

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

CLAIM NO. AXAHCV 2020/0008

BETWEEN:

GLENVILLE NKOMO KENYATTA HODGE

Applicant

and

THE COMMISSIONER OF POLICE

Respondent

Appearances:

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

2020: March 9; 17;
May 7.

Murder – Bail – Sections 67 (3) and (4) and section 72 Magistrates' Code of Procedure Act, R.S.A. c. M5 – Section 3 Anguilla Constitution Order, S.I. 1982 No. 334 – Renewed bail application – Principles to be applied on renewed applications for bail – Whether court having jurisdiction to hear renewed application for bail on substantially the same facts and legal arguments as in previous bail application – Whether applicant has triggered the court's jurisdiction to hear renewed application for bail – Whether substantial change of circumstances exist – Prosecution relying on evidence of police officer in relation to evidence from a confidential source not disclosed on applicant in opposition to bail – Whether breach of applicant's constitutional right to a fair hearing – Whether substantial change of circumstances permitting court to revisit previous factual and legal arguments in previous bail application

JUDGMENT

[1] **INNOCENT, J.:** This is a renewed application for bail made by the Applicant. The Applicant had previously applied for the grant of bail to this Court, which was refused by the court. On the previous bail application, the court held that it was satisfied that

there were substantial grounds for believing that the Applicant, if granted bail, was likely to abscond and fail to surrender to custody and was likely to be a danger to himself.

- [2] The Application is opposed by the Respondent on the grounds that the court has no jurisdiction to entertain a fresh application for bail on the grounds that there are no new or substantially new circumstances that have arisen since the previous refusal of bail, and that the present application seeks to invite the court to review its previous decision and essentially exercise an appellate jurisdiction which it does not possess.
- [3] On the contrary, the Applicant contends that this is a stand-alone application and not a review of the previous refusal which must be considered on its merits as it relates to circumstances that have arisen since the refusal of bail. Essentially, the Applicant contends that he is entitled to make a fresh application for bail and it is for the Respondent to show that there are substantial grounds for believing that one or more of the risks militating against the grant of bail exist.
- [4] The court initially heard the preliminary point taken by the Respondent and then heard argument by the Applicant in relation to what has been described as a stand-alone application. This course was taken to ensure that the Applicant was not prejudiced if in fact there was a substantial change of circumstances warranting the hearing of the fresh bail application which the court was capable of granting.

Point in Limine

- [5] The present application for bail is opposed by the Respondent. The main thrust of the Respondent's opposition to the grant of bail is contained in the written submissions filed by the Respondent and canvassed in oral argument by Mr. Astaphan, QC. The Respondent argued that the present application for bail is "doomed to failure and ought to be dismissed". According to the Respondent, it is trite law that where bail has been denied by an Applicant on a prior application for bail, any renewed application must be premised on new relevant material which was

not available at the prior hearing and/or a change of circumstances which arose since the hearing of the prior refused application.

- [6] In support of the above contention the Respondent relied on the decision in **Huey Gowdie v R**¹ at paragraph [31] where Brooks JA said:

“Applications should therefore not be renewed on each occasion that the accused is brought before the court unless there is new material to be considered which was not before the court at the time of the previous application.”

- [7] The Respondent also argued that none of the affidavits in support of the application disclose any new, relevant material which came into being after the previous bail application and/or any change of circumstances that occurred after the initial refusal of bail to the Applicant.

- [8] The Respondent also sought to reinforce its position by relying on the proposition that the present application seeks to have the court exercise an appellate power which it does not possess by inviting the court to review its own previous decision of refusing bail. It was argued by the Respondent that a judge of the High Court cannot sit either in review of a final decision of his court, or on an appeal from a final decision of his court. This point was further reinforced by the proposition that to invite the court to sit in review of its own previous decision regarding the previous refusal of bail to the Applicant was an affront to the generally accepted principle that there is no appeal against the refusal of bail by the High Court.²

- [9] In the circumstances, the Respondent argued that on the totality of the points of objection taken by the Respondent the present application could not have been truly meant to be a fresh application for bail and was therefore likely to lead one to the conclusion that “this current application is, in net effect, at its highest, a ‘backdoor’ attempt to have this Court review its very own decision”. Accordingly, the Respondent contended that the present application in the context of the grounds of

¹ [2012] JMCA Crim 56

² See: *Glasford (Michael) and Others v Commissioner of Police and Another*

objection advanced by the Respondent was an abuse of process, frivolous and vexatious, and ought to be dismissed in limine.

The Applicant's response to the preliminary objection

- [10] Notwithstanding the Respondent's preliminary objection, the court, for reasons of fairness and out of an abundance of caution, reserved its ruling on the preliminary point and permitted the Applicant to pursue the substantive application in order to determine whether there was in fact a substantial change of circumstances that would render the renewed bail application permissible or, at the very least, to determine whether there existed any grounds for departing from the general common principle. In any event, this was after the court heard submissions from Mr. Prudhoe in response to the points in limine raised by Mr. Astaphan, QC.
- [11] The Applicant's response to the preliminary objections raised by the Respondent was premised on the substance of the Applicant's Notice of Application which they argued clearly showed that the renewed bail application was based on matters that were not before the court on the previous bail application.
- [12] In order to fully appreciate the posture adopted by Mr. Prudhoe in response to the point in limine and the Respondent's argument in relation to the points of objection raised by them, it will be necessary to examine, in some detail, the Notice of Application and the evidence filed in support thereof.

The Notice of Application

- [13] The grounds that are set out in the Applicant's Notice of Application that are relevant were as follows: Firstly, that bail was sought in the previous bail application filed on 19th November 2019, and which was denied on 16th December 2019 after a full hearing on 9th December 2019; secondly, that the denial of bail to the Applicant was premised on evidence adduced from confidential sources relied upon by the

witnesses for the Respondent³. This second ground makes direct reference to the evidence contained in the affidavits of Deputy Commissioner of Police Mr. Elliott Forbes ('Mr. Forbes'), Police Constable Brandon Pinard ('Mr. Pinard'), and Superintendent of Prisons Ms. Carise Sasso ('Ms. Sasso'), and which was relied on by the Respondent in opposition to the grant of bail to the Applicant. Incidentally, Mr. Rogers, counsel who appeared for the Applicant at the previous bail hearing, sought leave of the court to cross-examine these witnesses and the court permitted him to do so.

[14] In the circumstances, it appears that the Applicant's contentions in relation to the grounds contained in the Notice of Application are directly related to the court's findings at the previous bail hearing, that based on the evidence presented there were substantial grounds for believing that the Applicant, if granted bail, is likely to abscond and fail to surrender to custody and is likely to be a danger to himself, and that the imposition of conditions were incapable of alleviating the likelihood of those risks occurring.⁴ In the submissions filed in support of the present application, the Applicant contends that "The first application was rejected on the grounds that the Applicant (1) represented a danger to himself and (2) was a flight risk. The basis for these findings were 'confidential sources'"⁵.

