

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

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

**CRIMINAL CASE NO. 40 of 2011
BVIHCV2020/0220
BVIHCV2020/0231**

BETWEEN:

**ALLEN BAPTISTE
YAN EDWARDS**

Applicants

and

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

Respondents

Appearances: Mr. Patrick Thompson for the Applicant, Allen Baptiste
Mr. Sherfield P. Bowen for the Applicant, Yan Edwards
Mr. O'Neil St. A. Simpson, Principal Crown Counsel, for the Respondents

**2020: December 16th
2021: January 11th**

JUDGMENT

[1] **FLOYD J:** This is an application for bail brought for the first time by the Applicants, despite having been incarcerated for several years. The Applicant, Allen Baptiste, has been in custody on this charge since 4th April, 2011 and the Applicant, Yan Edwards, has been in custody on this charge since 17th March, 2011. That length of time is a factor for consideration.

- [2] The Applicants are 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 Applicants 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. Following that development, this bail application was brought.
- [4] The current state of the case for the prosecution is somewhat 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. Learned Counsel for the Respondents readily admitted the appellate court’s view of the evidence.
- [5] The Crown’s case revolved around several witnesses who were friends with the Applicants. Allen Baptiste, Yan Edwards, Vaughan Cameron, Henito Penn, Keithroy Joseph, Deshon Richards, Allen Wheatly and Keri Harrigan were all known to each other. The general facts are as follows:

THE FACTS

- [6] Edwards told Cameron and Baptiste that he was displeased with 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 Wheatley’s residence, Edwards, Baptiste, Penn and Cameron were present when a box was opened which contained a number of items, including several

¹ [2018] ECSC J0130 – 2 at para 54

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.” Edwards took one gun and 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’.

- [7] The next day, Cameron received a phone call from 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. Cameron then used Richards’ phone to call Edwards. Cameron recognised Baptiste as the one who answered his call. Baptiste said they had seen “the girl” and if he heard shots, to stay put. Richards said he had earlier given his phone to Cameron. Cameron then heard three shots. He saw Harrigan down and covered in blood. Penn, who was elsewhere, also heard three shots. 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. 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 Harrigan down and bloodied. He could not identify the gunman. Richards heard the shots, then received a phone call from 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, in attempting to determine the strength of the Crown’s case for the purpose of considering these bail applications, the court is hampered by the fact of the multiple trials. Learned Counsel for the Applicants 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 apparently confirms male DNA was found on the shell casings but it was not the DNA of either Applicant. 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. Learned Counsel, Mr. Thompson for the Applicant, Baptiste, described the Crown witnesses, Richards and Wheatley as either hostile or reluctant and the remaining witnesses, Penn and Cameron, as unpredictable. There are now gaps and inconsistencies with some of the evidence from Richards and Wheatley. Learned Counsel, Mr. Bowen, for the Applicant, Edwards, 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 Cameron. However, at this stage, we do not know how the remaining evidence for the Crown will unfold. 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 take years to prosecute. 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, BAPTISTE

- [11] Mr. Thompson, for the Applicant, Baptiste, submitted that his client was not a flight risk and that there was no evidence that he would interfere with any witnesses nor with public order. An affidavit of Allen Baptiste was provided. It indicated that he was a BVI Belonger, had a home in Tortola and had employment as a painter prior to his incarceration. His children and their mother had relocated to the United Kingdom and to the United States of America. There is no desire to join them but rather to simply communicate with them successfully. They are not a family unit and communication is difficult from prison.
- [12] Mr. Thompson submitted that the case for the Crown was not a strong one. Assertions in the police affidavit relating to the state of the evidence and the Applicant being a flight risk were disputed. Difficulties with the evidence over time, a lack of physical evidence, a lack of forensic evidence, including DNA evidence, and questionable identification evidence, was pointed out. Unsubstantiated claims by the prosecution of flight risk and interference with witnesses were referred to. The affidavit of the Applicant, Baptiste, readily admitted that he had generated a criminal record while incarcerated. A sentence of 12 – 18 months was imposed upon guilty pleas to charges of criminal damage and threatening language. The court was advised that Mr. Baptiste

had friends and relatives willing to act as sureties, one of whom was a customs officer who owns real property.

