

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: ANUHCV 2021/0294

IN THE MATTER OF AN APPLICATION BY ARMAL WARNER JR.
TO BE ADMITTED FOR BAIL

BETWEEN:

ARMAL WARNER JR.

Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: Honourable Justice Colin Williams

Appearances:

Mr. Sherfield Bowen, Counsel for the Applicant

Mrs. Shannon Jones-Gittens and with her Ms. Rilys Adams, Counsels for the Respondent

2021: July 28th,
August 6th, 13th

DECISION

- [1] **WILLIAMS J.:** Could Armal Warner Jr be admitted to bail? That is the fundamental question to be answered in this matter.
- [2] Warner previously applied for bail by filing a Fixed Date Claim Form together with an Affidavit and exhibits on the 23rd June, 2020 (**ANUHCV 2020/0208**). Two days later, on the 25th June, 2020 Warner's application was heard by a judge; he was denied bail. Now, in July 2021, thirteen months

after Warner's bail was originally refused, he has come before the High Court once again asking for bail to be granted to him.

- [3] The learned authors of **Commonwealth Caribbean Criminal Practice and Procedure Fifth Edition**, Dana Seetahal with updates by Roger Ramgoolam, note at page 62:

"A defendant who has been refused bail by a judge may, however, reapply to the High Court for reconsideration of the issue on the basis of a change in circumstances since the refusal. These could include matters of health or even the delay in setting a trial date."

- [4] The Crown is resisting Warner's application on the ground that the Applicant has not shown that there is any change of circumstances that will allow for a judge to reconsider his application.

The Applicant

- [5] Warner is a 21 year-old Antiguan. He is a member of the Antigua and Barbuda Defence Force since 2017. He resided at Pares Village with his sister and mother.
- [6] Warner was arrested and charged on 6th June, 2020. He was charged jointly with three Defence Force colleagues with murder. (None of Warner's co-accused are associated with this application). The charge stated that Shakeil Thomas, Alijah Martin, Jason Modeste and Armal Warner between the 9th and 13th April, 2020 at Indian Creek in the parish of St. Paul did murder Bruce Greenaway.
- [7] Warner appeared before the Magistrate on the 8th June, 2020. Warner was remanded to prison. The committal proceeding was scheduled for 23rd September, 2020.

First Bail Application

- [8] Six weeks after Warner was remanded to prison on the murder charge, a bail application was filed on his behalf. That application was refused.
- [9] It is useful to restate the relevant part of the learned judge's order of 25th June, 2020 when he denied Warner's application for bail:

"**CONSIDERING** committal to the High Court on murder is scheduled for 23.09.20, at which point the defence counsel will have copies of the relevant statements.

IT IS ORDERED AS FOLLOWS:

1. Bail is refused for substantial fear of absconding, further offences and interfering with witnesses.

2. There shall be liberty to raise questions about bail on 25.09.20 to try to establish changed circumstances, if defence counsel requests.”

[10] If one dissects the contents of the Order it is apparent that the following things were being said:

- 1) The Crown had not yet disclosed its case to Warner (and the Defendants).
- 2) Disclosure will be made to the Defendants at the committal proceedings scheduled for 23rd September, 2020.
- 3) Bail was being refused at that time for fears that Warner may abscond, commit further offences and interfere with witnesses.
- 4) After the disclosure at the committal proceedings was completed (on the 23rd September, 2020) the issue of bail will be revisited.
- 5) The onus will be on Warner’s counsel to request a hearing to establish changed circumstances.

[11] The only affidavit in that bail application, **ANUHCV 2020/0208** was filed by the Applicant. The Crown did not file any affidavit opposing Warner’s application for bail.