[15] In support of the present application, the Applicant relied on the matters contained in the affidavits filed by the Applicant himself, his mother Mrs. Joan Hodge ('Mrs. Hodge'), his sister Mrs. Cherise Smith ('Mrs. Smith'), and two affidavits sworn to by Mr. Carlyle Rogers ('Mr. Rogers'), who incidentally appears as counsel for the Applicant in the present proceedings.

[16] The court is in total agreement with Mr. Astaphan, QC when he described the affidavits of Mrs. Hodge and Mrs. Smith as adding nothing new to the renewed bail

³ See: paragraphs [16] to [23] Judgment delivered on 16th December 2019 in AXAHCv 2019/0053

⁴ Infra at para. [40]

⁵ Applicant's Skeleton Arguments at para. 4

application and that they merely sought to rectify matters of a formal nature in the affidavits sworn by them at the previous bail hearing. It is the court's considered view that these two affidavits are of no relevance to the issues to be decided on the preliminary point, although they would be relevant to the issue of the ability of the Applicant to provide sufficient sureties in the event that the preliminary point was decided in the Applicant's favour, and the court went on to consider the question of whether bail ought to be granted to him.

- [17] Of greater relevance to resolving the issues to be decided on the preliminary point are the affidavits of the Applicant and Mr. Rogers.

The Applicant's Affidavit

- [18] The only new matters that have been substantially raised in the Applicant's affidavit in support of the renewed bail application relate to the stage at which the preliminary inquiry has progressed since the date of his arrest and the previous denial of bail by this Court. In addition, the Applicant's affidavit refers to evidence presented by the Respondent at the previous bail hearing, which evidence relied on what has been described as emanating from "anonymous sources".

- [19] At paragraph 9 of his affidavit the Applicant stated:

"The preliminary inquiry continues and is next listed before the Magistrates' Court from 30 March 2020 to 2 April 2020 for completion. The first hearing was on 20 January 2020 during which seven persons gave their depositions. The only witnesses remaining to give evidence are formal ones with the exception of Leroy Martinez."

- [20] In relation to what has been termed "anonymous evidence" the Applicant said at paragraphs 19 to 20 of his affidavit:

"Following the hearing of the previous bail application, I was denied bail by this Honourable Court on 16 December 2019 after a full hearing on 9 December 2019, on the grounds that I am at risk of harming myself and that I am a flight risk. That finding as to my being a flight risk was on the basis of anonymous evidence."

If I was in a position to comment on such evidence, I would wish to do so. I am not a danger to myself and was removed from suicide watch on 4 December 2019. This was confirmed by the testimony of Ms. Carise Sasso, the Superintendent of Prisons during the hearing of the first bail application on 9 December 2019. I have had no such thoughts since.”

Mr. Rogers’ Affidavits

- [21] In his first affidavit Mr. Rogers deposes that he is the solicitor engaged by the Applicant in the present bail application. He also states that he was also involved in the previous bail application before the High Court. According to Mr. Rogers, in the context of that previous bail application he wrote to the Attorney General’s Chambers in respect of the nature of the evidence led by letters dated 10th January, 17th January and 27th January 2020. These various correspondence were exhibited to his affidavit.⁶
- [22] The letters exhibited to Mr. Rogers’ first affidavit referred specifically to what has been dubbed “anonymous evidence” and made specific request for the identification of those confidential sources and an indication of whether the Crown was relying on public interest immunity in relation to that evidence and the Crown’s perceived refusal to disclose the same.
- [23] In a subsequent affidavit Mr. Rogers again states that he is the solicitor engaged by the Applicant in the present bail application. According to Mr. Rogers’ affidavit, he wrote to the Attorney General in respect of whether or not evidence in opposition would be filed and when this was going to be done. Mr. Rogers exhibits letters dated 18th February 2020 and 6th March 2020 to his second affidavit.
- [24] It appears from the two affidavits sworn by Mr. Rogers that the correspondence exhibited thereto was intended to foreshadow two aspects of the arguments put forward by the Applicant in support of the present bail application, namely: to support the contention that the Respondent had not filed evidence in opposition to the bail

⁶ Exhibit CKR1

application, which the Applicant contends was fatal to the Respondent's case; and in support of the arguments related to the so-called "anonymous evidence".

[25] Having set out the background to the Applicant's purported renewed bail application, the court will now examine Mr. Prudhoe's response to the preliminary objections advanced by Mr. Astaphan, QC.

[26] Mr. Prudhoe's argument, as the court sees it, is as follows. It appears that contrary to Mr. Astaphan, QC's argument that the present application for bail presents no new circumstances or substantial change of circumstances; Mr. Prudhoe submitted that a change of circumstances does in fact exist.

[27] With respect to the first limb of his argument, Mr. Prudhoe referred to the evidence relied on by the Respondent that came from confidential sources. In respect of this limb of Mr. Prudhoe's argument, he appears to be saying that the basis of the Respondent's opposition to the previous bail application has not been renewed. Therefore, the likelihood of the risk of the Applicant absconding and being a danger to himself have not been addressed by the Respondent in the present application by way of evidence presented in opposition; hence, the court is entitled to revisit these matters in light of events that have occurred since the last refusal of bail to the Applicant. In this vein, Mr. Prudhoe alluded to the fact that the Respondent has produced no recent or new evidence to substantiate the allegation of suicidal ideation held by the Applicant since 4th December 2019. Mr. Prudhoe also highlighted the fact that the Applicant has been taken off suicide watch for a period of over four months to the date of the renewed bail application.

[28] Mr. Prudhoe also argued that in relation to the likelihood of the risk of absconding and interference with prosecution witnesses, the court should take into consideration the fact that a majority of the preliminary inquiry has been concluded, the length of time that had elapsed since the previous bail application, the length of time that the Applicant has been in custody, and generally effluxion of time since

the commission of the offence. All these matters, Mr. Prudhoe argued, should inform the court's decision as to whether there exist a change of circumstances which gives the court jurisdiction to entertain the present application.

[29] The second limb of Mr. Prudhoe's argument related to the confidential sources relied on in the evidence presented by the Respondent in opposition to the previous bail application. According to Mr. Prudhoe the evidence of the likelihood of the risk of the Applicant absconding, which came from confidential informants, were not disclosed to the Applicant at the previous bail hearing. Mr. Prudhoe seems to have developed this broad argument in the following manner. In one sense, the information from confidential sources relied on in the Respondent's evidence created a challenge for the Applicant in terms of the fairness of the proceedings. In another sense, Mr. Prudhoe makes the suggestion that this raises a constitutional point.

[30] In support of the constitutional point that Mr. Prudhoe suggests arose at the previous bail hearing, he referred the court to case law and jurisprudence emanating from the European Court of Human Rights (the 'ECHR') in relation to the European Convention on Human Rights, which he argued were extended to Anguilla and should therefore have been germane to the inquiry which the court was engaged in at the previous bail hearing.

