

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

CLAIM NO. AXAHCV 2020/0027

BETWEEN:

GLENVILLE NKOMO KENYATA HODGE

Applicant

and

THE COMMISSIONER OF POLICE

Respondent

Appearances:

Mr. Tim Prudhoe with him Mr. Carlyle Rogers of Counsel for the Applicant
Mr. Thomas W.R. Astaphan QC with him Ms. Erica L.P. Edwards, Senior Crown
Counsel, Attorney General's Chambers of Counsel for the Respondent

Bail – Murder – Sections 72 – 73 of the Magistrate's Code of Procedure Act – Bail after committal for trial at the High Court – High Court Judge refusing the grant of bail on previous application made by the applicant on grounds that applicant likely to be a danger to himself and was likely to abscond – Whether substantial change of circumstances warranting a review of previous denial of bail – Whether applicant required to show substantial change of circumstances in order to have previous refusal of bail reconsidered by the court – Whether matters raised in renewed application for bail amounted to a substantial change of circumstances – Whether court required to review the circumstances and lawfulness of a defendant's remand periodically – Whether applicant proscribed from bringing fresh application for bail in the absence of a substantial change of circumstances

Burden of proof on application for bail – Whether respondent required to disclose to applicant source of confidential information upon which they rely in opposition to bail – Whether respondent required to disclose substance of the confidential information upon which they rely in support of their grounds of opposition to the grant of bail

Principles to be applied on an application for the grant of bail – Seriousness of the offence – Seriousness of the offence in the assessment of the likelihood of the risk of absconding – Whether the likelihood of the risk of the applicant absconding can be alleviated by the imposition of conditions on the grant of bail – whether protection of the applicant a matter to be considered by the court on an application for bail – Whether likelihood of the risk of interference with witnesses exist

2020: July 22;
August 21

JUDGMENT

- [1] **INNOCENT, J.:** This is the applicant's third application for the grant of bail. On the first application, the court denied bail to the applicant on the grounds that there existed the likelihood of the applicant absconding and there existed the likelihood of harm to himself, which said risk could not be alleviated by the imposition of conditions to the grant of bail. On the second application, the court denied the applicant bail on the ground that there existed no substantial change of circumstances warranting the court's revision or reconsideration of the denial of bail to the applicant.
- [2] The applicant has been on remand from 11th September 2019. The preliminary inquiry into the commission of the offence of murder commenced on 20th January 2020. The preliminary inquiry concluded on 11th June 2020 and the applicant was committed to stand trial for the offence of murder by the presiding magistrate on even date. There has been no complaint with respect to inordinate delay in the conduct of the preliminary inquiry and the likelihood of the trial not coming on for hearing without delay.
- [3] By Notice of Application filed on 18th May 2020 the applicant relied on the following substantial ground in support of his application for the grant of bail to him. The applicant contends that he has a constitutional right to his liberty under section 3, a right to freedom of movement under section 5, and a presumption of innocence under section 9 of the Anguilla Constitution Order, 1982 ('the Constitution') which ought not to be infringed by his continued incarceration when the bases for his continued denial of bail no longer exist and there have been substantial changes of circumstances.
- [4] The applicant filed a subsequent application for admission to bail on 12th June 2020 prior to the hearing of the first application. This subsequent application was dismissed by the court on the grounds that it amounted to an abuse of process.

[5] However, it appears that the applicant sought to rely on the grounds advanced in the dismissed application in support of the present application. Although the applicant did not seek to amend the present application, it appears that in the skeleton arguments submitted in support of the present application, the applicant sought to rely on the grounds relied on in the dismissed application. The court permitted the applicant's counsel to present arguments in relation to the grounds advanced in the previous application in the interest of fairness and justice to the applicant.

[6] These grounds were essentially that:

- (1) The applicant invokes his right to apply for bail (absent, even, any alleged change of circumstances following one or more previously denied bail applications) under sections 72 and 73 of the Magistrate's Code of Procedure Act¹ upon committal for trial to the High Court;
- (2) There is no need to demonstrate any change(s) in circumstance(s) of the applicant, and in fact, the bases for his initial denial of bail on 16th December 2019 no longer exist; and
- (3) The applicant has a constitutional right to be afforded facilities to examine in person or by his legal representative the witnesses called by the respondent before any court including when the respondent intends to rely on confidential sources to deny the applicant his constitutional rights.

[7] The substantial changes in circumstances relied on by the applicant included the fact that Anguilla's borders are closed due to the Emergency Orders issued in light of the Covid-19 pandemic; and that the applicant no longer poses a risk of harm to himself.

