

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

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

CLAIM NO. BVIHCV 2021/0215

BETWEEN:

YAN EDWARDS

Applicant

and

**THE COMMISSIONER OF POLICE
THE DIRECTOR OF PUBLIC PROSECUTIONS**

Respondent

Appearances: Mr. Sherfield P. Bowen, Counsel for the Applicant
Mrs. Kellee-Gai Smith, Principal Crown Counsel for the Respondent

**2021: September 20th
October 13th**

JUDGMENT

- [1] **FLOYD J:** This is an application for bail brought for the second time by this Applicant. The first application having been brought in December 2020 and decided in January 2021. The Applicant, Yan Edwards, has been in custody on this charge since 17th March, 2011. That length of time is a factor for consideration and forms part of the basis of this application.
- [2] The Applicant is charged with the murder of Keri Harrigan, which occurred on 16th March, 2011. Mr. Harrigan was shot four times and died of his wounds. The charge of murder is of the utmost gravity. The use of a firearm in the commission of the offence serves only to increase the very serious nature of the allegations.

- [3] The case has had a long and tortured existence. Following their arrests, the Applicant and his co-accused began a trial in 2012 which was aborted. A second trial led to their conviction in February, 2013. That conviction was eventually appealed successfully in January, 2018. A third trial began in November, 2020 but was not completed, due to a mid-trial ruling relating to a request for the disclosure of information pertaining to Crown witnesses involved in the Justice Protection Act program. Counsel for the prosecution appealed the ruling of the trial judge and the trial itself was therefore suspended before its completion. That appeal remains outstanding although the court was advised of recent movement in that regard.
- [4] The current state of the case for the prosecution is difficult to confirm, having gone through three trials. It is essentially a circumstantial case. Justice of Appeal Thom reviewed the evidence from the trial in 2013 and concluded that “the evidence against the appellants although it was not exceptionally good was not tenuous.” **Baptiste and Edwards v The Queen**¹.
- [5] The Crown’s case revolved around several witnesses who were friends with the Applicant. Allen Baptiste, Yan Edwards, Vaughan Cameron, Henito Penn, Keithroy Joseph, Deshon Richards, Allen Wheatly and Keri Harrigan were all known to each other. The case involves a dispute between some of these men.

THE FACTS

- [6] Mr. Edwards told Mr. Cameron and Mr. Baptiste that he was displeased with Mr. Harrigan. Edwards spoke of a package containing masks and other items that would allow him to deal with Harrigan. Baptiste agreed to assist with that. Later, at Mr. Wheatley’s residence, Edwards, Baptiste, Penn and Cameron were all present when a box was opened which contained a number of items, including several pounds of marijuana, three guns and some ammunition. Edwards was said to have waived one of the guns about and say he was going to give Harrigan “some of this.” Mr. Edwards took one gun and Mr. Penn took the other two guns. Penn hid the guns but apparently later could not locate them. Penn said that the plan to import the marijuana, guns and ammunition was his and Edwards’.