[12] Warner grounded his bail application to the High Court on the following:

- i. The learned Magistrate was without jurisdiction to grant him bail;
- ii. He is of good character – a member of the Defence Force since 2017 with an unblemished record, he does not smoke or drink, does not own a firearm and he attends church. The only time he has used a firearm is in the course of his duties as a soldier. He does not have any other pending matter before any court;
- iii. He is an Antiguan, has lived here all his life and has had a fixed place of abode;
- iv. He has suitable sureties, who were willing to use their freehold property as security for his bail;
- v. He can be housed at the Defence Force Headquarters at Camp Blizzard where he will be supervised;
- vi. He will attend Court when required to;
- vii. He can surrender his passport and he had no intention of absconding and jeopardizing the security put up by any sureties;

- viii. He did not know who the witnesses for the Crown are, as none were disclosed to him, however he can give an undertaking not to interfere with any witness;
- ix. He is willing to abide by any conditions that the Court may impose;
- x. His prayer was that he be granted bail.

Present Application

[13] A new Application for bail comprising a Fixed Date Claim Form accompanied by an Affidavit in Support was filed on Warner's behalf on the 23rd July, 2021 (**ANUHCV 2021/0294**). The matter was listed for hearing and at 8:44 a.m. on the 27th July 2021, the Crown lodged a 'Notice of Opposition/Defence' by completing the 'Represent Case' function within the electronic portal and so indicating that the Respondent intended to oppose/defend the matter.

[14] Warner in his new affidavit added, inter alia, the following reasons to underscore his bail application:

- i. He has now been committed to stand trial for murder;
- ii. He is of the view that the Crown is not yet ready to try his case;
- iii. He would like the Court to consider the onslaught of COVID-19, particularly as it relates to the over-crowded conditions at the prison;
- iv. He considers the Crown's case against him to be weak and tenuous. The only evidence tendered against him in the deposition is a CCTV footage where the crown alleged that he was a passenger in a vehicle travelling South in the vicinity of Indian Creek and in which the deceased, who was said to be alive, being seated in the vehicle and a later footage showing the same vehicle traveling North, which upon the crown's theory, the deceased was now absent but that Warner was still a passenger in the vehicle;
- v. He considers the crown's circumstantial case to be one in which the jury will be invited to 'speculate', 'deduce' or worst 'find' that he was complicit in murder;
- vi. He is innocent of the charge and has at all times denied any involvement in the death of Bruce Greenaway and always asserted his (Warner's) innocence;
- vii. He wishes to make a statement to the Office of the Director of Public Prosecutions and considers this a change of circumstances;
- viii. He gave the police his whereabouts in relation to the approximate time of the alleged offence; He was willing to sign in on a regular basis at the Willikies Police Station as a condition of bail;
- ix. He is short on material resources with his assets consisting of personal belongings – including clothing – and personal effects.

Crown's Objection

- [15] When this Application first came on for hearing on Wednesday 28th July 2021, the Crown orally submitted that the Applicant could not point to any change of circumstances so as to entertain a new bail application. The hearing of the bail application was adjourned; the Order included a recital that:

“The Crown to file and serve any affidavit in objection on or before Thursday, 5th August 2021.”

- [16] The ‘Affidavit of Objection’ was deposed to by Crown Counsel, Mrs. Shannon Jones-Gittens. She had conduct of this matter on behalf of the Crown and appeared at the previous bail hearing.

- [17] Mrs. Jones-Gittens in her affidavit pointed out that apart from the bail hearing of 25th June 2020, there were two subsequent hearings on the 25th September, 2020 and the 27th November, 2020.

- [18] At paragraph 6 of Mrs. Jones-Gittens affidavit she states:

“On 25th September, 2020... the bail application was refused and the Court gave as its reason for doing so that there was no change of circumstances. The matter was adjourned to 27th November, 2020, at which time counsel was at liberty to make another application to establish changed circumstances.”

- [19] Then at paragraph 7 of the affidavit Mrs. Jones-Gittens says:

“On 27th November, 2020... bail was once again denied, following the hearing, on the basis that there was no change of circumstances.”

- [20] Mrs. Jones-Gittens then deposes as to what transpired at the sitting of 28th July 2021, in particular to the response of the Learned Director of Public Prosecutions, Mr. Anthony Armstrong, who opined that there was no ‘change of circumstance.’ At paragraph 10, the affiant says:

“As was stated by Mr. Armstrong then, the Respondent’s objection to bail is that while the claimant has stated that there is a change of circumstances, he merely makes reference to a wish that he has and nothing tangible or more concrete has been presented to the Court. In those circumstances, there is therefore nothing before the Court supporting a change of circumstances.”