[8] In support of his application, the applicant relied on the affidavits of Doctor June Samuel ('Dr. Samuel') and Mr. Franklyn Rogers ('Mr. Rogers').

¹ R.S.A. c. M5

[9] Not surprisingly, the application was opposed by the respondent. The respondent relied on the following grounds of opposition:

- (1) That the reports exhibited to the affidavits of Dr. Samuel do not refer to any recent review of the applicant's mental status; consequently, there is no evidence of "recent vintage" upon which the court could rely to the extent that the court could be satisfied that the applicant's mental status had not reverted to previous suicidal ideation;
- (2) That the assertions contained in the affidavit of Mr. Rogers with respect to Anguilla's border security in light of the Covid-19 pandemic are outdated and wrong in fact and are therefore incapable of assisting the court in the assessment of the likelihood of the risk of the applicant failing to surrender to custody;
- (3) There is evidence of the likelihood of the risk of harm or the personal safety of the applicant emanating from confidential police sources and informants with respect to which the police authorities are entitled to invoke confidentiality privilege for the purpose of the safety of those sources and informants and as a matter of national security;
- (4) With respect to the likelihood of the risk of the applicant failing to surrender to custody, that the preliminary inquiry had concluded and the applicant has been committed for trial at the High Court which provides an incentive for the applicant to fail to surrender to custody should he be admitted to bail;
- (5) That the applicant is yet to be indicted and that he may more likely than not be indicted for further offences; in relation to (4) and (5), the serious nature of the offence and the nature and strength of the evidence against the applicant.

[10] In support of their contentions, the respondent relied on the affidavits of Deputy Commissioner of Police Mr. Elliot Forbes ('Mr. Forbes') and Detective Constable Brando Pinard ('Mr. Pinard').

[11] In the court's view the following issues arise for determination:

- (1) Whether there has been such a substantial change of circumstances that permits the court to reconsider the previous denial of bail to the applicant.
- (2) Whether the absence of any substantial change of circumstances prohibits the applicant from making successive applications for bail.
- (3) Assuming that the court has the power to review the applicant's incarceration and previous denial of bail, what are the relevant principles that ought to guide the court.
- (4) Whether the applicant's committal to stand trial is a substantial change of circumstances empowering the court to reconsider his admission to bail where bail had been previously denied by that court.
- (5) Whether sections 72 and 73 of the Magistrate's Code of Procedure Act entitled the applicant to make a renewed application for bail after his committal for trial absent any substantial change of circumstances.
- (6) Whether seriousness of the offence presents the likelihood of the substantial risk of the applicant absconding.
- (7) Whether the likelihood of the risk of the applicant absconding a ground for the denial of bail to the applicant.
- (8) Whether the applicant's continued detention is necessary for his protection; and, whether the protection of the applicant is a reason for the denial of bail to the applicant.
- (9) Whether the respondent is obligated to disclose either the source of confidential information or the substance of such confidential information as they relate to the likelihood of risk of harm to the applicant from the public.

General Principles to be Applied on an Application for Bail

[12] The court's power to grant bail is discretionary. However, the court must approach an application for the grant of bail on the basis that there is a rebuttable presumption in favour of bail. The court may refuse an application for bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail, whether subject to conditions or not would (i) fail to

surrender to custody; (ii) commit an offence; or (iii) interfere with witnesses. The court may also deny bail to an applicant where the court is satisfied that the defendant should be kept in custody for any reason including (i) for his or her own protection; (ii) for the protection of the community; or (iii) if he or she is a child or young person, for his or her own welfare. When exercising its discretion, the court shall have regard to any relevant factors including the following: (a) the nature and seriousness of the offence or default, and the probable method of dealing with the defendant for it; (b) the character, antecedents, associations and community ties of the defendant; and (c) the strength of the evidence of his or her having committed the offence.

- [13] It is not required that the court be satisfied that the likelihood of the risk will in fact occur in the event that bail is granted, or even be satisfied that they are more likely than not to occur. The court must merely be satisfied that there are substantial grounds for believing that they would occur.
- [14] This is a question of fact that cannot be answered according to the usual rules of evidence. This is clear from the case of **In re Moles**,² where it was held that a police officer explaining the objections to bail was entitled to recount what he had been told by a potential witness about the threats that the latter had received, with a view to showing that granting bail would lead to further interference with witnesses.
- [15] In **R v Mansfield Justices, ex parte Sharkey and others**,³ Lord Lane CJ referring to **re Moles**, said, that 'there is no requirement for formal evidence to be given' on an application for bail. What is required is that the court hearing the bail application applies the appropriate test.