- [13] Mr. Thompson asserted that the delay in dealing with this case was entirely attributable to the Crown. There was systemic delay relating to the overall prosecution of the charge and to the appellate stage. A lengthy delay was experienced in the production of transcripts for the appeal, a change in Crown Counsel assigned to the case delayed the prosecution, the impact of natural disasters such as Hurricane Irma and the COVID-19 pandemic, all delayed this case. In the face of such delay, Mr. Baptiste suffered extreme prejudice by remaining in custody. That prejudice was amplified by the fact that there was no recognized timeline for the hearing of the appeal and, therefore, for the continuation of the trial. Mr. Thompson went further and submitted that the delay in the prosecution of this case, which was likely to continue well into the future, was manifestly unjust, and would result, in his opinion, in an eventual permanent stay of the case as an abuse of process. To support that position, Mr. Thompson relied upon the case of **Charles, Carter and Carter v The State**², a decision of the Privy Council. Although the court at **paragraph 18** of that decision recognised that “it would be wrong to apply conditions and practices in England in this matter to cases in Trinidad and Tobago,” it went on to confirm at **paragraph 20** that the complaint involved not only the ground of delay but a third trial following an inconclusive jury verdict and a quashed conviction. Parallels were therefore drawn with this case.

THE POSITION OF THE APPLICANT, EDWARDS

- [14] Mr. Bowen for the Applicant, Yan Edwards, focused much of his argument on the interlocutory appeal of the Crown that interrupted the trial. However, the determination of that issue, on its merits, is for another court 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.

² (1999) 54 WIR 455

- [15] Mr. Bowen also questioned the strength of the Crown's case. He described the evidence as having become unreliable over the course of time and that there were now significant evidentiary issues in the Crown's case. That included problems with the testimony of Richards and Wheatley, a lack of forensic evidence and issues with identification.
- [16] The affidavit of the Applicant, Yan Edwards, 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. He was a firefighter, employed by the Territorial Fire Service. Mr. Edwards 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 submitted. As such, it was submitted that Mr. Edwards was not a flight risk and there was no reason to believe that he would interfere with witnesses. Mr. Edwards was also candid enough to indicate that he was convicted of another offence which generated a sentence of 12 years. This was confirmed and elaborated upon in the submissions of the Respondent. The criminal record for Mr. Edwards was tendered. That record actually 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.
- [17] Learned Counsel for the Applicant, Edwards, called as a witness, Mr. Verne Garde, Superintendent of Prisons. This testimony, in conjunction with a letter authored by Supt. Garde, confirmed that Mr. Edwards received a warrant of committal for the 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 programing of the Applicant, a recommendation for early release was forwarded to the Office of the Governor on 7th March, 2019. However, to date, no response had been received with no reason given.

THE POSITION OF THE RESPONDENT

- [18] Learned Counsel for the Respondent, Mr. Simpson, submitted that although the Applicant, Edwards, qualified for early release, it remained within the Governor's prerogative to grant or not, and there were absolutely no mala fides to be attributed to any office, in the lack of response.
- [19] Mr. Simpson took the position that the bail issue for the Applicant, Edwards, had to be considered in light of the fact that he was currently serving a sentence. The granting of bail, he submitted, was therefore a moot exercise. He did admit, however, that while there may be circumstances when an Applicant under sentence could apply successfully for bail, this case was not one of those.
- [20] Mr. Simpson also pointed out that the victim in the conspiracy to commit murder conviction for Mr. Edwards was a witness in this trial. That increased the danger of re-offending and potential witness interference, if Mr. Edwards was to be granted bail. This position generated a vigorous response from both Defence Counsel. It was submitted that the victim, Melbourne Francis, was no longer a witness when a severance order was granted in 2013. Mr. Francis passed away in May, 2013 and the Crown indicated that there was no reliance on the deposition of Mr. Francis. While the role of Mr. Francis and an earlier robbery that occurred in January, 2011 may have been part of the police theory, it was not relevant to this trial. Eventually, it became clear during submissions, that the Crown may have a theory for this trial that involved a continuum of events in which Mr. Francis may have played a role. However, it seems very remote at best.
- [21] Mr. Simpson responded to the defence criticism of the strength of the Crown's case by referring to the need to allow a jury determine the facts. That may, of course, necessitate a new trial, although that is yet to be confirmed. He relied upon the police affidavits to support the Crown's case. To his credit, Mr. Simpson admitted that this was not an overwhelming case for the prosecution.
- [22] Mr. Simpson was candid in advising that the Crown had no objection to bail for the Applicant, Baptiste, based upon his immigrant status. Rather, he submitted that the Applicant posed a danger to the public and to witnesses, and was a flight risk. He relied upon the gravity of the offence, combined with the potential for a significant sentence, to tip the balance away from the

presumption of innocence and individual liberty, to the protection and safety of society and the administration of justice, as outlined in **Labonne (JV) v Director of Public Prosecutions**³.