¹ [2018] ECSC J0130 – 2 at para 54

- [7] The next day, Mr. Cameron received a phone call from Mr. Edwards, whose voice he recognized. Edwards asked if he had seen “the girl” (an apparent reference to Harrigan). Minutes later, Cameron saw a vehicle belonging to Edwards’ girlfriend pass by, being driven by Edwards and also containing Baptiste as the front passenger. Mr. Cameron then used Richards’ phone to call Mr. Edwards. Cameron recognized Baptiste as the one who answered his call. Mr. Baptiste said they had seen “the girl” and if he heard shots, to stay put. Mr. Richards said he had earlier given his phone to Cameron. Mr. Cameron then heard three shots. He saw Mr. Harrigan down and covered in blood. Mr. Penn, who was elsewhere, also heard three shots. Mr. Penn said he saw a person dressed in black and wearing a black and white mask in the area both before and after the shots were fired. He could not identify that person. Mr. Joseph, who was with Harrigan, also saw a masked man with a gun in his hand and also heard three shots. He ran when he heard the shots but returned to see Mr. Harrigan down and bloodied. He could not identify the gunman. Mr. Richards heard the shots, then received a phone call from Mr. Edwards, although he had never spoken to him on the phone before.
- [8] Police experts identified the phone numbers used in these calls and the people to whom the numbers were associated. Post mortem examination confirmed Mr. Harrigan died from gunshot wounds. Spent cartridges found at the scene were confirmed as having come from the same firearm, although the type of gun could not be confirmed.
- [9] That was the extent of the evidence for the prosecution. However, as was indicated in the first bail application, in attempting to determine the strength of the Crown’s case for the purpose of considering a bail application, the court is hampered by the fact of the multiple trials. Learned Counsel for the Applicant advised that, for example, a DNA Report dated 16th September, 2011 was disclosed for the first time during the trial in November, 2020. That report was filed in this Application. It confirms male DNA was found on the cartridge cases but it was not the DNA profile of either this Applicant or the co-accused. The issues of voice identification from the phone calls and the visual identification of the occupants of the vehicle also remain to be considered.
- [10] Similarly, some of the evidence by way of witness testimony did not unfold as expected at the last trial and as perhaps it had at earlier trials. Apparently, the Crown witnesses, Richards and Wheatley, were reluctant and the remaining witnesses, Penn and Cameron, were unpredictable. There may

now be gaps and inconsistencies with some of the evidence from Mr. Richards and Mr. Wheatley. Learned Counsel for the Applicant maintained this position, arguing that the changed evidence of Richards and Wheatley significantly and negatively impacted the anticipated evidence of the remaining Crown witnesses, especially Mr. Cameron. Counsel for the Applicant also tendered an Affidavit from Irvin Smith. That Affidavit indicates that the Crown witness, Deshon Richards, had spoken to him in May 2021 and the contents of that conversation would impact the testimony of Mr. Richards. However, at this stage, we do not know how any of this evidence will unfold at any subsequent trial. It is for these reasons that assessing the strength of the Crown's case remains a difficult task. That is always the danger when a case endures multiple trials and takes years to prosecute. As the court indicated at the last bail application, suffice to say that the case for the prosecution has not improved and quite likely has deteriorated since Thom JA made her observations in 2018.

THE POSITION OF THE APPLICANT

- [11] Learned Counsel for the Applicant submitted that the continued delay in moving this case forward either to the hearing of the interlocutory appeal brought by the Crown that interrupted the trial on the merits, or the trial itself, constituted a material change in circumstances. He also submitted that the affidavit of Irvin Smith, affecting as it does, the evidence of the Crown witness, Deshon Richards, constituted a material change in circumstances. This evidence, it is said, affects the strength of the Crown's case and was not available at the time of the last bail application.
- [12] Counsel for the Applicant also questioned the strength of the Crown's case generally. He described the evidence as having become unreliable over the course of time and that there were now significant evidentiary issues. That included problems with the testimony of Richards and Wheatley, as well as another witness known as Arnold Smith, a lack of forensic evidence and issues with identification. The lengthy delay in the resolution of the case can only weaken the case for the Crown. To continue to detain the Applicant in the face of all of that would offend the public's confidence in the administration of justice. The situation was described as an abuse of process by Counsel for the Applicant and reference was made in the material filed that the Court should consider staying the proceedings on that basis. That position was, however, withdrawn during oral submissions and

confirmation was given that this remained an application for bail only. That is fortunate and appropriate in the circumstances. For, as the court indicated at the last bail hearing in this matter, the determination of the issue of abuse of process as it relates to the interlocutory appeal and the overall delay in proceeding with the case, must be for another court to determine in another forum. I am unable and unwilling to make any findings in that regard, other than to note that the appeal has delayed the completion of the trial, yet again. The case has had a very protracted history and is yet to be completed.