[31] Ultimately, Mr. Prudhoe seemed to have been arguing that had these authorities been placed before the court at the previous bail hearing it would have informed the court's inquiry into determining whether bail ought to have been granted to the Applicant. The court understands Mr. Prudhoe to be saying that the fact that those authorities had not been brought to the court's attention at the previous bail hearing, the court can clearly be invited to revisit its position and treat afresh with the issue as it relates to the confidential information relied on in the evidence presented by the Respondent's witnesses at the prior bail hearing.

[32] Mr. Astaphan, QC took strong objection to Mr. Prudhoe's line of reasoning and reiterated his previous position regarding the court's jurisdiction to hear the renewed bail application. In a nutshell, Mr. Astaphan, QC argued that the court could not merely infer that the matters alluded to by Mr. Prudhoe reflected a change of circumstances or amounted to new material that was not before the court at the previous hearing. In support of this contention, Mr. Astaphan, QC further argued that the Applicant has not presented any tangible or cogent evidence to support the position that any of the matters held out by the Applicant as a change of circumstance or new material do in fact exist. According to Mr. Astaphan, QC, it was not for the Respondent to produce any fresh evidence in opposition to the renewed bail application; on the contrary, it was for the Applicant to satisfy the court that a change of circumstances did exist which entitled the court to trigger its jurisdiction to hear the renewed application for bail.

[33] Mr. Astaphan, QC also strenuously opposed the Applicant's contention that there is no prohibition against a fresh application for bail and no requirement for there to be a change in circumstances to trigger a fresh bail application.⁷ In addition, Mr. Astaphan, QC took strong objection to the Applicant's reliance on the jurisprudence of the ECHR as binding authority for the proposition that "Not that any change of circumstances is required for a second bail application in Anguilla, passage of time allows for a new application within a short space of even one month"⁸. The Applicant had relied on a decision from the ECHR, **Bezicheri v Italy**⁹ for the proposition that Article 5 of the ECHR required periodic reviews of a defendant's detention which is not predicated on a change of circumstances.

⁷ See: paragraph 11 of Applicant's Skeleton Arguments

⁸ See: paragraph 13 of Applicant's Skeleton Arguments

⁹ [1989] ECHR 19 at paras 20 – 21

[34] The Applicant also relied on several cases emanating from the ECHR relative to the likelihood of the risk of the Applicant absconding and how the court ought to treat or ought to have treated with these factors in determining whether or not to grant bail.¹⁰

[35] The court understood Mr. Astaphan, QC to be challenging the Applicant's reliance on the jurisprudence of the ECHR as binding authority on this Court. According to Mr. Astaphan, QC, the Applicant's reliance on the European Court's jurisprudence as binding authority on this Court, in as much as it may be persuasive authority, is erroneous in law. Mr. Astaphan, QC submitted that whereas it is accepted that the ECHR, which was drafted in 1950 and which came into force in 1953 was extended to Anguilla, what was not extended to Anguilla is the jurisdiction of the ECHR. For the sake of completeness, the court finds it fitting to recite Mr. Astaphan, QC's argument in full. Mr. Astaphan, QC submitted that:

"The structure of the Anguillian Courts is to be divined from section 3 of the Anguilla Constitution Order, 1982; sections 16, 72 and 73 of the Constitution; section 4 of the West Indies Associated States Supreme Court Order 1967; and Part 1 (sections 1, 4 and 5) and Part 2 (section 26) of the Eastern Caribbean Supreme Court (Anguilla) Act respectively.

Clearly established in the aforesaid Instruments and Acts is a court structure with Her Majesty's Privy Council at the apex, and the Eastern Caribbean Court of Appeal ... in descending order.

Nowhere in any such Instrument or Act is there to be found the European Court of Human Rights as a Court in, for or over Anguilla, jurisdictional or otherwise.

Anguilla's apex court is the Privy Council ... The ECHR ... merely lends persuasion to the Courts of Anguilla. The judgments and jurisprudence of that foreign Court are not "binding" on the Courts of Anguilla. They are merely persuasive.

Thus, the ECHR judgments contained in the applicant's Bundle of Authorities are, if they were of any relevance to this application, are merely persuasive in nature, and do NOT bind this Honourable Court."¹¹

Applicable principles

¹⁰ See: paragraphs 24 – 26 of the Applicant's Skeleton Arguments

¹¹ At paragraphs 3.2 – 3.9 of the Respondent's Written Submissions

- [36] The Applicant had relied on the provisions of Part IIA of the Bail Act 1976 (UK) for the proposition that no change of circumstances is required for a second bail application in Anguilla.¹²
- [37] Unlike the United Kingdom and some Caribbean jurisdictions, the principles to be applied on an application for bail and fresh applications for bail have been put on a statutory footing. The principles to be applied in considering fresh applications for bail in this jurisdiction are to be determined in accordance with the common law.
- [38] The Bail Act 1976 in the United Kingdom (the 'Bail Act') underwent substantial amendment to the common law principles applied in the case law from that jurisdiction by virtue of the Criminal Justice Act 1988 (the 'CJA') as they relate to renewed applications for bail. This enactment has not been extended to Anguilla and, as such, have no applicability to the present proceedings.
- [39] Section 154 of the CJA inserted a new Part IIA of Schedule 1 of the Bail Act. It appears that the legislative intent was to provide a statutory solution to the problem of renewed applications for bail. The combined effect of section 4 and Part IIA of Schedule 1 is that at the first hearing the court shall grant a Defendant bail unless satisfied that one of the exceptions under Part 1 or II of Schedule 1 is established. At the first hearing, the Defendant may support an application for bail with any relevant argument as to fact or law. The court must, however, consider the question of bail regardless of whether or not any application for bail is made. If at the first hearing bail is refused, the Defendant's case then falls within paragraph 1 of Part IIA, and at each subsequent hearing, while he is a person to whom section 4 applies, the court is bound to consider the question of bail. Paragraph 2 of Part IIA provides that at the first hearing at which the court decided not to grant bail, the Defendant may support an application for bail with any argument as to fact and law, whether

¹² See: footnote 3 Applicant's Skeleton Arguments

or not he has advanced that argument previously.¹³ It appears that although the legislative intent was to provide for an argument being advanced on two occasions as of right, the second court being bound to consider the matter de novo, the court should not hear evidence as to fact or law which it has previously heard unless there has been such a change of circumstances as might have affected the earlier decision. To do otherwise would be to act in an appellate capacity.