- [23] Mr. Simpson submitted that both Applicants could communicate with children and family from within the prison and that the Applicant, Baptiste, having children outside the country was an incentive to flee, if released.
- [24] Mr. Simpson referred to the criminal records of both Applicants as indications of the danger they posed to the public generally and to witnesses specifically. In the case of Baptiste, his record was generated while in custody. If custody could not prevent Baptiste from offending, how could any bail conditions compel his compliance? He also 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.
- [25] Mr. Simpson was not prepared to accept the assertion that all the delay in this case was attributable to the Crown. He pointed to a two-year delay in filing the appeal, for example, and submitted that the natural disasters of hurricane and pandemic, which closed the courts for a time, were beyond anyone's control and could certainly not be attributed to the Crown.
- [26] Of significant interest is the position that Mr. Simpson promoted that the court should look to the fact that the Applicants were convicted by a jury, even though those convictions were subsequently overturned on appeal, when examining the strength of the Crown's case and when considering whether any bail conditions would be followed. That position was, of course, vigorously opposed by counsel for the Applicants, who argued that the presumption of innocence was paramount and any overturned conviction should be disregarded.

³ [2005] SCJ 38

THE LAW

- [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, 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.
- [28] In the seminal case of **Devendranath Hurnam v The State**⁴, the Privy Council, at **paragraph 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 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.”
- [29] The Privy Council went on to confirm the reasoning of the Magistrate in the **Hurnam** case as being correct. It was noted at **paragraph 25** that:
- “The reasoned judgment of the Magistrate cannot be faulted. He did not overlook, minimise 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.”
- [30] In another notable case, **Thelston Brooks v The Attorney General and The Commissioner of Police**⁵, George-Creque J. (as she then was), cited the **Hurnam** case with approval when she said, at **paragraph 12**:

⁴ [2005] UKPC 49

⁵ [2007] ECSC J0115 – 11

“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.”

[31] The court in the **Brooks** case at **paragraph 19** referred to five grounds for refusing bail, recognised 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.

[32] In the case of **R v Huey Gowdie**⁶, the Court of Appeal of Jamaica listed the considerations for a court in a bail application, including:

- (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.

⁶ [2012] JMCA Crim 56 at paragraph 15

- [33] 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**⁷. In that case, the court at **paragraph 87**, held that bail considerations, including the strength of the prosecution's case, the gravity of the offence, circumstances surrounding the commission of the offence (including whether a firearm was used), and the fact that the accused was liable, upon conviction, to a potentially lengthy term of imprisonment, were not exhaustive. A court should not automatically order detention even where the four listed circumstances are made out. Instead, a court must consider all of the circumstances of a case, paying particular attention to the four listed. No single circumstance is determinative. Other circumstances that might be relevant include the personal circumstances of the accused (age, criminal record, physical or mental health, and membership in a criminal organization), the status of the victim and the impact on society of a crime committed against that person and the fact that the trial of the accused will be held at a much later date. The court held, "this 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".
- [34] 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.
- [35] These cases and others are instructive. They provide guidance and hold that when making bail determinations, 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.

⁷ [2015] 2 S.C.R. 328, 321 C.C.C. (3d) 307

THE ISSUE OF DELAY

- [36] The issue of delay formed a large part of the basis for each application in this case, especially as advocated by learned counsel for the Applicant, Edwards. I am satisfied that delay is an issue that I can consider when contemplating bail. The issue of delay as it pertains to a ground for a stay application and the role that bail may play in that process was explored in the case of **Coecillia St. Romaine v The Attorney General**⁸. At **paragraph 27**, the court referred to a balancing process including “the failure of the state to allocate sufficient resources to ensure that prosecutions take place in a reasonable time. 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 some attention to the steps taken by the accused to complain about the delay to bring the matter to trial.”
- [37] Belle J., at **paragraphs 42 and 43** in the **Coecillia St. Romaine** case went on to hold that the delay was not to be attributed solely to the actions of the State. The interests of justice were to be considered as a whole and a balancing of interests was to occur. What must be recognized, however, is that in the **Coecillia St. Romaine** case, the court was provided with a large amount of material and evidence as to the reasons for the delay and how it should be attributed. I do not have that in this case.
- [38] This court examined the issue of trial delay in the case of **Selwyn Charles v The Attorney General**⁹. Generally, the longer the delay, the more difficult it is to be accepted. At **paragraph 27**, the court listed the factors to be considered when assessing delay to include: **a)** the length of the delay, **b)** the reason or explanation given for the delay, **c)** the responsibility for the accused to assert his rights (waiver), **d)** prejudice to the accused and **e)** the nature of the charges. The court went on to hold at **paragraph 28**, “delays can be attributed to either the Crown or the accused & the court must carefully examine the reason given”. Unfortunately, in this case, I do not have sufficient material and evidence to fully examine all of these factors.