- [13] Counsel for the Applicant also referred to the conditions at HM Prison at Balsam Ghut, with regard to the COVID-19 pandemic. However, those submissions were of a general nature, highlighting the risks associated with persons housed in close quarters or crowded settings with questionable sanitary conditions and a lack of social distancing, as may be found in any prison environment.
- [14] The affidavit of the Applicant confirmed that, while he was a resident of Tortola and a naturalized citizen of the Territory of the Virgin Islands, he was born in St. Kitts and Nevis. He has 3 children. Before his incarceration, he was a firefighter, employed by the Territorial Fire Service. The Applicant also attended a local church. Most of his family and friends were in the Territory of the Virgin Islands, including his mother, who owns real property and was willing to act as a surety. A property appraisal report was previously submitted. In total, four individuals were named as being ready to act as sureties on behalf of the Applicant, although no Affidavits were provided from those persons in this Application. As such, it was submitted that the Applicant was not a flight risk and there was no reason to believe that he would interfere with witnesses. The criminal record for the Applicant was tendered. The record had two entries, including a conviction in 2007 for wounding, for which he received 18 months' probation, and a further conviction in 2014 for the crime of conspiracy to commit murder. That sentence was 12 years. Most of this material was before the court at the previous bail application.
- [15] At the last bail hearing, Counsel for the Applicant, called evidence that confirmed the Applicant received a warrant of committal for a period of 12 years, commencing on 2nd December, 2013. His earliest possible release date, according to law and allowing for remission, was therefore 20th March, 2019 and his latest possible release date was 20th March, 2023. Based on the overall good

behaviour and the participation in programming of the Applicant, a recommendation for early release was forwarded to the Office of the Governor on 7th March, 2019. By letter dated 24th August, 2021 from John J. Rankin, Governor of the Virgin Islands, to Counsel for the Applicant, it is noted that the Governor granted early release on the charge of conspiracy to murder, with retroactive effect from 20th March, 2019. However, the letter confirms that the Applicant remains in custody on the charge of murder, which relates to this Application.

THE POSITION OF THE RESPONDENT

- [16] Learned Counsel for the Respondent, submits that there is no material change in circumstances supporting a renewed bail application. The issues of delay and the personal circumstances of the Applicant were dealt with at the previous bail hearing. There is nothing relevant in the material that Counsel for the Applicant places before the Court in this Application. In dealing with the issue of delay, the Court should bear in mind the impact of natural disasters and the pandemic, as well as apportioning delay equitably between the parties. The basis of the first detention order remains, including a concern for public safety and the maintenance of public confidence in the administration of justice. Counsel for the Respondent disputed the allegations of impropriety and abuse of process, and submitted that issues of an evidentiary nature, including the new evidence tendered by Counsel for the Applicant, were matters best left for the trial judge and case management.
- [17] A police Affidavit from Officer Shortte was tendered by Counsel for the Respondent. That Affidavit disputed much of what was found in the Affidavit of Irvin Smith, referencing the Crown witness, Deshon Richards. This was representative of the need to leave such triable issues to the purview of the trial judge, Counsel submitted.
- [18] As to the issue of delay in perfecting the interlocutory appeal, Counsel for the Respondent provided some new information. She submitted that the Crown had been diligent in seeking to obtain the transcripts necessary to move the appeal forward. She indicated that communication had been sent to the Office of the Registrar (whose role it was to obtain the transcripts from the Court Reporting Unit) on 31st May, 2021 and 26th July, 2021. Communication was then sent to the Office of the Chief Registrar on 9th September, 2021. Counsel for the Respondent advised that the Local Registrar

communicated with the Office of the Director of Public Prosecutions on 17th September, 2021 advising that the transcripts would be ready on or before 24th September, 2021 and the matter could then be placed before the Court of Appeal for reporting on or about 27th September, 2021. The interlocutory appeal was therefore moving forward significantly. This would go some way to deal with the delay issue raised by the Applicant.

[19] Counsel for the Respondent referred to the criminal record of the Applicant as an indication of the danger he posed to the public generally and to witnesses specifically. On the last bail application in this case, Crown Counsel pointed to the fact that several Crown witnesses were in the Justice Protection Program as being evidence of the danger of witness interference and the concern for their safety.

[20] Counsel for both the Applicant and the Respondent submitted a number of authorities to support their positions.

THE LAW

[21] The entitlement to bail arises from the general right to liberty and the presumption of innocence, which flow from the common law and the constitution. It does not emanate from statute, 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 authorized 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.

