

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

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

CRIMINAL CASE No. BVIHCR 2020/0163

BETWEEN:

NYRON ERICKSON

Applicant

and

THE SUPERINTENDENT OF PRISONS

Respondent

Appearances: Mr. Edward Fitzgerald QC with Ms. Reynela Rawlins, Counsel for the Applicant
Mr. John Black QC with Mrs. Fiona Forbes-Vanterpool for the Respondent

2021: March 12th

JUDGMENT

[1] **FLOYD J:** This is an application for bail. The Applicant is a young man born on July 12, 1992. He is the subject of an extradition application. He faces charges in the USVI of conspiracy to launder monetary instruments and conspiracy to conceal and smuggle over \$10,000 into the United States. It is generally agreed that he would be liable upon conviction to a term of imprisonment in the range of 21 – 68 months.

[2] The Applicant has been in custody since he turned himself in on August 30, 2020. However, it is also generally agreed that he was knowingly at large since January, 2020.

THE POSITIONS OF THE PARTIES

[3] The Applicant submits that he is entitled to bail. It should be granted as he is a citizen of this territory – a BVI Belonger. He has a residence and a business in Tortola. He has family here,

including 3 children. His mother and father filed affidavits indicating they are prepared to act as sureties for the Applicant. He has a minimal and unrelated criminal record. All of that was known to the court on the earlier applications.

- [4] Affidavits from the father and mother of the Applicant were previously filed with the court. It is submitted that the Applicant is not a flight risk. He has ties to the community and conditions can be imposed to deal with any concerns that may exist regarding potential interference with witnesses, attending court when required and remaining in the jurisdiction.
- [5] The Respondent referred to police affidavits from D/I David Moore and D/S Gilbert Charles which were filed with the court on 9th September, 2020 in regard to an earlier bail application. Those affidavits reveal that the Applicant was at large for a considerable period of time, knowing that he was wanted by police, but chose not to deal with the matter and turn himself in. Eventually, however, he did so. He also has access to boats and owns at least one vessel. The Applicant is therefore described as a flight risk.
- [6] The Applicant points out that there were two co-accused in this case who were charged and granted bail in the United States. Eventually, those charges were dismissed as a result of “actions designed to gain unfair prosecutorial advantage.” This hampered effective administration of justice and led to substantial delay. **United States v. Erickson et al Case No. 3-19-cr-0007 & Case No. 3:19-cr-0053.**
- [7] In reply, the Respondent described that as a procedural matter unrelated to the charges against this defendant. The prosecution will be put to the strict proof of its case at trial, if and when that occurs.
- [8] The Applicant referred to the delay in proceeding with this case since his arrest and detention. Each side attributed the reasons for such delay to the other. A series of emails between Crown Counsel and previous and current Defence Counsel were filed. References were made to requests for further particulars, material being filed at the last minute, sometimes voluminous in size, thus necessitating adjournments, accommodation of court and counsel schedules. As a result, hearing

dates moved from November 4, 2020 to January 18, 2021 to February 8th – 10th, 2021 to the current hearing date of 4th – 7th May, 2021.

- [9] Of particular note is the fact that the Applicant has been denied bail twice before in this case. A Senior Magistrate and a High Court Judge have denied bail to the Applicant in this case. The Magistrate on 30th August, 2020 and the High Court Judge on 25th September, 2020. From what I can glean from the material and submissions, both judicial officers had concerns regarding the Applicant being a flight risk, particularly based upon the delay in turning himself into police. It is this previous denial of bail that is key as it raises the issue of whether or not there has been a material change of circumstances, allowing for further bail considerations.
- [10] The Applicant submits that there has been a material change in circumstances since the bulk of the Crown's case was provided after the bail hearing in the High Court on 25th September, 2020. This has resulted in a number of significant arguments against extradition becoming available. Counsel for the Applicant submits that it is now clear that the extradition hearing will be strongly contested from both sides. It is also now clear that the time required to argue the matter will be substantial.
- [11] The Respondent submits that nothing found in the Certificate to Proceed and the extradition documents changes the material found in the two police affidavits outlining the flight risk argument which were available to the court in the previous bail application. Further, the fact that the substantive matter will be vigorously contested with confident arguments is not new and does not constitute a material change in circumstances.

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 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. I note that there are no criminal charges in this Territory in this case but the general principles remain.

- [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] 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, [2015] 2 S.C.R. 328, 321 C.C.C. (3d) 307**. The court held that bail consideration involves balancing all 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.
- [17] In the case of **R v Huey Gowdie, [2012] JMCA Crim 56** at **paragraph 15**, the Court of Appeal of Jamaica listed the considerations for a court in a bail application. Most are the traditional ones but I note that court included "the strength of the evidence of his having committed the offence or having failed to surrender to custody", which of course is a consideration here.

- [18] However, to get to that point, the court must determine that there has been a material change in circumstances when there has previously been a bail application. This court has not been provided with any transcripts of the last bail hearing although material was filed very recently and was referred to in oral submissions. It appears to be common ground that the learned Justice found the Applicant to be a flight risk. Much of that determination was based upon the extended time it took for the Applicant to deal with the matter and present himself to the arresting authorities. If that is so, nothing that was provided subsequently by way of disclosure of the extradition case affects that determination. It goes without saying that the extradition application is a serious one. Further, it is obvious that it would be a vigorously contested matter because of the consequences to both sides. Finally, it is hardly surprising that some time would be required to argue the entire the matter to its conclusion. None of this is new and would have been considered by the court previously.
- [19] 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.
- [20] In this case, although additional facts may now be available that were not previously available, those facts go to the extradition case proper. Nothing subsequently revealed goes to the issues for bail consideration as they would have been before the previous Justice, save perhaps the strength of the prosecution's case. But is that an end to it? Do any intervening events require review as they pertain to bail, in the interests of justice? This approach has been confirmed in several Regional cases. Cottle J. stated **In The Matter Of An Application for Bail by Raffique Chewitt, Dwaine Sandy & Noval Sayers, SVGHCRB 2014/0027, 2015/0028, 2016/0030 at para 10:** As I understand the applicable rule, an unsuccessful application for bail to the High Court cannot be renewed unless there is a change in circumstances relative to the application for bail of existing circumstances which had not been previously drawn to the attention of the bail court.