[40] For the purposes of comparative analysis, the court has examined the provisions of the Criminal Procedure Rules¹⁴ in the Eastern Caribbean Supreme Court jurisdiction of Saint Lucia. Although the Criminal Procedure Rules has set out a comprehensive procedure relating to renewed bail applications, it has not sought to modify the common law position as it relates to a Defendant relying on matters of fact and law argued on a previous bail application on a renewed bail application. Rule 5.2¹⁵ of the Criminal Procedure Rules makes provision for the review of bail conditions of persons remanded in custody by the Criminal Division of the High Court. In addition, Rule 5.3 of the Criminal Procedure Rules deals generally with applications for bail. The provisions of Rule 5.3 are particularly instructive in that by virtue of sub rules 5.3 (2) (a) (ii) and (2) (b) (ii) it is implied that a Defendant who makes a renewed application for bail must specify each relevant previous bail decision and the reasons given for each, and explain what further information or legal argument, if any, that has become available since the most recent previous bail decision was made.

[41] Therefore, there is a substantial distinction to be drawn between the application of the common law and the statutory enactments described above. The purport and

¹³ Archbold, Criminal Pleading Evidence & Practice, (2014) Sweet & Maxwell 3-25 – 3-26

¹⁴ Statutory Instrument No. 22 of 2015

¹⁵ 5.2 – (1) The Criminal Division Manager shall prepare by the 15th day of every month a list of all persons who are remanded in custody and are unable to satisfy the conditions of bail.

(2) The list referred to in sub-rule (1) shall contain for each person listed, the date of remand, bail conditions, and a brief summary of bail applications made.

effect of these statutory provisions cannot be implied into the statutory framework that grants the High Court in Anguilla the discretionary power to grant bail, nor can it be implied in the High Court's inherent jurisdiction to grant bail in this jurisdiction. In addition, the provisions of the Bail Act 1976 and the Criminal Justice Act have not been extended to Anguilla and therefore do not inform the court's consideration of the present issues.

- [42] The common law position as set out in the case law is quite clear. In **R v Nottingham Justices, ex parte Davies**¹⁶, the court considered the issue of whether the court was bound to investigate all the circumstances or only whether there were new circumstances not before the court on a previous application where the accused had been denied bail on the grounds that he came within one of the exceptions to the right to bail. The court held that where a Magistrates' Court had been satisfied on an application for bail that one or more of the exceptions set out in Sch 1 to the 1976 Act applied and accordingly remanded the accused in custody; the court, whether differently constituted or not, could not on a subsequent application for bail ignore the earlier decision, since it was a finding by the court that the circumstances of Sch 1 existed at the time of the previous application and it had, like every other finding of the court, to be treated as *res judicata* or analogous thereto. On the renewed application for bail, the court could only investigate whether there were any new considerations which were not before the court on the previous occasion. Since, in the circumstances, there were no grounds on which the conduct of the justices could be impugned, no order would be made.¹⁷

- [43] In delivering the decision of the court, Donaldson LJ sets out the approach to be taken by a court hearing successive applications for bail:

"I fully accept the submission that in accordance with s 4 of the Bail Act 1976 every accused person who appears or is brought before a magistrates' court in the course of or in connection with proceedings for the

¹⁶ [1980] 2 All ER 775

¹⁷ See p. 778 J-P; 779 J

offence or who applies to a court for bail in connection with the proceedings is entitled to be granted bail except as provided by Sch 1 to the Act. I also fully accept that on each such occasion the exceptions specified in para 2, and for that matter para 3 (keeping in custody for the accused's own protection or, in the case of a child or young person, for his own welfare), only apply if the justices then sitting are satisfied in terms of those paragraphs. Finally, I accept that the fact that a bench of the same or a different constitution has decided on a previous occasion or occasions that one or more of the Sch 1 exceptions applies and has accordingly remanded the accused in custody does not absolve the bench on each subsequent occasion from considering whether the accused is entitled to bail, whether or not an application is made.

However this does not mean that the justices should ignore their own previous decision or a previous decision of their colleagues. Far from it. On those previous occasions, the court will have been under an obligation to grant bail unless it was satisfied that a Sch1 exception was made out. If it was so satisfied, it will have recorded the exceptions which in its judgment were applicable. This 'satisfaction' is not a personal intellectual conclusion by each justice. It is a finding by the court that Sch 1 circumstances then existed and is to be treated like every other finding of the court. It is res judicata or analogous thereto. It stands as a finding unless and until it is overturned on appeal. And appeal is not to the same court, whether or not of the same constitution, on a later occasion. It is to the judge in chambers. It follows that on the next occasion when bail is considered the court should treat, as an essential fact, that at the time when the matter of bail was last considered, Sch 1 circumstances did indeed exist. Strictly speaking, they can and should only investigate whether that situation has changed since then.

There will always be a possibility that there has been a change, because more time will have elapsed. For example, the ability to interfere with witnesses diminishes as police inquiries progress and statements have been taken. Furthermore, as counsel pointed out in argument, it is well established that it is a proper exercise of judicial discretion to decide that the prosecution has unreasonably delayed in the preparation of its case and that, on that account, the accused should no longer be remanded in custody. But the starting point must always be the finding of the position when the matter was last considered by the court. I would inject only one qualification to the general rule that justices can and should only investigate whether the situation has changed since the last remand in custody. The finding on that occasion that Sch 1 circumstances existed will have been based on matters known to the court at that time. The court, considering a fresh the question of bail, is both entitled and bound to take account not only of a change in circumstances which has occurred since that last

occasion, but also of circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider than 'Has there been a change?' It is 'Are there any new considerations which were not before the court when the accused was last remanded in custody?'"

Whether substantial change of circumstances

- [44] Distilled to its essence, the main thrust of the Applicant's contention is that he is entitled to make the fresh bail application on the grounds that at the previous bail hearing the prosecution relied on confidential material contained in evidence given by police officers, and which was not disclosed to the Applicant. It appears that the Applicant is seeking to make a fresh bail application on the basis that this amounted to an error of fact and law at the first hearing and which, in all the circumstances of the case, amounts to a material change of circumstances empowering the court to revisit its earlier decision of refusing bail. In addition, the Applicant contends that the reliance placed upon the evidence of the police officer insofar as he relied on the contents of the undisclosed confidential document, was incompatible with the Applicant's right to a fair hearing guaranteed to him under section 9 of the Constitution.
- [45] The Applicant's contentions on this point raise several issues. Firstly, whether, to what extent, if at all, is the court empowered to reopen earlier factual and legal arguments. Secondly, whether the reliance upon the evidence of the police officer insofar as he relied on the contents of an undisclosed confidential document or source was incompatible with the Applicant's rights under section 9 of the Constitution. Thirdly, if the second issue is answered in the affirmative, whether this fact entitles the Applicant to make a fresh bail application to the extent that it amounts to new circumstances permitting the court to entertain a fresh bail application. Lastly, if all of the aforementioned issues are answered in the affirmative, the court will then go on to consider whether the Applicant should be granted bail.