[22] In the seminal case of **Devendranath Hurnam v The State**², the Privy Council, at **para 1**, described the court's considerations for bail applications as follows:

Such decisions very often raise questions of importance both to the individual suspect or defendant and to the community as a whole. The interest of the individual is of course to remain at liberty, unless or until he is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried, will inevitably prejudice him and, in many cases, his livelihood and his family. But the community has a countervailing interest, in seeking to ensure that the course of

² [2005] UKPC 49

justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence, and that he does not take advantage of the inevitable delay before trial to commit further offences.

- [23] The Privy Council went on to confirm the reasoning of the Magistrate in the **Hurnam** case as being correct. It was noted at **para 25** that:

The reasoned judgment of the Magistrate cannot be faulted. He did not overlook, minimize or discount the seriousness of the offences with which the appellant was charged. But he did not, rightly, treat this as a conclusive or all but conclusive reason for refusing bail. Instead, he addressed, rightly, the wider question whether, given the seriousness of the alleged offences, it was necessary to refuse bail in order to serve one of the ends for which detention before trial is permissible.

- [24] In another notable case, **Thelston Brooks v The Attorney General and The Commissioner of Police**³, George-Creque J. (as she then was), cited the **Hurnam** case with approval when she said, at **para 12**:

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

- [25] The court in the **Brooks** case at **para 19** referred to five grounds for refusing bail, recognized by the European Court of Human Rights as being in keeping with the European Convention for the Protection of Human Rights. Those grounds include:

- (i) the risk of the Defendant absconding bail,
- (ii) the risk of the Defendant interfering with the course of justice,
- (iii) preventing crime,
- (iv) preserving public order, and
- (v) the necessity of detention to protect the Defendant.

- [26] In the case of **R v Huey Gowdie**⁴, the Court of Appeal of Jamaica listed the considerations for a court in a bail application, including:

³ [2007] ECSC J0115 – 11

⁴ [2012] JMCA Crim 56 at para 15

- (i) the nature and seriousness of the offence;
- (ii) the defendant's character, antecedents, association and community ties;
- (iii) the defendant's record with regard to the fulfilment of his obligations under previous grants of bail;
- (iv) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having failed to surrender to custody;
- (v) whether the defendant is a repeat offender, that is to say, a person who has been convicted on three previous occasions for offences which are punishable with imprisonment; or
- (vi) any other factor which appears to be relevant including the defendant's health profile.

[27] In recent times, bail applications have come to include a further consideration, the maintenance of confidence in the administration of justice. The Supreme Court of Canada elaborated on this point in the case of **R v St. Cloud**⁵. 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 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. At **para 86**, the court concluded:

In short, there is not just one way to undermine public confidence in the administration of justice. It may be undermined not only if a justice declines to order the interim detention of

⁵ [2015] 2 S.C.R. 328, 321 C.C.C. (3d) 307

an accused in circumstances that justify detention, but also if a justice orders detention where such a result is not justified.

- [28] These cases and others tell us that bail considerations are multifaceted. They 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, and **c)** whether detention is necessary, based on a likelihood of the commission of other offences or the interference with the administration of justice.
- [29] These cases and others are further instructive. They provide guidance and tell us that when determining whether to detain or release, the court may consider a number of factors 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, and **f)** the maintenance of confidence in the administration of justice.
- [30] However, to reach that point, the court must first determine that there has been a substantial change in circumstances when there has been a previous bail application. The 2015 edition of **Archbold's at 3-25 & 3-26** indicates that, generally, a court was not bound to entertain an application for bail after it had previously been refused unless it was satisfied there had 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.
- [31] Does the occurrence of intervening or subsequent events therefore require review, as they pertain to bail, in the interests of justice? The answer must be in the affirmative. 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 Sayers**⁶:

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

⁶ SVGHCRB 2014/0027, 2015/0028, 2016/0030 at para 10

bail of existing circumstances which had not been previously drawn to the attention of the bail court.