Resumed Hearing

- [21] At the resumed hearing on the 6th August 2021, Ms. Rilys Adams took over conduct of the matter (with Ms. Jones-Gittens now being a witness – having sworn to an affidavit in the matter). She reiterated that the Crown was focusing on paragraph 6 of Warner’s affidavit which mentions the words ‘change of circumstances.’ Warner deposed:

“Since my prior bail hearings there has been a change of circumstances in that I wish to make a statement available to the Office of the Director of Public Prosecutions.”

- [22] Warner's affidavit was sworn to on the 22nd July, 2021 and filed the following day. Since then, there was no follow up by the Applicant.
- [23] Counsel Adams confirmed that the committal proceedings were completed on the 26th April, 2021 when the Applicant and his co-accused were committed to stand trial. No indictment has as yet been filed by the Director of Public Prosecutions in relation to the matter in which Warner and the other men were committed.
- [24] The question was posed to the Crown Counsel as to: what is the "real objection" that the Crown had to Warner's bail? Ms. Adams indicated that based on the fact that the Applicant's bail was previously refused by a judge, there was a requirement for Warner to show a change of circumstances.

Changed Circumstances?

- [25] Has Warner's circumstances changed since June 2020 to permit a reconsideration of the previous refusal to admit him to bail?
- [26] It must also be pointed out, that even if it is found that there is any changed circumstance so as to permit a reconsideration of an application for bail, that finding does not translate automatically into the granting of bail, since the judicial officer must then examine all the facts and make a determination.
- [27] Although reference was made in the Crown's 'Affidavit of Objection' to two other bail applications concerning Warner being adjudicated upon, on the 25th September, 2020 and the 27th November, 2020 no copy of any Order has been provided in relation to any of those mentioned dates. The only Order that has been produced is the one that is dated and entered on the 25th June, 2020. Accordingly, consideration is given to that Order only and not the content of any Affidavit regarding other hearings at which an Order may have been made. Further, the only matter on the portal concerning the Applicant besides this present one, is the June 2020 bail application.
- [28] It is noteworthy that the Judge when he refused to admit Warner to bail, scheduled the matter to come back up two days after the Committal Proceedings were scheduled to be held. This can suggest that the Learned Judge was of the view that the relative strength of the Crown's case against the Applicant is a factor that can be critical to a change of circumstance. As it turned out, the Committal Proceedings ended 26th April, 2021 some eight months later. This is the first hearing of a bail application following the conclusion of the Committal Proceedings.
- [29] To determine whether or not there has been any change of circumstance, one need only peruse Warner's affidavit what is new in the present affidavit as compared to the first affidavit of June 2020. Among the things that Warner mentions for the first time in his affidavit in this matter are the following:
- i. Since his previous application, he has been committed to stand trial;

- ii. In the three months since being committed to stand trial he has not heard anything further and it appears to him that the Crown is not yet ready to try his case;
- iii. Having heard the evidence tendered at the Preliminary Inquiry, he considers the case against him as weak and tenuous;
- iv. The health and safety situation at the prison is critical given the overcrowding and the COVID-19 pandemic.

[30] The Crown did not respond to nor address any of those circumstances documented in the Applicant's affidavit. Rather, the focus was solely on paragraph 6 of Warner's affidavit where he expressed a desire to give a statement to the Office of the Director of Public Prosecutions but to date, nothing further was heard of this desire.

Evaluation of Circumstances

[31] The Applicant did not provide any details in relation to any of the issues that he raised in his Affidavit. For example:

- In relation to delay: by pointing out the time that it normally takes from arrest through to committal and how the general situation compared with his particular case;
- In relation to the tenuous nature of the evidence: by putting before the Court the actual relevant extracts of the deposition so the Court would have a sound appreciation of the case against him;
- In relation to the overcrowding at the prison: by presenting facts and figures as to what the remand prison population is like and the conditions of the accommodation as well as the impact of COVID-19 on the institution.