- [46] The court understands Mr. Prudhoe's argument to be that what transpired at the previous bail hearing in relation to the evidence relied on by the Respondent, some of which came from confidential sources, infringed the Applicant's right to a fair hearing. Mr. Prudhoe relied heavily on the case law from the ECHR and suggested, in the court's view, that the court is entitled to revisit its earlier findings in light of the ECHR jurisprudence which was not before the court at the previous hearing and upon which the court did not have the benefit of argument from both sides.
- [47] The court has given careful consideration to Mr. Prudhoe's arguments on this point. In so doing, the court has sought guidance from the case of **Re Donaldson's Application for Bail**¹⁸, not cited in argument by counsel, but which deals squarely with the issue now raised by the Applicant in these proceedings. The court will discuss the authorities cited by the Applicant in his Skeleton Arguments in light of the decision in **Re Donaldson**. This approach, it is hoped, will assist in the proper elucidation and disposition of what the Applicant held out as being a crucial point.
- [48] In **Re Donaldson**, where following the refusal of his bail application in reliance on the evidence of a police officer who in turn relied on a security document which was not disclosed to the defence, the Applicant requested a fresh bail hearing before a differently constituted court. Recent jurisprudence of the European Court of Human Rights pertaining to Article 5(4) of the European Convention on Human Rights (entitlement to take proceedings to determine lawfulness of detention) (as set out in Sch 1 to the Human Rights Act 1998) was not before the court. At the hearing of the request for a fresh bail hearing, the Crown accepted that there had been an error of fact in the judgment of the judge who had originally refused bail, and the matter was referred back to that judge. The judge sat to deal with that point and stated the correction would have made no difference to his decision to refuse bail. The following matters fell to be determined: (i) in what circumstances might an Applicant who had been refused bail make a further application to the High Court; and (ii)

¹⁸ [2002] NIQB 68

whether reliance upon the evidence of the police officer, insofar as he relied upon the contents of the undisclosed security document, was compatible with the applicant's rights under Article 5(4) of the Convention.

[49] The court in **Re Donaldson** held that the identification of a new consideration relevant to bail did not entitle the accused to make a further full bail application in which both the fresh and the old arguments might be relied upon. That was particularly so where the matter came back before the same judge, who had initially refused bail but accepted that there were changed circumstances or new considerations which were not before the court on the previous occasion. It would only be necessary in that situation for the judge to refer back to his earlier notes. If the renewed application for bail came back before a different judge, which ought to be avoided unless it caused inconvenience, it would depend upon the circumstances of the particular application and the discretion of the judge as to what extent, if at all, the earlier factual and legal arguments should be reopened. The court should not entertain what was in reality an attempt to appeal an earlier decision of the court under the guise of alleged change of circumstances or new considerations. In the instant case, however, the fact that certain decisions of the European Court of Human Rights were not before the original judge was a new consideration which empowered the court properly to entertain a further application for bail, particularly having regard to the heavy reliance placed by the judge on the evidence of the police officer and his apparent reliance on the contents of the security document which was not disclosed to the defence.

[50] The court in **Re Donaldson** also held that reliance upon the evidence of the police officer, insofar as he relied upon the contents of the security document disclosure of which was denied to the defence, was not compatible with the Defendant's rights under Article 5(4) of the Convention. Where the Crown intended to rely upon intelligence material in a bail application and the defence sought disclosure thereof, that material had to be disclosed in the light of the recent jurisprudence of the European Court of Human Rights. That material might, however, be edited so as

not to disclose, directly or indirectly, the identity of informants or other sensitive information upon which no reliance was made by the Crown in the application. Accordingly, bail would be granted with appropriate conditions.

[51] The court in this instance declines to follow the approach taken by the court in the case of **Re Donaldson**. The facts in **Re Donaldson** are clearly distinguishable from those of the present case. The decision in **Ex parte Davies** predated the statutory regime under the ECHR. In this regard, the court adopts the reasoning of Mr. Astaphan, QC, that the common law, and not the European Court jurisprudence, is what ought to guide the court in these proceedings.

[52] In addition, it appears that the present application does not raise a clear, distinct and discrete constitutional point. The Applicant has not directed the court's attention to any provision of the Constitution that has been infringed in relation to him. Mr. Prudhoe made copious reference to the decision of **Thelston Brooks v The Attorney General of Anguilla and Another**¹⁹ in his oral and written submissions. A clear distinction must be drawn between the case of **Thelston Brooks** and the present case. In **Thelston Brooks**, unlike the present case, the defendant had premised his application for the grant of bail on the basis of the relevant provisions of the Anguilla Constitution. It cannot be argued that in delivering the judgment of the court that the references made to the provisions of the ECHR by the learned trial judge was intended to be a judicial pronouncement that the provisions of the ECHR were to be applied in determining the constitutional arguments as opposed to the Anguilla Constitution itself. It is not in dispute that the ECHR was extended to Anguilla. However, it appears that the ECHR was referred to in **Thelston Brooks** for comparative analysis. Ultimately, the case was decided on the provisions of the Anguilla Constitution and the references to the European Court jurisprudence²⁰ were relied on merely as persuasive authority not necessarily intended to bind the court.

¹⁹ AXAHCRCR 2006/0089 delivered 15th January 2007

²⁰ See: paragraphs [19] – [21] in **Thelston Brooks**

- [53] The provisions of section 3(3)²¹ of the Anguilla Constitution are similar to the provisions of Article 5(4) of the ECHR. They both permit a person who is detained the right to apply to the court to determine the lawfulness of their detention. It cannot be said that the Applicant in the present case has been deprived of that right.
- [54] The next issue that arises is whether, had the Applicant been privy to the confidential source, would it have made a difference to the outcome of the previous bail application? The court is not inclined to accept that it would have, for the reasons setout below. The court also understands the Applicant's argument to be, that the failure of the Attorney General to disclose the confidential source operated unfairly to the Applicant to the extent that he is being deprived of his right to have the lawfulness of his detention reviewed afresh. The difficulty with this argument is two-fold. Firstly, on the one hand, the Applicant's counsel never sought disclosure of the identity of the confidential source relied on by the Respondent's witnesses at the initial bail hearing. On the other hand, the evidence based on information from the confidential source was not unchallenged. Secondly, the procedure adopted at the previous bail hearing was adversarial and the court made findings in relation to the evidence presented. The present application seems to suggest that the court can revisit and have the same issues ventilated afresh.
- [55] The Applicant relied on the decision in **Re Moles**²² to support their argument in relation to the disclosure point. However, respectfully, this case does not take the Applicant's case any further. In fact, it reinforces the point made by the Respondent. It cannot, in any event, be argued that the failure to disclose a confidential source

²¹ (3) 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.

²² [1981] Crim LR 170

constituted a change of circumstances requiring the court at this stage to reinvestigate an alleged change of circumstances where the court had already fully investigated the circumstances surrounding the likelihood of the risk of absconding at a previous bail hearing.