- [32] Similarly, Persad J. in the case of **The Queen v David Brandt**⁷ 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.
- [33] The recent case of **Armal Warner Jr. v Director of Public Prosecutions**⁸ is also instructive. Williams J. considered the passage of time, the state of the evidence at the Committal being weak and tenuous, and the health conditions at the prison, relative to the COVID-19 pandemic, all as being relevant changes in circumstances, allowing for the consideration of the bail application on the merits.
- [34] Further afield, there is the case of **The Queen on The Application of B v Brent Youth Court**⁹, wherein the court considered, amongst other things, “the effluxion of time” and the strength of the case against the claimant. Both of those arguments had not been made previously and have parallels to the case at bar. Bail was therefore re-examined.
- [35] Another case of note is **Alket Dauti v Court of First Instance West Flanders**¹⁰, which referred to the delay caused by the adjournment of the extradition hearing as being an acceptable change of circumstances, allowing for the reconsideration of bail. The court, however, made no mention of the reason for the adjournment nor did it attribute it to one party or the other.
- [36] Judicial interim release is a significant component of the criminal justice system. However, such applications by their very nature usually take place early on in the life of a case. It is not unusual for something less than the entire case for the Crown to be available. But applications proceed because many of the considerations for bail relate not only to the case itself but also to the Defendant and to her/his liberty. 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

⁷ MNIHCR 2019/0008 at para 4

⁸ ANUHCv 2021/10294 at para 38

⁹ [2010] EWHC 1893 (Admin)

¹⁰ 2018 WL 07252461 (2018)

power of review. That will only be appropriate where there is admissible new evidence showing a material and relevant change in the circumstances of the case.

[37] The issue of delay formed a large part of the basis of the Application in this case. As is set out in the cases cited above, I am satisfied that delay is an issue that the court can consider when contemplating bail. When examining the cause of the delay, the court must consider all of the circumstances and facts. As the court pointed out in the last bail application in this case, that issue was explored in the case of **Coecillia St. Romaine v The Attorney General**¹¹. In that case, the court referred to a balancing process to ensure that prosecutions take place in a reasonable time, including the need for the state to allocate sufficient resources to ensure that occurs. In considering this, the approach taken is one of proportionality where the court weighs the competing interest of the public against those of the defendant. It was also important, however, to pay attention to the steps taken by the accused to complain about the delay in bringing the matter to trial.

[38] In the case of **Gibson v The Attorney General of Barbados**¹², the Caribbean Court of Justice dealt with the issue of delay in a murder case. The court was clear in confirming that the issue of delay requires a review of the tactical approach of both defence and prosecution when it held:

When devising an appropriate remedy, a court must consider all the circumstances of the particular case, especially the stage of the proceedings at which it is determined that there has been a breach. In particular, the court should pay special attention to the steps, if any, taken by the accused to complain about the delay since, as was pointed out by Powell J of the US Supreme Court in **Barker v Wingo**, delay is not an uncommon defence tactic.

[39] The amount of time it is taking to bring this case to a conclusion continues to be lengthy. The delay in moving forward with the interlocutory appeal creates a knock-on effect delaying the trial of the case on the merits. Such delay creates a hardship for all of those affected, not just the accused but also the victim's family, the witnesses and the community. This court accepts the submission that delay can play a role in bail considerations. However, to analyze the reasons for the delay requires more information than I currently have as to the causes for the delay and how to apportion the delay between the parties. For example, surely the delay caused by the decision to appeal the mid-trial ruling does not rest solely with the prosecution. The evidence that ruling relates to was disclosed to

¹¹ [2012] ECSC J0530 – 1 at para 27

¹² (2010) 76 WIR 137 at para 61

the defence, as required, a long time ago. However, the objection to the leading of that evidence and the request for further related disclosure was apparently not made until the trial had commenced. That was a tactical approach taken by learned defence counsel and the Applicant must therefore accept some responsibility for what flowed from that. Such applications should be brought in a timely fashion at the pre-trial stage.

[40] As Morley J. held in the recent case of **R. v V.G.**¹³, there is a duty on Counsel to raise procedural matters as officers of the court. Further, **at para 2**, the court declared that it was not acceptable practice to raise fundamental matters late. The purpose of case management is to identify issues for forethought and argument. This allows for the issues to be properly weighed, researched and adjudicated. Any delay incurred therefrom, therefore lies at the feet of those responsible.