² [1981] Crim LR 170

³ [1985] QB 613 at p. 626 A

Successive Bail Applications

[16] It will be necessary to deal with this issue prior to the court's determination of the present bail application on its merits. The applicant has prayed in aid the provisions of sections 3, 5 and 9 of the Constitution as permitting successive bail applications after previous bail applications have been denied notwithstanding the absence of any substantial change of circumstances. This proposition is vehemently opposed by the respondent on the ground that in order for the applicant to make a subsequent bail application, he must show a substantial change of circumstances.

[17] Section 3(3) of the Constitution provides:

“Any person who is arrested or detained—

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Anguilla, and who is not released, shall be brought without delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Anguilla 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 or for proceedings preliminary to trial.

[18] Section 9(5) of the Constitution provides:

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty: Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

[19] The general principle at common law is that in order to make successive bail applications, the applicant must show that there is a material or substantial change of circumstances which entitles the court to whom the application is made to

review the previous denial of bail. This begs the question whether an accused person is prohibited from making successive applications for bail unless there exist a material or substantial change of circumstances.

[20] In addition, the question arises as to whether the common law principle that guides the right to make successive bail applications abrogates an accused person's constitutional rights to the presumption of innocence and procedural due process.

[21] Section 266 of the Magistrate's Code of Procedure Act provides:

"If at any time during any proceedings before the Magistrate it is necessary to adjourn the hearing of the proceedings, the Magistrate may from time to time adjourn the case to a certain time and place to be then appointed in the hearing of the parties, or their counsel or solicitors and, if the defendant is in custody, he may admit him to bail as provided in this Act, or by his warrant remand him to prison for any time not exceeding 8 clear days and, if the remand is not for longer than 3 clear days, the Magistrate may verbally order the peace officer in whose custody the defendant may be to keep him in custody and to bring him up for further examination on the day appointed for the adjourned hearing, but the Magistrate may order the defendant to be brought up to attend the further hearing at any time prior to the expiration of the time for which he was remanded and the officer in whose custody he is shall duly obey such order."

This provision entitles a magistrate to remand during a preliminary inquiry or admit to bail. However, it does not permit, by virtue of section 67(3) of the Magistrate's Code of Procedure Act to admit to bail a person who is charged with the offence of murder. Moreover, section 266 of the Magistrate's Code of Procedure Act provides that an accused may only be remanded for a period of 8 clear days. Therefore, this entitles an accused person at every subsequent adjournment of the proceedings to renew his application for bail before the committing magistrate provided that such committing magistrate has the discretion to admit him to bail.⁴ Unfortunately, an accused charged with murder, such as the applicant herein, can avail himself of no such right.

⁴ See: section 69 Magistrate's Code of Procedure Act

- [22] It appears that a person in like situation as the applicant herein, who can only approach the High Court for the grant of bail and from whose decision he has no right to appeal, should he be denied bail, is clearly in a less favourable position than an accused person who is entitled to have the decision to remand reviewed on successive occasions.
- [23] Therefore, it appears to the court that in order to curb the likelihood of any hint of the infringement of an accused person's constitutional rights, the proper approach ought to be that, successive applications for the grant of bail ought to be entertained so that the court is entitled to review the previous denial of bail to the applicant in order to consider whether there are existing circumstances which were not brought to the attention of the court on the previous bail application and are relevant to the grant of bail. This approach would result in each successive application being heard on its merits and would eliminate any hint of constitutional impropriety.
- [24] In the judgment rendered by this Court on the previous bail application, reference was made to specific statutory provisions which permitted the High Court to periodically review an accused person's remand and entitlement to bail. Unfortunately, there are no similar statutory provisions existing in Anguilla. Those statutory interventions could only have evolved within the context of the recognition of an accused person's right to have their period of detention on remand reviewed in keeping with the prevailing constitutional framework.
- [25] The court notes that the English common law authorities relied on regarding successive bail applications are grounded in a markedly different constitutional framework from that which obtains in Anguilla.
- [26] Therefore, it behooves the court to hear the present application on its merits to make the determination whether there is any new material relevant to the question of bail to be considered; and also whether there were existing circumstances at the time of the previous application which were not brought to the court's attention and is relevant to the grant of bail.

- [27] In the court's view, the requirement for an accused to show a material change of circumstances on each bail application should be applied in such a way that it is compatible with the constitutional rights of the accused.
- [28] Therefore, courts should be willing at regular intervals to consider arguments that the passage of time constitutes, in the particular case before the court, a change in circumstances which may be relevant to the need to detain the accused, thereby entitling the court to hear full arguments. If the court finds that the passage of time does not amount to a relevant changed circumstance, or that there are other circumstances which may be relevant to the need to detain the accused that have changed or come to light since the last fully argued bail application, then a full bail application should follow in which all arguments, old and new, could be put forward and taken into account. In this way, compatibility with an accused's constitutional rights is achieved and his continued detention is less likely to be seen as arbitrary. Therefore, renewed applications for bail at reasonable intervals should be permitted to achieve compatibility with an accused's constitutional rights.