[32] The **Magistrates Court Pre-Trial Time Limits Guidelines 2003**, issued under the hand of the then Chief Justice of the Eastern Caribbean Supreme Court, ECSC, Sir Dennis Byron, provides at rule 7 (ii) which deals with 'Period of date of charge to preliminary inquiry':

"In proceedings in which a court is to hold a preliminary inquiry and the accused is in custody, the time within which the preliminary inquiry must be conducted must not exceed three months from the date on which the charge is laid."

[33] It is acknowledged that the Chief Justice **Guidelines** were not implemented in all the jurisdictions of the ECSC. It must also be acknowledged that the **Guidelines** 'are not cast in stone' and are flexible. But it must also be acknowledged that the **Guidelines** have been applied in ECSC jurisdictions where the homicide rate is six and sevenfold what it is in Antigua and Barbuda. In this matter Warner was arrested and charged on the 6th June, 2020. There is no indication as to when the Committal Proceedings began but it is clear from the Order in the previous bail application, that the Learned

Judge had reason to expect the committal to be completed prior to the 25th September, 2020. Crown Counsel Ms. Adams stated that Warner was committed on 26th April 2021, which is roughly 10 months after he was charged. There may be reasonable explanations for the extended period between Warner being charged and when he was committed; however no affidavit evidence was put before the Court explaining whether for example the delay was caused by the effects of the epidemic, or a result of the conduct of any of the Defendants or some other good reason.

- [34] Warner's concern about delay is that since his committal at the end of April, he has not yet been indicted by the Respondent. He has concluded that the Crown is not yet ready to proceed against him. The practical effect of Warner not being indicted is that any possible trial date is being pushed further into some unspecified future date.
- [35] In relation to the evidence, Warner described it as tenuous and said it would require the jury to speculate. Warner claimed that the only evidence against him was the allegation that he was in a vehicle captured on CCTV, in which the deceased was a passenger at one time. The Crown did not refute Warner's claim.
- [36] The conditions of the prison have been referred to and highlighted in judgments from the High Court. Generous discounts on sentences have been given to convicted prisoners because of the overcrowding and nature of the facilities at the institution. Morley J, who said he made annual visits to the prison, noted that ironically, persons on remand – like the Applicant – in fact experience worse conditions at the prison than convicted persons. In Regina v Elton Charles ANUHCR 2017/0025, Morley J stated at paragraph 21:
- “The prison is called ‘1735’, as that is when it was first used for custody. The facilities appear to date back to the 19th Century, more in keeping with 150 years ago, rather than the 21st century. Facilities are rudimentary. The prison is overcrowded. Remandees are often twelve to a cell with only six beds; allowed out often for only about six hours a day. Convicted prisoners in another section of the prison are in small cells and allowed out only during daylight hours, (oddly for longer than the remandees who are unconvicted, innocent until proven guilty). In the overcrowding there is potential for the spread of disease.”
- [37] To this “potential for the spread of disease” mentioned in Regina v Elton Charles, judicial notice must be taken of the very real impact that the COVID-19 pandemic has had, is having and could/is likely to have on the prison.
- [38] I have considered the passage of time, the unchallenged affidavit evidence of the claimant about the evidence at committal and the health conditions at the prison as relevant changes of circumstance. I find as a fact that there has indeed been a change of circumstance. But this acknowledgement of changed circumstance only provides the gateway for Warner's bail application to be considered. It is not conclusive on the granting of bail.

The Constitution and Right to Bail

[39] Consideration of bail in Antigua and Barbuda, like most countries of the ECSC, is governed by the provision of the **Constitution** and the common law. There is no **Bail Act** as obtains in some other Commonwealth Caribbean countries.

[40] There is the presumption of innocence and a general right to liberty.

[41] Floyd J, in a matter that arose in the Territory of the Virgin Island, **Allen Baptiste and Yan Edwards v The Commissioner of Police and The Director of Public Prosecutions** BVIHCV 2020/0220 and 0231 said at paragraph [27]:

“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.”