[41] In the case at bar, it appears that it took approximately two years from date of arrest in 2011 to conviction in 2013. There was a successful appeal in 2018 and another trial in 2020. As the court held in the decision in the last bail application in this case, in order for the court to analyze and apportion responsibility properly for the delay throughout, would require more evidence than is before the court. Without agreement between counsel, it would require transcripts and detailed evidence. The issue of delay is an important consideration in any criminal case but it must be examined in conjunction with the reasons therefore and in a wide context. The court accepts that the Applicant has been incarcerated for a long time. It is a factor to be considered in the bail application. But the court does not accept that the responsibility for this can be laid entirely at the feet of the Respondent. The court also notes that for the majority of this time, the Applicant has been serving a sentence. Even if bail had been granted, he would not have been released until recently.

ANALYSIS

[42] The facts in this case are very serious. They include the discharge of a firearm in a public place. The victim suffered 4 gunshot wounds, three to his head and one to the back. He died as a result thereof. The use of a firearm in a violent incident heightens the concern of this court. However, one must examine the evidence of the Crown to support the prosecution of this very grave crime. The

¹³ SKNHCR 2021/006

evidence in this case is circumstantial. Identification is a live issue. As the court stated in the last bail application in this case, although the facts are very serious and it is obvious that the potential for a substantial sentence, including incarceration if convicted exists, the Crown's case must be considered and it is not an overly strong one.

[43] It is clear that there will be a number of issues for the court hearing the interlocutory appeal and the trial proper to review and determine. The Applicant has presented some additional evidence that was not previously known and was not before the court for the last bail hearing in this case. It is not substantial but it is new evidence nonetheless and must be considered. The court also recognizes the delays in the progress of this case through the criminal justice system. Indeed, more time has passed since the last bail application in this case relating to the hearing of the interlocutory appeal. The parties attribute that deferral to the inability of obtaining transcripts necessary to perfect the appeal. On all of these points, I am prepared to accept that there has indeed been a material change in circumstances such that I can consider bail in a fulsome manner.

[44] The Applicant is a naturalized citizen of the Territory of the Virgin Islands, having been born in St. Kitts and Nevis but immigrating to this Territory at a young age. He has three children as well as other family and friends, including his mother, who is willing to act as a surety, as apparently are other persons. He has a history of employment and attends a local church. He has ties to this community. He has a criminal record consisting of two serious entries, both of which are crimes of violence. He is currently charged with an offence of extreme violence. He was convicted in 2007 of wounding and received a term of probation. In 2013 he was convicted of conspiracy to commit murder and in 2014 he was sentenced to a lengthy term of imprisonment, 12 years. Although he remains incarcerated, he qualified for early release, based upon his good behaviour while serving his sentence. The Governor recently granted early release to the Applicant on the charge of conspiracy to murder, with retroactive effect from 20th March, 2019. He is entitled to apply for bail on this charge, however, the fact remains that his record and the nature of his convictions are troubling, especially when considered in light of the charge he currently faces.

- [45] Judicial interim release requires the court to be confident that, amongst other things, the accused will neither flee nor reoffend while on bail. After reviewing all of the material filed and upon hearing the submissions of counsel, just as I was at the last bail hearing in this case, I am not persuaded that the Applicant, if released on bail, would flee the jurisdiction and fail to appear in court as required. The Crown's case is of questionable strength. I must consider the seriousness of the offence and the severity of penalty relative to the risk to abscond and the risk of reoffending. In this case, I balance the potential for a lengthy sentence if convicted, with the fact that the Applicant has already spent years in custody on this charge. In sum, I continue to find the Applicant not to be a flight risk, owing to his close and long-standing connections to this community. The Respondent has therefore failed to show cause on this ground.
- [46] 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? In this case, the fact that several Crown witnesses have become involved in the Justice Protection Act program is an indication of the concern on the part of the Respondent for their safety. However, no evidence was presented of any actual or attempted interference by the Applicant. Notwithstanding that, I must also consider the criminal record of the Applicant. It is there that the court continues to have concerns. The record of the Applicant is serious and substantial. The entries for wounding and conspiracy to commit murder, with the latter resulting in a lengthy sentence for which he received a substantial term of imprisonment, continue to give me pause. It is a significant and violent record. It must also be noted that the evidence in the Crown's case places a gun in the hands of the Applicant, along with the use of threatening words, close in time to the shooting. All of this raises serious concerns with the Applicant interfering with the administration of justice and the likelihood of the commission of further offences, if released. The protection and safety of the public, including witnesses, must be ensured. I am not satisfied that those concerns can be alleviated, even with strict terms of bail and the use of sureties. Furthermore, I am satisfied that, at this time, to allow the Applicant to be released in the face of this vicious crime, with the record that he has, would erode public confidence in the administration of justice.