Bail Subsequent to Committal

- [29] Mr. Tim Prudhoe ('Mr. Prudhoe'), counsel appearing for the applicant, argued that sections 72 and 73 of the Magistrate's Code of Procedure Act provides a stand-alone or free-standing right to apply for bail after committal for trial. This argument is opposed by the respondent. In addition, the respondent argued that far from providing a free-standing right to make a fresh application for bail, the fact of the applicant's committal for trial does not amount to a substantial change of circumstances requiring the court to review afresh the previous denial of bail to the applicant. In addition, the respondent argued, that the very fact of the applicant's committal is a factor that the court ought to consider as militating against the grant of bail to the applicant. For the avoidance of doubt, committal for trial at the High Court does not amount to a material change of circumstances.⁵

⁵ R v Slough Justices, ex parte Duncan (1982) 147 JP 1

[30] The court has formed the view that those considerations raised by the respondent ought to be decided on the assessment of the factors relevant to the grant of bail to the applicant; the court having already determined, that it can review the circumstances of the applicant's incarceration subsequent to the denial of the applicant's previous bail application.

[31] In the circumstances, the issue of whether sections 72 and 73 provide a free-standing right to apply for bail absent any substantial change of circumstances, although now otiose, given the court's previous findings, it becomes necessary to examine this issue here for the sake of completeness only. This examination in no way informs the court's decision whether or not to deny the applicant bail.

[32] Section 72 of the Magistrate's Code of Procedure Act reads:

"In all cases of indictable offences or suspicion of indictable offences and in all cases of summary offences when an accused person has been committed for trial as hereinbefore provided by this Act or by any Act relating to the duties of Coroners, any Judge of the High Court may on application made to him for that purpose and on notice to the Attorney General or in his absence to the officer, if any, for the time being in charge of the Police Force in Anguilla, order the accused person to be admitted to bail on entering into recognizances with sufficient sureties before the Magistrate in such amount as the Judge directs and thereupon the Magistrate shall issue a warrant of deliverance and shall attach thereto a copy of the order directing the admission of the person to bail."

[33] Section 73 of the Magistrate's Code of Procedure Act provides:

"When any person has been committed for trial by the Magistrate or Coroner, the prisoner, his counsel or solicitor may notify to the Magistrate or Coroner that he will as soon as counsel can be heard move before a Judge of the High Court to admit the prisoner to bail, whereupon the Magistrate or Coroner if they are in his possession shall with all convenient speed transmit to the Registrar of the High Court all informations and evidence touching the offence with which the prisoner has been charged together with a copy of the warrant of commitment and inquest, if any."

[34] The resolution of this issue lies in the interpretation of sections 72 and 73 of the Magistrate's Code of Procedure Act. The language of section 72 of the

Magistrate's Code of Procedure Act grants a judge of the High Court the statutory power to admit an accused person to bail upon his committal for trial at the High Court. On its proper construction, section 73 of the Magistrate's Code of Procedure Act sets out the procedure to be followed when an accused person is committed for trial and they intend to apply to the High Court to be admitted to bail.

[35] The two sections when read together do not appear to confer a free-standing right to bail in the manner advanced by the applicant. Sections 72 and 73 must be read within their statutory context. The two sections deal specifically with the right of an accused to apply to the High Court for bail after committal. When an accused person is granted bail subsequent to being charged with an indictable offence, this admission to bail continues until he is either discharged or committed for trial by the magistrate having conduct of the preliminary inquiry.

[36] The court is fortified in this view by the provisions of section 62 of the Magistrate's Code of Procedure Act.⁶ In other words, any previous grant of bail to him is spent at the time of committal for trial to the High Court. It is at the stage of committal for trial that the magistrate presiding over the preliminary inquiry must exercise his discretion whether to admit an accused person to bail; this is evident from the provisions of section 65 of the Magistrate's Code of Procedure Act which provides that:

"When the Magistrate has committed the accused person for trial he shall, unless he admits such person to bail, as hereinafter provided, commit him by his warrant to the prison to which he may by law be committed, where he is to be safely kept until delivered in due course of law."

