

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

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

CRIMINAL CASE No. BVIHCV 2021/0124

BETWEEN:

ROYDEN SEBASTIAN

Applicant

and

THE COMMISSIONER OF POLICE

Respondent

Appearances: Mr. David A. Penn, Counsel for the Applicant
Mrs. Kellee-Gai Smith, Counsel for the Respondent

2021: May 7th & 14th

JUDGMENT

[1] **FLOYD J:** This is an application for bail. The Applicant is 37 years of age. He was born in the British Virgin Islands on 30th May, 1983. He is charged with murder. The date of offence is 2nd September, 2020. The Applicant was arrested on 13th October, 2020, charged on 14th October, 2020 and has been in custody ever since.

THE FACTS

[2] On 2nd September, 2020, sometime after 9:00 p.m., a man armed with a handgun, entered a private residence where George Burrows and his five children resided. The man fired one shot at one of the victim's sons, missing him, and then pursued him through the house. As he passed the victim, who was watching television, the man shot Mr. Burrows once in the head, killing him. The gunman continued after his first target, through the house and outside into the street. When he could not

catch up to that person, the gunman turned to another of Mr. Burrow's sons. This young man was confined to a wheelchair. The gunman approached the disabled man, put the gun to his head and pulled the trigger several times. However, the gun jammed and failed to discharge. The gunman then struck the male in the wheelchair in the head with the gun and fled the area, making good his escape.

- [3] The gunman was described by witnesses as a black male, well built, over 6' 2" in height, wearing a white T-shirt and black pants. Information was received that the Applicant was at a nearby basketball court close in time to the incident and wearing the same clothing as described. CCTV footage was obtained showing a male, shortly after the shooting, walking near the basketball court, wearing a white T-shirt and dark pants.

- [4] The police interviewed several witnesses, including one, N.D., who was in a nearby residence at the time of the incident. The Applicant was known to that witness. N.D. recognized him. N.D. gave a statement to police. N.D. looked out the window into a well-lit but deserted street. N.D. heard a bang and observed several flashes of light in the kitchen of the victim's house nearby. N.D. heard another bang and saw a male exit the front door of the house. The man wore a white T-shirt, dark pants and dark boots. N.D. saw the male approach the victim's son in a wheelchair, put the gun to his head and pull the trigger several times. The gun did not fire and so the male struck the wheelchair-bound man in the head with the gun. The gunman then moved away towards the basketball court and disappeared. N.D. recognized the gunman as the Applicant and gave a photograph of the Applicant to police.

- [5] Police executed a search warrant at the residence of the Applicant on 6th October, 2020. On 13th October, 2020, the Applicant was located and arrested at the same basketball court, close to where the offence occurred.

- [6] On 14th October, 2020, the Applicant was interviewed under caution. He told police that he was at the basketball court at the time of the incident. He heard shots fired. He remained there for a while and then went home. He denied being involved in the murder.

THE POSITIONS OF THE PARTIES

- [7] The Applicant submits that he is entitled to bail. It should be granted as he is a citizen of this territory – a British Virgin Islander. He has a residence in Tortola with his brother. He has family here. The only Affidavit filed in support of the Bail Application was from a legal assistant in the law firm representing the Applicant. The Affidavit indicates that the Applicant provided DNA and fingerprints to police voluntarily. It also indicates that the names of witnesses who can confirm where the Applicant was at the time of the incident were given to police. The Applicant takes issue with the description of the gunman given by the witness, N.D., and says that it does not match his height or hairstyle. That witness' evidence does not accord with other witness' evidence. There is a complete lack of forensic evidence.
- [8] It is submitted that the Applicant is not a flight risk. He has ties to the community and conditions can be imposed to deal with any concerns that may exist regarding potential interference with witnesses and the preservation of public order. Although no other Affidavits were filed, the Applicant submits that his brother and others will act as sureties. They have assets that would satisfy bail considerations.
- [9] The Respondent relied upon an affidavit from the Investigating Officer, D/I Vernon Larocque, regarding the facts of the case. The Respondent describes the Applicant as a danger to interfere with the course of justice, including witnesses and the investigation. There is a significant public safety risk owing to the criminal record of the Applicant. The Respondent referred to the Applicant having access to firearms, however, no evidence was provided to support that assertion, save for the record of convictions for the Applicant.
- [10] The Respondent also referred to contact being made with witness N.D. by a private investigator on behalf of counsel for the Applicant. That has caused concern on the part of the Respondent and anxiety on the part of the witness, such that the witness has been placed into the Justice Protection Program. Other witnesses who still reside in the victim's home are described as being fearful of the Applicant.