[42] In a matter that arose in the Commonwealth of Dominica, **Martin Seaman et al v The Chief of Police** DOMHCV 2015/0071, 73 and 74, Thomas J (Ag) said at paragraph [23]:

“The right to bail though not a fundamental right was always recognized in law and enforced.”

[43] The **Protection of Fundamental Rights and Freedoms of the Individual** provisions of **The Antigua and Barbuda Constitution Order 1981 Cap 23 of the Laws of Antigua and Barbuda Revised Edition 1992**, state the following in relation to the right to personal liberty of the subject and the provision to secure protection of the law:

“Section 5 (4):

Where accused is arrested, excessive bail shall not be required in those cases where bail is being granted.”

Section 5 (6):

If any person arrested or detained... is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial....

Section 15 (1):

If any person is charged with a criminal offence, then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Section 15 (2) (a):

Every person who is charged with a criminal offence – shall be presumed to be innocent until he is proved or has pleaded guilty.”

[44] There are two broad considerations when a defendant’s bail is being evaluated:

- 1) The likelihood of the defendant answering to his/her bail; and
- 2) The public interest.

[45] Under the first heading, likelihood of the defendant answering to his/her bail, the Court must consider:

- i. the nature and seriousness of the offence charged;
- ii. the strength of the evidence and probability of conviction;
- iii. seriousness of the punishment for the relevant offence; and
- iv. the character and conduct of the defendant.

[46] Warner is jointly charged with one of the most serious offences. Warner’s assertion is that the evidence against him is tenuous. That was the only evidence in this application about the strength of the evidence. It is noted that this is a case based on joint enterprise and that there are certain challenges regarding establishing proof against accomplices. Warner acknowledges in his affidavit, that a conviction would result in a lengthy term of imprisonment. In reference to character, Warner is a young man, with no antecedents, who joined the military since in his mid-teens.

[47] Regarding the public interest, the Court must consider:

- i. the length of time before trial is likely to take place;
- ii. any risk of interference with witnesses;
- iii. risk of the defendant offending while on bail; and
- iv. whether there is the possibility of prejudice to the preparation of the defence.

[48] Warner has been in custody for the past 14 months; he has not yet been indicted and in the scheduling of his trial, two factors that must be kept in mind is that there have been no jury trials in Antigua and Barbuda for about 16 months, and with four defendants, scheduling of the trial may well take some time to fit the schedule of four counsels. Nothing was put before the Court to suggest that Warner is likely to pose any threat to witnesses or likely to re-offend if placed on bail. The Applicant has not submitted that he would be prejudiced in relation to the preparation of his defence if he remains in custody.

- [49] A defendant would ordinarily be denied bail if there are substantial grounds for believing that he/she will fail to surrender to custody, or that he/she is likely to commit an offence while on bail; or there may be interference with witnesses or otherwise obstruct the course of justice.
- [50] I have not seen anything on the record where the Respondent has placed before the Court any suspicion or belief or anxiety that the Applicant is likely to abscond or will not show up for his hearing if admitted to bail or is likely to interfere with any witness or obstruct the course of justice in anyway.
- [51] In November 2013, the Honourable Mr. Patrick A. Brooks, Justice of Appeal (as he was then) of the Jamaica Supreme Court authored: "Bail – The Theory and Practice of Applications for Bail." Mr. Justice Brooks in the conclusion of his article stated:
- "Despite pressures placed on judicial officers to keep incarcerated a large percentage of individuals charged with serious offences, the imperative of the Constitution... is that these accused persons are presumed to be innocent of the allegations made against them and are entitled to bail pending their trial... The onus is on the prosecuting authorities to justify the denial of the individual's right to bail. This must be done by providing cogent reasons to the court.... If the court finds that any of the situations militating against the grant of bail have been proved, then it must consider whether the imposition of conditions would eliminate, or at least minimize, the risk of the occurrence."
- [52] The Crown has not advanced any reasons whatsoever to justify the denial of Warner's right to bail. It is therefore not necessary to consider whether there is a need for the imposition of any special conditions to minimize or eliminate any potential risks.