- [21] Similarly, Persad J. in the case of **The Queen v David Brandt**, MNIHCR 2019/0008 at para 4 stated: The Defendant would have to satisfy the court that there has been a change of circumstances since the last bail hearing, before this court could even begin to consider the merits of whether bail should be considered. Both of these cases were referred to by the Respondent.
- [22] Judicial interim release is a significant component 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. Once a decision is made to detain, there is no open-ended discretion for the court to review and vary that decision. The court must determine whether it is appropriate to exercise the power of review. That will only be appropriate where there is admissible new evidence showing a material and relevant change in the circumstances of the case.
- [23] Counsel for the Applicant also provided cases that are helpful. In the case of **The Queen on The Application of B v Brent Youth Court**, [2010] EWHC 1893 (Admin), the court considered, amongst other things, the “effluxion of time” and the strength of the case against the claimant. Both of these arguments had not been made previously and have parallels to the case at bar. I note there are further special considerations in that case because it involves a youth with the applicable legislation. That of course is not the case here.
- [24] The second case provided by counsel for the Applicant, **Alket Dauti v Court of First Instance West Flanders**, 2018 WL 07252461 (2018), also referred to delay caused by the adjournment of the extradition hearing as being an acceptable change of circumstances. The court, however, makes no mention of the reason for that adjournment, nor does it attribute it to one or other of the parties. Of course, counsel for the Respondent in the case at bar submits the delay is attributable to the Applicant and points out that one cannot create the delay and then seek to benefit from it.

ANALYSIS

- [25] The facts in this case are serious. There will be a number of issues for the court hearing the application to review and determine. However, it does appear that a good deal more factual

elements of the Crown's case may now be known then were before the Bail Courts previously and certainly much more has been disclosed to the Applicant. The court also recognizes the delays in the progress of this case through the criminal justice system. Although much of that delay appears to rest with the Applicant, I am not prepared to attribute all of it to him. Therefore, on those two 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.

[26] 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 business. However, there is more for me to consider on the issue of flight risk and court attendance if released. By his own affidavits, and a total of four have been filed over time, the Applicant confirms his relationship with boats and boating. Although I note his affidavit of September 4, 2020 at paragraph 4 refers only to being a truck driver and heavy equipment operator, his other affidavits refer to boat ownership, boat use and boat repairs.

[27] The affidavit of D/S Moore goes much further. It confirms sightings of the Applicant on vessels, participation in powerboat competitions, ownership of one or more boats and having an interest in a boat yard. Indeed, at least one sighting of the Applicant on board ship occurred while the arrest warrant for him remained outstanding. In this jurisdiction, access to the sea by ship, given the close proximity of other islands, is a consideration.

[28] The police affidavit goes on to describe instances of the Applicant travelling overseas while he was wanted by police on the arrest warrant. That includes the chartering of a plane to fly to St. Maarten. Of note, the travel documents associated to the Applicant for that journey apparently include passports from the BVI and the UK, although the latter was expired, and an expired United States Visa card.

[29] According to the police affidavit and Anguilla police, the Applicant made an appearance in Anguilla, although no formal record of the Applicant entering that jurisdiction can be found.

- [30] The police affidavit goes on to confirm that multiple announcements were made by the BVI Police Service in local media confirming to the public that the Applicant was a wanted man.
- [31] The police affidavit indicates instances of the Applicant actually evading capture on 14th April, 2020 and 12th July, 2020 when police moved on residences where he was located.
- [32] A second affidavit was prepared and filed by D/I Charles. This affidavit describes instances of contact with police by two different defence lawyers apparently acting for the Applicant, in order to make arrangements for the Applicant to turn himself in to the authorities. One occurred in April, 2020 and the other occurred in July, 2020. Neither resulted in the Applicant actually coming into police custody.
- [33] After reviewing all of the material filed and upon hearing the able submissions of counsel, I have serious concerns on the primary ground, that the Applicant, if released, would flee the jurisdiction and fail to attend court on this matter. His experience with vessels, his relationship to them and his access to them is clear. His travel to other jurisdictions while the arrest warrant was outstanding, particularly to a jurisdiction that has no formal record of him entering legally, is troubling. His bold and successful attempts to evade capture by the police is troubling. It is clear that he was aware of the warrant as counsel acting for him apparently made enquiries with the police.
- [34] Despite eventually turning himself into authorities, his behaviour for many months prior, is concerning. I am not satisfied that there are conditions that could be crafted to satisfy this concern. Further, to release this Applicant on bail in the face of this behaviour, and on these facts, would lead to a serious erosion in public confidence in the administration of justice. The Application for judicial interim release is therefore dismissed. The Applicant is to remain in custody in this matter. His next appearance date remains May 4 in the Magistrate's Court.

Richard G. Floyd
High Court Judge

By the Court

Registrar