Therefore, in the event that the committing magistrate declines to admit an accused person who has been committed for trial before the High Court to bail, the accused person has the right to apply to the High Court for admission to bail upon

⁶ When the accused has been heard and his witnesses (if any) examined, the Magistrate shall either—
(a) dismiss the charge and if the accused is in custody make an order for his release; or
(b) shall commit him for trial before the High Court that shall next be held after the committal;
but, if the day of committal is so near the day for the holding of the High Court that in the opinion of the Magistrate it would not be practicable for the case to be tried by the High Court as aforesaid, it shall be lawful for him to commit the accused to the High Court next following such High Court as aforesaid.

such refusal. Clearly, such an application to the High Court for admission to bail would operate as a review of the committing magistrate's discretionary power to refuse bail.⁷

[37] What distinguishes the present case from the other cases is the magistrate's lack of discretion to admit an accused to bail for murder as provided for by section 67(3) of the Magistrate's Code of Procedure Act. The committing magistrate simply has no discretion to grant bail on committal for a charge of murder. In the premises, the court is of the view that the applicant cannot avail himself of the provisions of sections 72 and 73 of the Magistrate's Code of Procedure Act.

[38] The provisions of the Magistrate's Code of Procedure Act examined herein can only lead to the ineluctable conclusion that sections 72 and 73 only relate to a situation where a committing magistrate exercises his discretion to deny bail to an accused who has been committed to stand trial in the High Court. Therefore, it would be procedurally incorrect to assume that sections 72 and 73 provide a free-standing right to the applicant to apply to the High Court for bail.

[39] However, this is not to say that the applicant is prevented from applying to the High Court for his admission to bail upon his committal for murder in the ordinary course of law. Clearly he has done so in the present application notwithstanding his reliance on sections 72 and 73. Therefore, it is left to consider whether the applicant ought, in the circumstances, be admitted to bail. On committal for trial at the High Court, the presumption of innocence still prevails in favour of the applicant. Therefore, bail may be withheld only if there are substantial grounds for believing that one or more of the grounds for withholding bail exist

Substantial Change of Circumstances

[40] The issue of whether the facts relied on by the applicant constitute a substantial change of circumstances which empowers the court to review the previous denial of bail to the applicant will now be considered.

⁷ See: CPR 58

- [41] The principle enunciated in the case law appears to be, that on each successive application for bail the court must have regard to the previous findings on each application for bail and consider whether there is any new material relevant to the question of bail to be considered; and also whether there were existing circumstances at the time of the previous applications which were not brought to the court's attention or were not considered by the court and are relevant to the grant of bail.

Failure to Surrender to Custody

- [42] The issue that arises here is, whether there is any new material or facts not before the court on the previous bail application in relation to the likelihood of the risk of the applicant absconding which entitles the court to review its previous findings on that issue in denying bail to the applicant. In the first bail application the court relied on the evidence contained in the affidavits of Mr. Forbes and Mr. Pinard in relation to the question of whether there existed the likelihood of the applicant absconding or failing to surrender to custody if admitted to bail.
- [43] The applicant, in the present application, relied on the fact that Anguilla's borders are closed and remain closed, up to the time of the present application, pursuant to Emergency Orders and border security measures enacted as a result of the Covid-19 pandemic as amounting to a material change of circumstances which permits the court to reconsider its earlier findings in relation to the risk of absconding or failing to surrender to custody. It appears that the applicant contended that these emergency measures and border controls were not matters considered by the court on the previous application.
- [44] The court accepts these emergency measures and border closures were not in place at the time that the previous bail application was considered. In the circumstances, the court is prepared to find that this amounts to new material which requires the court to reconsider its previous decision.

- [45] In the premises, the court has considered whether this material change of circumstances is capable of alleviating the likelihood of the risk of the applicant absconding or failing to surrender to custody in light of its previous findings.
- [46] The applicant relied on the affidavits of Mr. Rogers⁸ and his second affidavit, in support of his arguments in relation to this issue. In the court's view, Mr. Rogers' affidavits, distilled to their essence, add very little, if anything at all, to the present discourse. It simply recites what is already in the public domain as far as the closure of Anguilla's borders are concerned.
- [47] The court is quite mindful of the fact that Anguilla's borders are not destined to remain closed indefinitely. This state of affairs has been in existence since 18th March 2020; and it is a well-known fact, which has been publicized by the Government of Anguilla, that it is intended that Anguilla's borders will reopen on 1st October 2020.
- [48] The evidence contained in Mr. Rogers' several affidavits came under intense scrutiny by virtue of what was contained in Mr. Forbes' affidavit.⁹ Having read the affidavits filed by both parties, it became apparent that Mr. Rogers is in no position to speak to matters of national border security, police operations or the deployment of police resources in securing Anguilla's borders.
- [49] Having considered the evidence and the arguments presented relative to the issue of the likelihood of the risk of the applicant absconding, the court is satisfied that there are substantial grounds for believing that the applicant, if released on bail, subject to conditions or not, will abscond or fail to surrender to custody.
- [50] The argument that the applicant having reported the offence to the police, and having led them to the area where the body of the deceased was found, insofar as the applicant has argued that it is relevant to the question of the likelihood of the

⁸ Affidavits filed 18th May at paras. 3-12 (Exhibits FR1-FR7) and 26th June 2020

⁹ At paras. 7-13

risk of the applicant absconding, is not only self-serving but invites the court to speculate.