[56] Having adopted this posture, the court feels constrained to find that for the purposes of the present application, the fact that the confidential source had not been disclosed to the applicant or the applicant's counsel did not result in unfairness to the applicant or inequality of arms between the parties.

[57] At the previous bail hearing, the Applicant's counsel, Mr. Rogers, sought leave of the court to cross-examine the witnesses who were called by the Respondent. Mr. Rogers was granted leave to do so.²³ This fact can be easily discerned from the transcript of proceedings in the previous bail application, which coincidentally and conveniently were exhibited to the present application.

[58] It appears that the Applicant is seeking to have the court imply that there has been a change of circumstances related to the likelihood of the risk of the Applicant absconding and the likelihood of the risk of the Applicant being a danger to himself, which requires investigation by the court in this instance. However, there appears to be no evidential basis upon which the applicant seeks to have the court reinvestigate or reconsider these matters.

[59] The Applicant has simply not presented any evidence to support this aspect of his case. It seems that the underlying basis or the Applicant's argument is that the court must imply that there has been a change of circumstances due to the mere effluxion of time between the previous bail application and present one.

²³ Transcript of proceedings in AXAHCV 2019/0053, 9th December 2019 at pp. 40-77

- [60] That contention appears to be a quantum leap from the principles regarding the basis for making a fresh or renewed application for bail. Simply put, the Applicant is seeking to have the court revisit, review and/or reconsider findings of fact and law that it had made previously without presenting any fundamental evidential basis for doing so.
- [61] Perhaps it would have been different had the Applicant presented some evidence that had not been placed before the court at the previous bail hearing. For example, in the case of the likelihood of the Applicant causing harm to himself, a psychological assessment report which proves or alleges the contrary.
- [62] The argument advanced by the Applicant's counsel was that it was incumbent on the Respondent to produce evidence justifying the Applicant's continued detention. This was a hopeless and totally fallacious argument. It has already been established by sound judicial authority that it is for the Applicant to present evidence of a change of circumstances warranting the court's review of the previous bail decision.
- [63] In any event, there is no statutory remit that enables the court, in this instance, to review the Applicant's remand automatically on every subsequent occasion that he comes before the court. This position is amplified by the distinction which the court has made between the Anguillian jurisprudence and the statutory provisions that exist in the United Kingdom and Saint Lucia.
- [64] In relation to the disclosure issue, the Applicant has relied on the decision in **R v Hallett and Others**²⁴. However, in the court's respectful view, this case does not avail the Applicant in the present proceedings. In fact, this authority stands in dire contrast to another authority relied on by the Applicant, namely, **R (on the application of Director of Public Prosecutions) v Havering Magistrates'**

²⁴ [1986] Crim LR 462

Court²⁵. For completeness, the court will examine the two decisions in light of the arguments advanced by the Applicant.

[65] In **R v Havering Magistrates' Court**, the question arose as to the effect of the Human Rights Act 1998 on the Bail Act 1976. The prosecution had contended that the Justices were wrong in holding that Article 6 of the ECHR had any relevance to an issue under the Bail Act 1976. The Justices had previously held that a witness was required to give oral evidence at a bail hearing and having failed to call the witness, the matter was dismissed as against the defendant. In relation to another Defendant, the Justices held that the provisions of Article 6 of the ECHR did not apply. Article 6 of the ECHR is similar in context to section 9 of the Anguilla Constitution and guarantees a person charged with a criminal offence the right to a fair trial, the presumption of innocence, and procedural fairness in the conduct of criminal proceedings against him.

[66] In deciding the issue raised in **R v Havering Magistrates' Court**, Latham LJ said at paragraph [27] of the judgment:

“Article 5 therefore requires there to be in place a judicial procedure which not only meets the criterion of being in accordance with law, but which also provides the basic protection for a defendant inherent in the concept of judicial proceedings. Such proceedings must ensure equal treatment of the person liable to be detained and the authorities, it must be truly adversarial, and there must be “equality of arms” between the parties. These concepts inevitably overlap. In language more familiar to common lawyers, a person liable to detention is entitled to natural justice. He must be treated fairly.”

[67] In **R v Havering Magistrates' Court**, their Lordships, in delivering the judgment of the court, were careful to note the necessity to not conflate the issues arising under Articles 5 and 6 of the ECHR. Essentially, Article 5 of the Convention deals with the right to challenge the lawfulness of one's detention, whereas Article 6 deals with the whole gamut of rights guaranteeing procedural fairness in criminal matters. To properly highlight the point which the court makes in the present case, it is

²⁵ All England Official Transcripts (1997-2008); [2000] Lexis Citation 3483

necessary to cite extensively from the passages in **R v Havering Magistrates' Court**.

[68] In delivering the judgment of the court in **R v Havering Magistrates' Court** their Lordships said:

"[33] It is submitted on the basis of these authorities that where the complaint which is said to justify deprivation of liberty depends upon proof of a past event, then the only way in which that can properly be tested by the **court** is by production of the witness or witnesses necessary to establish that event, so as to give the defendant an opportunity to cross-examine and make appropriate submissions. It is submitted that further support for this can be gleaned from academic authority.

i. In *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* page 150, the authors state:

"Article 5(4) also incorporates the principle of adversarial proceedings, which has been developed under Article 6(1). There, it means that all evidence must be produced before the parties with a view to adversarial argument."

[34] At page 214 the authors refer to the right to cross-examine as being one of the core rights inherent in adversarial proceeding under art 6(1).

ii. In *European Human Rights Law* at para 7.20, Starmer says:

"Presumably there must also be an opportunity for the defence to test such evidence as is adduced to justify pre-trial detention."

[35] It seems to me, that care needs to be taken to ensure that the facts and decisions in given cases do not hide the principal purpose behind the provisions of art 5. It is to ensure that persons are not subject to arbitrary deprivation of liberty. That is clear, not only from the cases to which I have already referred, but also from the decision of the **Court** in *Kemmache v France (No 3)* [1994] 19 EHRR 349. The **court** said:

"37. The **court** reiterates the words 'in accordance with a procedure described by law' essentially refer back to a domestic law; they state the need for compliance with the relevant procedure under that law. However the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from or be executed by an appropriate authority and should not be arbitrary."

[36] It is clearly with this principle in mind, that the Court has been prepared to borrow some of the general concepts of fairness in judicial proceedings from art 6. But that does not mean that the process required for conformity with art 5 must also be in conformity with art 6. That would conflate the Convention's control over two separate sets of proceedings, which have different objects. Article 5, in the present context, is concerned to ensure that the detention of an accused person before trial is only justified by proper considerations relating to the risks of absconding, and of interfering with witnesses, or the commission of other crimes. Article 6 is concerned with the process of determining the guilt or otherwise of a person who if found guilty would be subject to criminal penalties. It is in that context that the procedural safeguards required respectively under art 5 and art 6 must be viewed. In particular, it seems to me to be important to note that the *de Wilde* case and the *Winterwerp* case represent the high watermark of the argument that the procedural requirements of art 6 are to be in some way assimilated to consideration of issues under art 5. Neither decision does more, in my view, than to underline the fact that where a decision is taken to deprive somebody of his liberty, that should only to be done after he has been given a fair opportunity to answer the basis upon which such an order is sought. It seems to me that in testing whether or not such an opportunity has been given, it is essential to bear in mind the nature and purpose of the proceedings in question.