⁸ [2012] ECSC J0530 – 1

⁹ [2011] ECSC J0302 – 1

[39] In the case of **Gibson v The Attorney General of Barbados**¹⁰ at **paragraph 61**, 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.”

[40] The amount of time it is taking to bring this case to a conclusion is, without a doubt, lengthy. Such delay creates a hardship for all of those affected by the case, not just the accused but also the complainants and the witnesses. 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 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 Applicants must therefore accept some responsibility for what flowed from that. Such applications should be brought in a timely fashion at the pre-trial stage.

[41] In this case, 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. In order for me to analyze and apportion responsibility properly for the delay throughout, would require more evidence than I have. 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. I accept that the Applicants have been incarcerated in this case for a long time. It is a factor to be considered but I do not accept that the entire time can be laid at the feet of the Respondent.

¹⁰ (2010) 76 WIR 137

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 serious crime. I accept the submissions from the Applicants that the allegations found in the police affidavit from the Respondent are overbroad and not entirely substantiated by the facts in evidence. The reference to a connection between an earlier robbery and this incident is vague and unsubstantiated. The reference to one Applicant being the disguised shooter is entirely without foundation. The evidence in this case is circumstantial. Identification is a live issue. The Respondent's submission that the victim in the conspiracy to murder case for which the Applicant, Edwards, was convicted, is a witness in this case, is also unsupported. Of note, the Affiant, D/I Harford, states that the case is strong, yet he admits that the Court of Appeal found the evidence to be not exceptionally good. He baldly asserts the Applicant, Baptiste, to be a flight risk but gives no basis for that belief. It is disappointing that D/I Harford concludes his affidavit by alleging that the Applicants have advanced no exceptional or extraordinary grounds that justify their liberty, when we know that liberty is a fundamental right coupled with the presumption of innocence, and the burden rests with the Crown to justify detention. Therefore, although, in light of the severity of the facts, 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] The police affidavit submitted in regard to the Applicant, Edwards, also refers, in error, to a belief that exceptional circumstances must be advanced by the Applicant to achieve bail. The Affiant, Vernon Larocque, appears to assert that the Applicant, Edwards, must serve his entire sentence until 2024 (actually 2023) and therefore cannot be released on bail. I accept the evidence on behalf of the Applicant, Edwards, that he is actually entitled to early release, although that application has not been accepted by the Governor. Despite the able submissions of the Respondent, I am not persuaded that the Applicant, Edwards, nor anyone else currently serving a sentence, could not apply for bail nor should such an Applicant be automatically denied bail on that basis alone. To state otherwise would fly in the face of the right to bail and the presumption of

innocence. Any sentence being served by an Applicant for bail must be examined and it will be a factor for consideration, but it cannot preclude bail considerations, *ab initio*.

- [44] Similarly, the submission of the Respondent that the fact that a jury returned a guilty verdict in this case, even though that conviction was subsequently overturned on appeal, should be considered by this court and somehow confirms the strength of the Crown's case, cannot be accepted. I cannot and do not consider, nor do I take anything, from any previous conviction that was successfully appealed. To do otherwise would conflict with the presumption of innocence, the right to a fair hearing and the right to bail. The fact that an appeal took place, which contributed to the overall delay in this case, is noted, but nothing more.
- [45] The Applicant, Baptiste, is a BVI Belonger residing in Tortola. He has a trade and past employment. He has friends and family that support him and are willing to act as sureties. He therefore has ties to this community. His children and the mother of those children, however, now reside overseas. He has a short criminal record (threatening language and property damage) which resulted in a term of incarceration and which was generated while in custody on this charge.
- [46] The Applicant, Edwards, 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. He has a history of employment and attends a local church. He too has ties to this community. Like the Applicant, Baptiste, he has a criminal record. However, that record is substantially different to that of Baptiste. It consists 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 has qualified for early release. That appears to have been based upon his good behaviour while serving his sentence. Without question, he is entitled to apply for bail on this charge, however, his record and the nature of his convictions are troubling, especially when considered in light of the nature of the charge he currently faces.