Protection of the Applicant

- [51] On the first application for the grant of bail, the court held that there existed the likelihood of the risk of the applicant absconding or failing to surrender to custody and presenting a danger to himself, which could not be alleviated by the imposition of conditions on the grant of bail.¹⁰
- [52] On the previous application for bail, the court found that there was no material change of circumstances in relation to the protection of the applicant that triggered the court's power to reconsider the previous denial of bail to the applicant on that basis.¹¹
- [53] The protection of the applicant must be considered in two distinct respects. On the one hand, the protection of the applicant from the risk of causing harm to himself; and on the other hand, in relation to the risk of harm from the public.
- [54] The applicant has presented evidence in relation to this aspect of the case by way of affidavits from himself and Dr. Samuel, which said evidence was not presented to the court and considered by the court on the previous bail application. Therefore, it will be necessary to consider the new material and determine whether they provide adequate grounds to admit the applicant to bail.
- [55] On the two previous applications for bail, the court did not have before it the affidavits of Dr. Samuel. Therefore, the matters contained therein did not in any way inform the court's consideration of whether the applicant ought to have been admitted to bail. In the circumstances, the court is constrained to review its previous decision regarding the existence of the likelihood of risk of harm to the applicant.

¹⁰ Judgment of Innocent J. in AXAHCV 2019/0053 (delivered 16th December 2019)

¹¹ Judgment of Innocent J. in AXAHCV 2020/0008 (delivered 7th May 2020)

- [56] The applicant, in his affidavit in support¹² of the present application, had exhibited thereto the Medical Report of Dr. Samuel. This Medical Report also comes to the court by way of the first affidavit of Dr. Samuel.¹³ In summary, the Medical Report of Dr. Samuel¹⁴ indicates that, based on successive reviews of the applicant conducted between 16th October 2019 and 4th March 2020, the applicant does not appear to be suffering from any psychosis and presents no suicidal ideation. He was taken off suicide watch on 27th November 2019 and that he is currently on medication.¹⁵
- [57] In a second affidavit¹⁶ Dr. Samuel, in summary, opines that her review of the applicant between 30th April 2020 and 20th May 2020 confirms that the applicant exhibited no symptoms of suicidal ideation or risk of self-harm.¹⁷
- [58] Mr. Astaphan QC, appearing for the respondent, made the partial concession in his oral submissions that apart from the issue of self-harm there exist no other material change of circumstances.
- [59] Having considered the evidence in relation to the applicant's mental status, the court is of the view that it is fair to conclude that the applicant no longer poses a threat of harm to himself. Therefore, the court will give no consideration to this as a matter militating against the grant of bail to him.
- [60] However, the more contentious issue is the likelihood of risk of harm to the applicant from the public should he be granted bail. The evidence in relation to this issue comes from the affidavit of Mr. Pinard.¹⁸

