooner. If that had happened, perhaps the Applicant’s involvement in the new charges could have been avoided entirely. We shall never know. The Court wonders aloud how bail conditions could go unenforced for so long. No police officer checked the Bail Reporting Book. No police officer sought to enforce the order of the Court and further offences were allegedly committed. It is very troubling indeed. The onus is upon an accused person to abide by the terms of release. However, it is incumbent upon the authorities to monitor and to enforce those terms when they are not complied with.

[23] Although the Applicant had the benefit of a surety previously, he again appears before the Court with the support of a different surety. That is helpful. The confirmation through documentary evidence of the willingness and ability of others to support the Applicant and his Application for bail is notable. A concrete plan for bail has been provided on behalf of the Applicant. That is significant. All too often, this Court has found itself dealing with Bail Applications, particularly those brought on by way of Certificates of Urgency, with little supporting material. Serious offences with serious factual allegations require fulsome material in support of Bail Applications.

- [24] After reviewing all of the material filed, hearing from the Applicant and upon hearing the submissions of counsel, what follows is my decision in this matter. The charges are serious. Human Trafficking is an international problem. As we have recently seen in cases from this region and elsewhere, human trafficking can result in the death or serious injury of the migrants involved. The unauthorised entry of migrants can have a significant impact upon the local economy and the public health implications are enormous. For that reason, the penalties for those convicted of such crimes can be substantial. That must be considered in light of the strength of the Crown's case.
- [25] All of this must be balanced, however, with the presumption of innocence. Despite the state of the Crown's case, the serious nature of the allegations and the outstanding charges that the Applicant faces, the Applicant remains a person of good character, with no criminal record. Counsel for the Respondent submits that the Applicant is likely to flee if released and may well interfere with witnesses and the ongoing investigation. Based upon his inability to comply with the terms of release previously, he will not comply if released again. Bail conditions will not suffice, as proven by the outstanding charges. Although the Applicant has no record for failing to comply with bail conditions and no record for failing to appear, the submitted facts indicate a significant inability to comply with the bail conditions he was previously bound by. The Court must therefore consider whether or not increased, stricter conditions can be crafted to satisfy the concerns of the risk of flight and the likelihood of the commission of further offences.
- [26] The Applicant has strong ties to the community. He has friends, family, a home and a trade. He has retained counsel and indicated a desire to defend the charges. All of that stands him in good stead and is to his credit in this Application. On the primary ground, I am therefore satisfied that the Applicant, if released, would not flee the jurisdiction nor fail to attend court. His connection to this Territory is long standing. Importantly, the Applicant has provided the court with a surety prepared to pledge money or property in support of the Applicant's release.

[27] Turning to the second ground, 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 or commit further crimes. Is there a serious risk of harm to public safety, including witnesses? Although the Applicant is a person of good character in that he has no criminal record, he stands accused of similar offences. His outstanding charges include illegally entering the Territory by boat from an area close to the USVI. The new offences concern, among other things, assisting in the illegal entry to this Territory of several migrants. The plan in that case, was apparently to eventually transfer those migrants to the USVI. For the previous charges, the Applicant was granted bail with a surety. The terms were straightforward and consisted of reporting, keeping the peace and being of good behaviour. He was unable to do that by generating these charges and failing to report to the police for a very long time. The conduct displayed by not reporting to police, as he was required to do, indicates to the Court a cavalier attitude and a complete disregard for the terms of his bail. It cannot be explained by a change of working conditions and hours. On the second ground I am satisfied that there are very real concerns with him interfering with the administration of justice and committing further offences if released. There are no suitable bail conditions, even with the assistance of another surety, that would effectively deal with those concerns. Furthermore, to release this Applicant on bail in the face of that behaviour, and on these facts, would lead to an erosion in public confidence in the administration of justice.

[28] For all of these reasons, the Application for judicial interim release is therefore dismissed. The Applicant is to remain in custody on all counts in both matters. His next appearance date is apparently already scheduled in the Magistrate's Court.

Richard G. Floyd
High Court Judge

By the Court

Registrar