- [11] To bolster its concerns regarding the Applicant interfering with witnesses and the course of justice in murder cases such as this, the Respondent refers to **Archbold's Criminal Pleadings and Practice**, and **Blackstone's Criminal Practice**, which confirm that the court must be satisfied that there is no significant risk to commit further offences if bail is to be granted. The Respondent directed the court's attention to the criminal record of the Applicant, which is significant. A copy of the record was filed. It consists of twelve entries commencing in April, 2005 and ending in March, 2013. Convictions include keeping a firearm without a license, possession of explosives, being armed with an offensive weapon, unlawful wounding and armed robbery. Sentences imposed included custody. A 20-year sentence for the armed robbery was reduced on appeal to 10 years, with an early release date of 18th March, 2019. The facts as outlined in the police affidavit reveal the robbery to be a very serious matter. It involved a bank robbery on 26th July, 2010 at 10:00 a.m. Three masked men armed with guns entered the bank and forced employees and customers to the ground. Money was taken and the men escaped. The Applicant entered a guilty plea to the charge.

THE LAW

- [12] 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 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.
- [13] I am guided by these authorities and considerations as well as by seminal cases such as **Devendranath Hurnam v The State**, [2005] UKPC 49 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**, [2007] ECSC J0115-11.

- [14] 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.
- [15] 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.
- [16] The court in the **Thelston Brooks** case at **paragraph 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**, of which the United Kingdom is a signatory, and which is therefore applicable to the British Overseas Territories. 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

ANALYSIS

- [17] The facts in this case are extremely serious. A man armed with a handgun enters a private dwelling house and essentially terrorizes its inhabitants. He shoots and kills one man, fires at another, chases that person into the street and when that person escapes, he turns his attention to a disabled man in a wheelchair who cannot flee. The man attempts to fire the gun at the person in the wheelchair but the gun jams, so he bludgeons him with the gun. There will, no doubt, be a number of issues for the court hearing the trial of this matter to review and determine. Part of that process will include a close review of the evidence of those who saw the incident and the culprit, in particular, N.D. But that exploration and review will take place in another forum on another day. As matters stand, the Crown has an eye witness who knows the Applicant and who identifies him as being the shooter. At the appropriate moment, that evidence, along with all the other evidence, will be tested. I note as well

that while the evidence known so far is relevant when considering the strength of the Crown's case, it is but one component for review at the bail stage.

[18] Judicial interim release is a significant part of the criminal justice system. However, such applications by their very nature 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. Additional evidence may or may not come to light later.

[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, his home and his employment. He was born here. It would have been helpful had the court been provided with more detail regarding potential sureties and confirmation of employment and residence for the Applicant. However, no affidavits from either the Applicant or any proposed sureties were tendered. They, of course are not mandatory, but when considering bail, especially for a crime as serious as this, it would have been of great assistance.

[20] 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, and despite the lack of detailed supporting material from the Applicant, I am not persuaded that the Applicant, if released on bail, would flee the jurisdiction and fail to appear in court as required. Even considering the Crown's case and the serious nature of the charges, I do not believe the Applicant to be a flight risk, owing to his close connections to this community, his employment and his family. To her credit, counsel for the Respondent does not, in any event, pursue this issue as a basis for opposing bail. I am obliged, however, to consider it none the less.

[21] 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? The Respondent has submitted that the Applicant will carry out such interference in the course of justice and with witnesses.

[22] **Blackstone's Criminal Practice 2020 at para. D7.31 states:**

Under para 6ZA, an accused who is charged with murder may not be granted bail unless the court is of the opinion that there is no significant risk that the accused will, if released on bail, commit an offence that would, or would be likely to, cause physical or mental injury to any other person...

[23] It is here that I have concerns. Having regard to all of the circumstances of this case, is detention necessary for the protection or safety of the public, including any witness? Is there a substantial likelihood that the Applicant will, if released from custody, commit an offence or interfere with the administration of justice? The fact that several Crown witnesses are fearful and one has become involved in the Justice Protection Program are indications of the concern on the part of the Respondent for their safety. In considering this category, I note the gravity of the offence, the significant penalty potential if convicted and the stark circumstances surrounding the commission of this offence, including the use of a firearm. Currently, the Territory is enduring an increase in gun related violence and the public is understandably concerned. The use of a firearm and the taking of a life are extremely serious matters.

[24] The court is troubled by the record of the Applicant. It is serious and substantial. The entries for wounding, possession of a firearm and armed robbery, with the latter resulting in a lengthy sentence, give me pause. There are multiple entries for crimes of violence, including the use of firearms and explosives. The record is not so old as to be irrelevant nor are the entries too few to be discounted. The Applicant had only been released from custody for over one year after serving 6 years of a 10-year sentence for armed robbery, when this incident occurred. The facts of that offence were also very serious, involving as it did, a daylight bank robbery by three masked men armed with guns.

[25] After reviewing all of the material filed and upon hearing the able submissions of counsel, I have serious concerns on the second ground. At this stage, the Crown's case appears to have merit. There is at least one eye witness who identifies the Applicant, although issue will no doubt be taken with that evidence eventually. That, combined with the significant and violent record for the Applicant, leads me to conclude that there are very real concerns with him interfering with the administration of justice and committing further crimes if released. I am not satisfied that any suitable bail conditions could be crafted to prevent that. His record for violence and the possession and use

of firearms cannot be discounted nor overcome. The risk is too great. The protection and safety of the public is paramount.

- [26] The Application for judicial interim release is therefore dismissed. The Applicant is to remain in custody in this matter.

Richard G. Floyd
High Court Judge

By the Court

Registrar