¹² Affidavit filed 18th May 2020 at paras. 3-5 Exhibit GH1

¹³ Affidavit filed 22nd May 2020

¹⁴ Medical Report dated 5th May 2020

¹⁵ At paras. 4-10

¹⁶ Affidavit sworn 16th June 2020 at para. 4

¹⁷ At paras. 4-10

¹⁸ At paras. 11-18

- [61] In a nutshell, Mr. Pinard stated that he carried out a threat assessment report in relation to the likelihood of harm to the applicant in the event that he is released on bail. He stated further that he carried out investigations in Anguilla in order to gather crucial information on the threat level to the applicant. Based on these investigations he obtained information from confidential sources.
- [62] According to Mr. Pinard, one confidential source revealed that there are persons in the community who plan to harm the applicant if he is released from custody; and that those threats were formulated from the date of the offence and remain extant.
- [63] In his affidavit, Mr. Pinard said that another confidential source informed that there are persons in Anguilla associated with the family of the deceased who have evinced an intention to harm the applicant should he be released on bail.
- [64] Mr. Pinard stated in his affidavit that the Royal Anguilla Police Force ('RAPF') has assessed the threat level to the applicant as high which may result in death or serious bodily injury. Essentially, Mr. Pinard's affidavit was in similar terms as that in the first bail application.
- [65] On the contrary, the applicant avers in his affidavit that he is unaware of any risk to his personal safety if released from custody. In addition, Mr. Prudhoe, counsel for the applicant, advanced the following counterarguments in his oral submissions in relation to the issue of the likelihood of harm to the applicant if released on bail.
- [66] Mr. Prudhoe argued that the threat and threat level relied on by the respondent in support of the opposition to the applicant's release on bail is wholly unsubstantiated and is incapable of being confirmed. The court understood Mr. Prudhoe's argument in this way: that assuming such a risk exist, then it begs the question of why the Commissioner of Police had not issued an 'Osman' warning. Mr. Prudhoe contended that there was no factual or material basis for establishing what is contained in Mr. Pinard's affidavit, particularly at paragraph 17 thereof, the imprecision of which is exacerbated by the absence of an 'Osman' warning.

[67] The court fails to see the significance of this argument in light of the approach that the court is mandated to adopt in the determination of whether there are substantial grounds for believing that the risk exist to the requisite standard of proof.

[68] As in the previous bail application, the applicant has raised the issue of the respondent's failure to disclose the sources of the confidential information relied on in relation to the issue of harm to the defendant. The court will not revisit this issue as the court had made a determination on this issue in the previous bail application. As the court sees it, there has been no material change of circumstances relevant to this issue entitling the court to revisit or reconsider its previous findings on that point.

[69] In light of the evidence presented to the court by the respondent, the court is of the view that there are substantial grounds for believing that the applicant, if released on bail is likely to be at risk of harm.

[70] It may very well be the case that passions, feelings of disgust and resentment towards the applicant may have subsided with the effluxion of time. However, the court is not entitled to speculate on this issue. The court can only assess the relevance of this issue to the application for bail in light of the available evidence.

Seriousness of the Offence and Strength of Prosecution's Evidence

[71] The substance of the respondent's opposition to the present application is pivoted on the grounds that the nature and seriousness of the offence or default, and the probable method of dealing with the defendant for it; and the strength of the evidence of his or her having committed the offence presents the likelihood of the risk of the applicant failing to surrender to custody if admitted to bail subject to conditions.

[72] The respondent's arguments in relation to the aforementioned ground of objection is premised on the grounds that the applicant has been committed for trial, the applicant has yet to be indicted for the substantive offence with which he is

charged; and, more likely than not counts for other offences arising from the same transaction are will be included in the indictment. These circumstances, the respondent argued, is likely to increase the likelihood of the risk of the applicant absconding or failing to surrender to custody.

[73] In support of their arguments, the respondent relied on the affidavits of Mr. Forbes¹⁹ and Mr. Pinard²⁰ the contents of which are summarized below. However, the affidavit of Mr. Forbes appears to be more poignant to the issue of the seriousness of the offence particularly in light of the manner in which the applicant sought to impugn the relevance and weight to be attached to the same in his third affidavit.²¹ The court will be extremely cautious how it approaches this issue in order to avoid placing evidential matters pertinent to the applicant's trial in the public domain, particularly in light of the fact that the presumption of innocence prevails in the applicant's favour.

[74] Mr. Forbes' affidavit gives meaningful insight into the circumstances surrounding the commission of the offence, the nature of the injuries suffered by the deceased and evidence allegedly connecting the applicant to the commission of the offence by virtue of the Post Mortem Examination Report and the DNA Analysis Report respectively.²²

[75] The aforementioned evidence was unavailable to the court on the previous bail applications; and, accordingly, did not factor into the court's considerations regarding the seriousness of the offence and the strength of the evidence of his having committed the offence in relation to the likelihood of the risk of his failing to surrender to custody. Therefore, it becomes necessary for the court to examine and consider this in the present renewed application for bail.