Grounds for Objecting

- [53] Where the Crown intends to object to an application for bail, it ought to put before the Court evidence to ground any submissions they would be making. Affidavits which contain the essential information ought to be filed. As Brooks JA stated in *The Theory and Practice of Applications for Bail*:
- "Considering the entitlement to bail, counsel for the prosecution must, as far as possible, be ready to answer the application and be able to justify any negative assertions made against the accused. For this reason, vague allegations by the investigator must be tested and probed in order to secure specifics. It must be borne in mind, not only that the strict rules of evidence do not apply but that the standard of proof, it seems, not the criminal standard of beyond reasonable doubt but the civil standard of a balance of probabilities."
- [54] Where the allegation from the Crown is, for example, that the Applicant is likely to abscond, there ought to be the demonstration of some reasonable basis for so believing, such as the Applicant has

the means to relocate, or external ties and contacts, or history or some other factor that points to that risk.

- [55] If there are concerns of possible interference or tampering with witnesses, then the Crown must put before the Court the general location of witnesses, or point to their vulnerability, or the relationship between the Applicant and the witness. The Court ought to be informed of the proximity of any witness residence or place of work that is likely to cross paths with any possible locations that the Applicant is likely to reside or work.
- [56] The history of the Applicant is also a relevant factor which the Crown may highlight through affidavit evidence. Here, the Crown is not just confined to putting before the Court the antecedent record of the Applicant, but may also refer to pending matters, other reports or threats.
- [57] As a Minister of Justice, the Prosecutor ought to be able to provide a fair, balanced and honest assessment as to whether any effective measures can be implemented to mitigate any of the challenges to the Applicant's application for bail.
- [58] The matters outlined above do not represent an exhaustive list but are some of the usual concerns that arise.
- [59] Chief Justice Smellie of the Cayman Islands in **R v Whorms, R v Clarke** [2008] CILR 188, noted that the evidential burden is on the prosecution to demonstrate that an Applicant ought not to be granted bail. He said that the default position at the pre-trial stage is to grant bail:
- “The burden may not, therefore, be reversed, by placing it upon a defendant, without infringing that principle and the presumption of innocence itself. If a person is presumed innocent until proven guilty, he cannot be required to prove that there should be no infringement upon his liberty, while his guilt is yet to be established.”
- [60] The Applicant's prayer is to be admitted to bail. The Crown has not shown why he ought not to have his prayer granted. Warner therefore not only could be admitted to bail, but should be.

Courts Order:

- [61] Armal Warner Junior is to be admitted to bail, with recognizance in the sum of \$40,000.00, and two sureties each in the like sum of \$40,000.00.
- [62] Mr. Warner is to observe the following conditions of his bail:
- 1) Reside with his mother and sister at Pares Village and he must not change residence without the express approval of a High Court Judge.
 - 2) Not to leave the jurisdiction of Antigua and Barbuda without prior approval of a High Court Judge.

- 3) Sign in at the Willikies Police Station once a week, on Monday's, sometime between the hours of 6:00 am and 6:00 pm, commencing the first Monday after he is released from custody.
- 4) Attend the Supreme Court when summoned and each and every adjourned date until completion of his matter.
- 5) Not to contact or communicate with any of the witnesses for the Crown whether directly or indirectly, or electronically or in person, about this matter or anything relating to this matter.

Consequences:

- [63] If a surety or both sureties consider that the Applicant, Armal Warner Junior is likely to breach any of his conditions of bail or is likely to abscond or is likely to commit an offence for which he can be arrested, the surety or sureties may apply to the High Court to be released from his/her/their obligations and Armal Warner Junior shall promptly abide with whatever order or directions may be given by the Judge.
- [64] If you Armal Warner Junior breach any of the conditions of bail, or if you are charged with any offence triable on indictment, you are to be brought as soon as practicable before a Judge of the High Court for consideration to be given to forfeiting the recognizance and a revocation of bail.
- [65] Copies of the Bail Order are to be served on the Commissioner of Police, the Chief Immigration Officer, the Director of Public Prosecutions and the Chief Magistrate.

COLIN WILLIAMS
High Court Judge

By the Court

Registrar