- [47] 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, I am not persuaded that either 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 both Applicants have already spent several years in custody on this charge. In sum, I do not find the Applicants to be a flight risk, owing to their close connections to this community. The Respondent has therefore failed to show cause on this ground.
- [48] Turning to the second ground, the public safety component, I must consider whether there is a substantial likelihood that the Applicants, 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 Applicants. Notwithstanding that, I must also consider the criminal records for each Applicant. And it is there that I must distinguish the two. The record of the Applicant, Baptiste, is brief and unrelated. The record of the Applicant, Edwards, is however, serious and substantial. The entries for wounding and conspiracy to commit murder, with the latter resulting in a lengthy sentence for which he remains incarcerated, give me pause. Although I have some concern with the Applicant, Baptiste, as it pertains to the protection and safety of the public, including witnesses, and the likelihood of the commission of further offences, I am satisfied that those concerns can be alleviated with strict terms of bail and the use of sureties. I am not so satisfied with the Applicant, Edwards.
- [49] I note the evidence in the Crown's case that places a gun in the hands of the Applicant, Edwards, combined with threatening words, close in time to the shooting of Mr. Harrigan. There is no such evidence for the Applicant, Baptiste. That, combined with the significant and violent record for the Applicant, Edwards, leads me to conclude that there are very real concerns with him interfering

with the administration of justice and committing further crimes if released. There are no suitable bail conditions that would effectively deal with those concerns. Furthermore, I am satisfied that, to allow the Applicant, Edwards, to be released in the face of this alleged vicious crime, with the record that he has, would erode public confidence in the administration of justice. I do not have the same concerns for the Applicant, Baptiste, in his circumstances.

[50] I have also considered the issue of delay in reaching my decision for each Applicant. As I have already noted, I am concerned about the length of time it has taken to prosecute this case. But I am unable to adequately apportion the delay between the parties, based upon the material I have been provided with. Delay does play a factor in my considerations for bail. In the case of the Applicant, Baptiste, all of the time he has spent in custody relates to this charge, and the case has still not been resolved. However, the Applicant, Edwards, was serving a sentence throughout the majority of the time he was in custody for this charge. That disparity is important to note and augurs more towards release for Baptiste than it does for Edwards.

[51] For all of these reasons, the Application for bail of the Applicant, Edwards, is hereby dismissed. He is to remain in custody on this charge. The Application for bail of the Applicant, Baptiste, is hereby granted. Allen Baptiste is therefore released on a recognizance of bail on the following terms:

- i. There shall be four sureties: Debbie Thomas, Uly Thomas, Roselie James and Denise Stout. Bail is set in the amount of \$250,000 bond, with a cash deposit of \$25,000.
- ii. Allen Baptiste shall be bound by the following conditions:
 - (a) Report to and sign in at the East End Long Look Police Station every Monday, Wednesday and Saturday between the hours of 6:00 AM and 6:00 PM, commencing on 13th January, 2021.
 - (b) Reside with the surety, Denise Stout.
 - (c) Remain in your residence at all times except when in the company of and immediate presence of one of his sureties.
 - (d) Do not contact or communicate in any way either directly or indirectly by any physical, electronic or other means with any Crown witness in this case, especially Vaughan Cameron, Deshon Richards, Keithroy Joseph, Allen Wheatly and Henito Penn, nor with the co-accused, Yan Edwards.

- (e) Do not be within 50 metres of any of the above-named persons, nor any place where the above-named persons live, work, go to school or frequent.
- (f) Do not possess any weapon, firearm, pellet gun, flare gun, imitation firearm, prohibited weapon, restricted weapon, bladed weapon, ammunition or explosive substance, or anything designed or intended to be used to cause death or injury.
- (g) Do not possess or apply for any licence, authorisation or registration certificate for any such weapon referred to above.
- (h) Do not possess or consume any non-prescription drugs and do not possess or consume any other drugs or medication without a valid prescription issued in the name of Allen Baptiste by a licenced medical practitioner.
- (i) Remain in the Territory of the Virgin Islands.
- (j) Deposit your passport and any other travel permits or documents with the Royal Virgin Islands Police Force immediately upon your release from custody.
- (k) Do not apply for a passport or any other travel permits or documents.

Richard G. Floyd
High Court Judge

By the Court

Registrar