¹⁹ Filed 11th June 2020

²⁰ Filed 11th June 2020

²¹ See: Applicant's third affidavit sworn 16th June 2020

²² At para. 5 Exhibits EF2 and EF3

- [76] The applicant has sought to challenge the strength of the evidence against him and in so doing vehemently denied that he committed the offence.²³ In fact, during oral submissions Mr. Prudhoe indicated that the available evidence, when taken in light of the applicant's third affidavit, suggests that an arguable case of self-defence is made out. The court having reviewed the evidence contained in the applicant's third affidavit will not endeavour to delve into the substance of the same in this judgment in the interest of fairness and justice to the applicant.
- [77] However, having considered the affidavits of Mr. Forbes and the applicant's third affidavit, the court has concluded that the seriousness of the offence and the strength of the evidence of the applicant having committed the offence, there exist the likelihood of the risk of the applicant absconding or failing to surrender to custody which cannot be alleviated by the imposition of conditions on the grant of bail.
- [78] In addition, the court is also mindful of the fact that on the basis of the available evidence, particularly as summarised in the affidavit of Mr. Forbes, suggest the strong likelihood that the applicant may be indicted for other serious offences. In addition, the court notes that the applicant has been committed to stand trial before the High Court. In the circumstances, the court has concluded that these matters may very well increase the risk of the likelihood of the applicant absconding and failing to surrender to custody.
- [79] The relevance of the offence being serious is that an accused would appreciate that, if convicted, a severe sentence is likely and will therefore be tempted to abscond rather than face such a sentence. The gravity of the charge, however, is not an automatic reason for refusing bail, although an accused may be denied bail where the charge is one of murder or rape.

²³ At paras. 5-15

[80] It was stated in **Hurnam v The State of Mauritius**²⁴ that the seriousness of an offence cannot be treated as a conclusive reason for refusing bail to a person who has not been convicted. Lord Bingham said:

“The seriousness of the offence and the severity of the penalty likely to be imposed on conviction may ... provide grounds for refusing bail, but they do not do so of themselves, without more: they are factors relevant to the judgment whether, in all the circumstances, it is necessary to deprive the applicant of his liberty. Whether or not that is the conclusion reached, clear and explicit reasons should be given.”²⁵

[81] The respondent placed before the court in the present application evidence obtained at the preliminary inquiry which was not before the court on any of the previous bail applications. The court considered this evidence relevant to the grant of bail insofar as it related to the strength of the prosecution’s evidence. In the circumstances, it was necessary for the court to consider whether the strength of the evidence presented by the respondent amounted to substantial grounds for believing that any of the risks contemplated by the grant of bail to the applicant existed.

[82] The strength of the prosecution’s evidence is relevant to whether an accused would surrender to custody, in the sense that one who knows that there is a good chance of being acquitted is less likely to abscond than one who anticipates almost certain conviction. It can be argued that there is no point in an accused absconding if an acquittal is likely in any event. Conversely, if the prosecution’s case is strong, so that conviction is likely, the accused may be more likely to abscond than face conviction on trial. The present case is not a borderline case where the prosecution’s evidence is strong but not overwhelming.

Interference with Witnesses

[83] Although this point was not raised specifically, but only tangentially by the parties, the court has taken into consideration the fact that one of the proposed sureties for the applicant is the mother of the applicant and incidentally also a material witness

²⁴ [2005] UKPC 56; [2006] 1 WLR 857

²⁵ At para. [15] *infra*

in the proceedings. The court is also mindful of the fact that nearly all of the witnesses in the case, perhaps save and except formal witnesses, are all well known to the applicant. Mr. Prudhoe argued that the likelihood of this risk occurring may be reduced or abated by the fact that the preliminary inquiry has been completed. The court does not agree with Mr. Prudhoe's supposition.

Looking at the matter in the round, the court is of the view that the completion of the preliminary inquiry, meaning that the applicant has been committed for trial, may very well provide more incentive to interfere with prosecution witnesses or to attempt to pervert the course of justice.

- [84] In the circumstances, the court is of the view that there are substantial grounds for believing, that should the applicant be released on bail, with or without conditions, there exist the likelihood of the risk of the applicant interfering with prosecution witnesses.

Order

- [85] In the circumstances, and for the reasons set out in this judgment, the court's order is as follows:

1. The application for admission to bail is denied for the reasons set out below.
2. The court is of the view that there are substantial grounds for believing that the seriousness of the offence creates the likelihood of the risk of the applicant absconding or failing to surrender to custody if admitted to bail which cannot be curbed by the imposition of conditions attached to the grant of bail.
3. The strength of the prosecution's case is a substantial ground for believing, that if bail is granted to the applicant, subject to conditions or not, there exist the likelihood of the applicant failing to surrender to custody.
4. There are substantial grounds for believing that if the applicant is released on bail, subject to conditions or not, there exists the likelihood of the risk that the applicant will interfere with prosecution or intended prosecution witnesses.

5. There are substantial grounds for believing, that if the applicant is admitted to bail, there exist the likelihood of the risk of harm to him from members of the public.
6. The court shall review the applicant's incarceration on remand on the 6th day of October 2020 without prejudice to the applicant's right to apply for bail in the interim to this Court or a differently constituted court.

Shawn Innocent
High Court Judge

By the Court


Registrar