[37] Under the Bail Act 1976, a person suspected of an offence and brought before the Court for the purposes of consideration of bail, is, by virtue of s.4 at and Sch 1 to the Bail Act 1976 entitled to bail unless the court is satisfied that there are substantial grounds for believing that the defendant would behave in the way set out in para 2 of Pt 1 of the Schedule. In the case of *In re Moles* [1981] Crim LR 170, the Divisional Court stated that strict rules of evidence were inherently inappropriate in a court concerned to decide whether there were substantial grounds for believing something, such as a court considering an application under the Bail Act 1976. And in *R v Mansfield Justices ex parte Sharkey and others* [1985] 1 QB 613, [1985] 1 All ER 193, Lord Lane LCJ stated:

"It is conceded that there is no requirement for formal evidence to be given, see *In re Moles* [1981] Crim LR 170. It was, for example, sufficient for the facts to be related to the justices second hand by the police officers."

[38] The correctness of these decisions has not been challenged before us. Similar considerations must apply to the assessment of the likelihood of a defendant absconding or breaching the conditions of his bail in an inquiry under s.7(5). But, say both Mr Knowles and Mr Blaxland, where such an inquiry depends upon proof of a past fact, for example a threat to abscond,

or to breach the conditions of bail, or an allegation that a condition of bail has been breached, that is a matter which must be proved, and proved formally, that is by the production of evidence and, says Mr Knowles, the opportunity to cross-examine the appropriate witnesses. This follows, it is said, from the need to give the defendant a proper opportunity to challenge the basis upon which detention is sought; and, it is submitted, the justice can only be of the “opinion” required to justify detention, if the matter has been proved by the prosecution to the criminal standard of proof. It is further submitted, by an analogy with criminal sentencing, where a decision has to be taken as to the appropriate course to take, and there is a conflict of fact between the prosecution and the defendant, the judge should, save in obvious cases, order a trial of the issue: *R v Newton* (1983) 77 Cr App Rep 13, [1983] Crim LR 198”

[69] Again, the court in this instance cannot resist the temptation to cite extensively from **R v Havering Magistrates’ Court** to make the point more pellucid. In providing their reasons their Lordships said:

[40] It seems to me, that the justice is simply required by the statute to come to an honest and rational opinion on the material put before him. In doing so, he must bear in mind the consequences to the defendant, namely the fact that he is at risk of losing his liberty in the context of the presumption of innocence. This was the view of this **court** in *R v Liverpool Justices*. Article 5 does not, in my judgment require any different approach. None of the cases which have been cited to us suggest that the provisions of art 5 include a requirement that underlying facts relevant to detention are to be proved to the criminal standard of proof. This is not surprising, bearing in mind the delicate exercise on which the **court** is engaged in this type of jurisdiction, in seeking to provide fairness to the defendant on the one hand, but securing the objectives of justice and the protection of the **public** during the period up to and including trial on the other.

[41] From the decisions in *R v Liverpool Justices*, *Re Moles* and *R v Mansfield Justices* [supra] It is clear that the material upon which a justice is entitled in domestic law to come to his opinion is not restricted to admissible evidence in the strict sense. Lord Lane describes the common practice of the relevant material being presented by a police officer. I see nothing in either art 5 itself, or in the authorities to which we have been referred, which suggest that, in itself, reliance on material other than evidence which would be admissible at a criminal trial would be a breach of the protection required by art 5. It is true that the European Court of Human Rights on occasions refers to the need for evidence; but that is used in contra- distinction to mere assertion. It does not seem to me that any of the authorities to which we have been referred assist in determining the nature of that “evidence”. Bearing in mind the differences in the rules for

admissibility of evidence in the different jurisdictions of the Member States, it is perhaps not surprising that the **court** appears to have left resolution of that question to domestic law.

[42] What undoubtedly is necessary, is that the justice, when forming his opinion, takes proper account of the quality of the material upon which he is asked to adjudicate. This material is likely to range from mere assertion at the one end of the spectrum which is unlikely may not have any probative effect, to documentary proof at the other end of the spectrum. The procedural task of the justice is to ensure that the defendant has a full and fair opportunity to comment on, and answer that material. If that material includes evidence from a witness, who gives oral testimony, clearly the defendant must be given an opportunity to cross-examine. Likewise, if he wishes to give oral evidence he should be entitled to. The ultimate obligation of the justice is to evaluate that material in the light of the serious potential consequences to the defendant, having regard to the matters to which I have referred, and the particular nature of the material, that is to say taking into account, if hearsay is relied upon by either side, the fact that it is hearsay and has not been the subject of cross-examination, and form an honest and rational opinion. If his opinion is that the defendant has broken a condition of his bail, he must then go on to consider whether or not, in view of that opinion, and in all the circumstances of the case, he should commit the defendant in custody or grant bail on the same or other conditions, applying the principles set out in s.3 (6) and 4 of, and Sch 1 Pt I para 2 (in Pt II para 2) to the Act. If that course is taken, I cannot see how the procedure could be said to be in breach of art 5.

[43] It seems to me, therefore, that the general principles established in *R v Liverpool Justices* remain good law subject to what I have said in para 41 above.”

[70] Ultimately, their Lordships decided that the Justices were wrong to conclude that the provisions of Article 6 of the Convention applied to the hearing before them and their decision was quashed.²⁶

[71] Having considered the decision in **R v Havering Magistrates’ Court** in great depth, it becomes pointless to give any serious consideration to the decision in **R v Hallett and Others** cited in argument by the Applicant. The latter case dealt with the

²⁶ At para [49]

question of the admissibility of the evidence of informants in a criminal trial. The learning in that decision, unfortunately, does not avail the Applicant.

[72] At this stage, the court wishes to add that having considered this limb of the Applicant's argument and the authorities upon which he relies, it has become even more apparent that the Applicant is seeking to have the court review its decision on the previous bail application in an appellate manner. This exercise the court certainly cannot undertake. The court has gone through great pains to discuss the case law cited by the Applicant which inevitably amplifies this point.

[73] The court will not proceed to consider in depth the other authorities relied on by the Applicant in his Skeleton Arguments for the following reasons. Those authorities referred to relate to the principle regarding the fairness of a criminal trial and how the failure by the prosecution to disclose material to a defendant is likely to lead to unfairness in the trial process. The additional case law cited by the Applicant have no relevance to the issues to be decided presently.