- [47] I have considered the issue of the new evidence presented by Counsel for the Applicant. Although it may indeed have an impact on the trial of this case and the manner in which the evidence of particular witnesses may be received and considered, it remains a matter for a trial court to consider, along with all of the other evidence. In my view, that material is not so significant as to call into question or outweigh the other evidence that exists in the Crown's case at this time.
- [48] I have considered the issue of the impact of the COVID-19 pandemic on detention facilities and gaols, specifically HM Prison at Balsam Ghut. In the **Warner** case, the court referred to the potential for the spread of disease at HM Prison in Antigua. The court noted the comments of Morley J. in the case of **R. v Elton Charles**¹⁴. Morley J. had attended the prison in Antigua and made observation of the conditions experienced by prisoners incarcerated there. **At para 21**, the court described the facilities as rudimentary, dating back to the 19th century. The prison was overcrowded. Accommodation included 12 inmates to a cell with only 6 beds. Having been assigned to the High Court in Antigua in the past, I too toured HM Prison there. It was and apparently still is, archaic, hardly reaching modern standards for a detention centre. As I am now assigned to the High Court in this Territory, I have also toured HM Prison at Balsam Ghut. The contrast with the facility in Antigua is stark. Although a grim place, Balsam Ghut is far superior to HM Prison in Antigua. Accommodation and sanitation are much better than the Antigua gaol. It is a relatively modern facility. The court is not aware of any COVID-19 outbreak at HM Prison in this Territory, nor has any such evidence been tendered. That is not to say that there is no risk. There has always been a great risk for the spread of infectious diseases in a custodial setting. Overcrowding, an inability to implement social distancing and a lack of proper sanitation are all factors. It can therefore be a consideration in a bail application. However, without reference to specific cases, statistics and data relating to the situation at HM Prison at Balsam Ghut, the court is unable to accept the Applicant's submission on anything other than a general level. The situation in this Territory is not even close to the situation experienced by prisoners in Antigua in this regard.

¹⁴ ANUHCR 2017/0025

[49] I have also considered the issue of delay in reaching my decision. As I have already noted, I am troubled by the length of time it has taken to prosecute this case. Time continues to march on. Although I am unable to adequately apportion the delay between the parties, the court remains concerned. Delay does play a factor in bail considerations and in supplementary bail applications. The court notes that the Applicant was serving a sentence throughout the majority of the time he has been in custody on this charge. Although that is a consideration, the longer the case continues unresolved, the more significant the issue of delay becomes. The court agrees with Learned Counsel for the Applicant that the issue of whether detention is necessary to maintain public confidence in the administration of justice is an important consideration. It does, however, cut both ways. It may be an issue that assists an application for bail and it may be an issue that supports an argument for detention. It depends upon the facts of the case. For the purposes of this application, I am satisfied that the issue falls to support the argument for detention, given the record of the Applicant, the seriousness of the offence and the case for the Crown, as it currently stands.

[50] For all of these reasons, this Application for bail is hereby dismissed. The Applicant is to remain in custody on this charge.

[51] In closing, the court notes the comments of Williams J. in the recent case of **Jason Modeste, Aliyah Martin, Shakeil Thomas v The Commissioner of Police & The Director of Public Prosecutions**¹⁵ wherein, although denying a bail application in a murder case, it was indicated that “if this matter is not listed for trial within a reasonable time, or if any of the Applicants is of the view that there is any change in circumstances, that Applicant is entitled to move the Court to consider bail”. Such considerations remain in most cases, including this one.

Richard G. Floyd
High Court Judge

By the Court

Registrar

¹⁵ ANUHCv 2021/0314/315/316 at para 42