[74] In addition, it is necessary to comment on the procedure adopted by counsel for the Applicant in seeking to reinforce their argument on the disclosure point. It appears that the Applicant relies on two affidavits sworn to by Mr. Rogers. The court has difficulty with this practice particularly as it amounts to evidence from counsel appearing as solicitor on record for the Applicant in the instant proceedings. Additionally, the evidence appears to ex post facto, deliberate and self-serving. Moreover, the evidence contained in Mr. Rogers' affidavits appears to have been tailored for the purpose of engineering what seems to be cleverly disguised as a change of circumstances capable of triggering the court's intervention in reviewing its decision on a previous bail application.

[75] As has been stated previously, Mr. Rogers was given great latitude by the court at the prior bail hearing to cross-examine those witnesses upon whose evidence the Respondent had relied on to oppose the grant of bail to the Applicant. Therefore,

the Applicant cannot now be permitted to say that the previous bail proceedings were unfair. The point is that the court had embarked on a full inquiry of the evidence at the previous bail hearing and Mr. Rogers made no complaint of nondisclosure in those proceedings.

[76] The court also deprecates the highly undesirable practice of counsel who appears on record swearing to an affidavit in proceedings wherein he has the general carriage, care, and conduct of the matter on behalf of the client.

[77] In any event, the court finds no merit in the nondisclosure arguments regarding the confidential sources relied on by the Respondent at the previous bail hearing.

[78] In the premises and for the aforementioned reasons, it would be difficult for the court, in this instance, to accept the submissions made on behalf of the applicant, both in response to the preliminary objection and in support of the renewed application for bail.

[79] Therefore, the court will dismiss the present application for bail. In so doing the court makes the following observations. The court has observed that the Applicant, in the present proceedings, had appealed the previous bail decision given by this court to the Court of Appeal. While this appeal was extant the present application was filed. The appeal was withdrawn prior to the hearing of this application. The court has been alerted to the fact that some of the same grounds relied on by the Applicant in the aborted appeal are now being canvassed in the present application. Particularly, the court was alerted to what is contained at paragraph 42 of the Applicant's Skeleton Arguments.

[80] At paragraph 42 of the Applicant's Skeleton Arguments, the Applicant contends that the court ought to be consistent in its rulings with respect to previous cases. According to the Applicant's Skeleton Arguments, "Judicial learning demands that this Court exercises its discretion in like cases in a similar manner according to law". In support of this contention the Applicant relies on the authorities of **Birkett v**

James²⁷ and **Ward v James**²⁸. Relying on these two authorities, the Applicant referred to two previous decisions given by this Court in relation to bail applications made by other Defendants. The purpose of this was seemingly to say that the court must achieve the same result in each case, notwithstanding that the factual matrix of every case differs.

- [81] The court does not agree with the argument in the manner advanced by the Applicant. This clearly cannot be grounds for triggering the court's jurisdiction to hear a fresh bail application. The argument presupposes, respectfully, quite erroneously, that the court can review the exercise of its own discretion or can make a finding that it exercised its discretion improperly or on an unreasonable basis on a previous occasion; or that the court in the exercise of its discretion failed to take into consideration certain matters which ought to guide the exercise of its discretion on a previous occasion involving the same or similar issues.
- [82] This argument has no basis in law, and as ingenious and well-crafted as it may seem, is an affront to avowed legal principles and also an affront to the dignity of the court. Such deliberate and willful machinations can only be considered as having been conceived and designed to undermine the integrity of the judicial process and cannot be countenanced by this Court.
- [83] The cases of **Birkett v James** and **Ward v James** dealt specifically with the power of an Appellate Court to interfere with the exercise of a judge's discretion and therefore, has no bearing on the present application.
- [84] In support of the court's ruling on this aspect of the case, the court echoes the sentiments expressed in the case of **Attorney General v Marques**²⁹, not cited in argument before this Court, which crystalises the posture adopted by this Court

²⁷ [1978] AC 297 at 881 B-G

²⁸ [1966] QB 273 at 570 C, 571 H

²⁹ [2013] IEHC 415

towards the present application, portions of which will be cited here for the purpose of edification.

[85] In **Attorney General v Marques** the Applicant who had been arrested and remanded into custody applied before one judge of the High Court. His application for bail was refused and he was again remanded into custody. On the following day he was again brought before the same judge and bail was denied. The Applicant subsequently issued a fresh motion to be admitted to bail before another judge. On that application, the Respondent raised a preliminary objection to the effect that the application was misconceived and ought not to be allowed to proceed in the absence of a substantive change in the Applicant's circumstances and that therefore it would be inappropriate for the court to revisit a recent judicial determination that the applicant should be denied bail by a court of concurrent jurisdiction. It was argued that in the absence of a substantive change in circumstances the applicant was, in effect, refusing to accept the court's previous ruling and adopting an argumentative posture that was disrespectful and abusive of the court's process. Therefore, the Respondent argued that as the court has an inherent jurisdiction to protect its own process, it had jurisdiction to refuse to entertain the fresh bail application.

[86] In delivering the judgment of the court in **Attorney General v Marques**, Edwards J said:

"The court has considerable sympathy with the notion that barring a meaningful change in circumstances an Applicant for bail who has been previously refused bail cannot ask a court at the same level to revisit the matter. To do places the judge asked to deal with the matter afresh in an invidious situation. Moreover, there has to be finality and certainty in the law. When a court makes a ruling it has to be accepted. If a party is dissatisfied with the ruling his or her remedy is to appeal to a court at a higher level. He or she is not entitled to refuse to accept the court's ruling and to seek to have it revisited by another judge at the same level. To attempt to do so would amount to being argumentative and disrespectful of the court, and could rightly be characterised as attempting to abuse the process of the court.

It is a different situation, however, where the Applicant seeking a revisitation of the bail issue can point to a material change in his situation on the basis that there now exists some new and material circumstance that did not exist at the time that a previous application for bail was refused.”

[87] Although in **Attorney General v Marques** the court granted the Applicant bail, it did so on the basis that the delay in the matter alongside the Applicant’s prolonged incarceration, amounted to a material change of circumstances which permitted revisiting the previous denial of bail.

[88] The court has already given its findings in relation to the question of delay and the Applicant’s present incarceration. It appears from the material before the court that a case for inordinate delay in the conduct of the proceedings by the prosecution cannot be made out. There is no allegation that can be properly made out to suggest that there cannot be a ‘speedy’ conclusion of the preliminary inquiry or the trial for that matter.

[89] The court is also mindful of the fact that at the committal stage of the preliminary inquiry the committing magistrate has no jurisdiction at that stage to admit the Applicant to bail. However, sections 72 and 73 of the Magistrates’ Code of Procedure Act gives the Applicant the right upon committal to apply to the High Court for admission to bail pending trial.³⁰

Shawn Innocent
High Court Judge

By the Court

Registrar

³⁰ See: R v Slough Justices Ex parte Duncan and Another (1982) 147 JP 1