

EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIMS NOS. DOMHCV2015/0071, 73 AND 74

BETWEEN:

MARTIN SEAMAN

Applicant

And

CHIEF OF POLICE

Respondent

And

GEMMA LOUIS

Applicant

And

CHIEF OF POLICE

Respondent

And

DELVIN CHALLENGER

Applicant

And

CHIEF OF POLICE

Respondent



Appearances:

Mrs. Zena Moore-Dyer and Mrs. Gina Dyer-Munroe of Dyer and
Dyer and Mrs. Dawn Yearwood Steward of Dawn Yearwood
Chambers for Applicant

Mrs. Evelina Baptiste, Director of Public Prosecutions, and Ms. Sherma
Dalrymple, Senior State Counsel, for Respondent

.....

2015: April 10th, 13th, 14th 23rd

May 5th

.....

DECISION

- [1] **THOMAS, (Ag):** Before the court are three notices of application filed on 27th March 2015 by Martin Seaman, Delvin Challenger and Gemma Louis, seeking bail in the context of charges for murder against all of them.
- [2] The grounds upon which the applications are based are identical and those recorded in the application of Martin Seaman read as follows:
1. That bail in the offence of murder can only be obtained by order of the Honourable Judge.
 2. That the Applicant has a fair chance of successfully defending the murder charge and moreover there is no evidence of murder.
 3. That the Applicant will attend trial.
 4. That the Applicant has them fixed place of abode in Dominica,¹ and the availability of suitable persons willing to sign [as sureties]

¹ Martin Seaman, Canefield, St. Paul, Devin Challenger, Castle Bruce, St. Andrew and Gemma Louis, Morne Rachette, St. Joseph

[3] At paragraphs 12, and 11, respectively, the affiants depose that:

"That in the circumstances I am respectfully requesting that bail is granted to me with suitable surety (ies) and that the learned magistrate at the Roseau Court is directed to grant bail to me in a sum fixed by the court."

[4] In each application there is a further affidavit in support; by Natasha Scotland, clerk of the Law Firm of Dye and Dyer, deposing as follows at paragraph 2:

"That I am informed by the Solicitor for the Applicant and verily believe that the Chief of Police indicated that; as far as he is concerned, he has no objection to bail as the Applicants, (that is the other Police Officers jointly charged) have been at the Police Barracks for some time now and they have not attempted to abscond."

Supplementary affidavit in support

[5] On 30th March 2015 all three applicants filed supplementary affidavits in support. Again, the contents of the affidavits are similar and, in summary they speak to the following: the supplementary nature of the affidavit, the officers jointly charged with the murder of Joshua Ettienne, the complainant being acting Assistant Superintendant of Police, Matthew Cuffy; the alleged locus of the murder being the Portsmouth Police Station, while the applicants were on duty, denial of the alleged murder, the absence of disclosure, of being informed and verily believing that in the circumstances of such an allegation of an unlawful act the charge is manslaughter and not murder, the stay of proceeding being obtained upon application to the High Court for judicial review, the withdrawal of the said application and the joint charges being read [in the Magistrate's Court] and being remanded to barracks, despite "undertaking" [concerning remand at the barracks being] remanded to maximum security at the State Prison; during the hearing of the application for judicial review, being 12th August 2014 to 27th March 2015, the officers were allowed to go home and there was no issue of not attending trial; having a permanent place of abode in Dominica, there was never an issue of non-attendance at the trial; the belief there would be no objection will be made on non-attendance if bail granted; being informed by their solicitor and verily believe that the Chief of Police had indicated that, as far as he is concerned, he has no objection to bail being granted; the conditions at maximum security being characterized by threats being made by prisoners and objects being thrown into their cells at night by the said prisoners; and the matter being fixed for hearing in June 2015 before the Magistrate in Portsmouth.

- [6] Finally, the affiants "respectfully request" that an order be made directing the Magistrate to grant bail.

Affidavit opposing bail

- [7] This affidavit is sworn to by Matthew Cuffy, Acting Assistant Superintendant of the Commonwealth of Dominica Police Force, on being so authorized by the Director of Public Prosecutions.²
- [8] At paragraphs 2 and 3 of the said affidavit the deponent says that he is attached to the Criminal Investigation Department and is the Investigating Officer in the report of murder of Joshua Etienne against the applicants: Gemma Louis, Hayden Morgan, Martin Seaman, Delvin Challenger and Olan Vigille all of whom are jointly charged with the murder of the deceased. He further deposes that on 27th March 2015 the charge was read to the co-accused at the Roseau Magistrate Court where they were remanded pending trial.
- [9] At paragraph 5 the deponent identifies the applicants and says that they were all co-accused and were on duty at the Portsmouth Police Station from 8 p.m. on 4th August 2014 to 8 a.m. on 5th August 2015.
- [10] With respect to the affidavits in support filed by Delvin Challenger and Gemma Louis filed 27th March 2015, paragraphs 1,2,3,4,7,8,9 and 20 the deponent neither admits nor denies. The same applies to the same paragraphs of the affidavit in support of Martin Seaman of even date, plus paragraphs 11 thereof.
- [11] At paragraphs 10 to 12 of his said affidavit, A.S.P. Cuffy chronicles some of the evidence obtained in the matter, including a copy of the autopsy report relating to the death of the deceased. Also mentioned is a specific response obtained from the co-accused regarding the presence or absence of injuries on the deceased at the time when he was placed in the cell at Portsmouth Police Station.

² This is so indicated at paragraphs 3 thereof

[12] Two propositions are posed at paragraphs 13. The first is that the evidence does not disclose self defence and the second is that there is reasonable suspicion and strong circumstantial evidence to sustain a charge of murder against the co-accused except Hayden Morgan.

[13] In the premises the deponent is asking the court to deny the application for the bail sought by the co accused.

Affidavit in Reply

[14] In their affidavit in reply filed on 9th April 2015 the applicants set out to cast doubt on the evidence which A.S.P Cuffy deposed that he had gathered. And the evidence is characterized as being "unreliable" and "does not establish murder".³

[15] But the applicants take the matter to another level by pointing out contradictions in the evidence of Josey Jno Lewis and Alison George⁴ and go on to describe two witnesses, Allison George and Keith Baron, as "notorious criminals"⁵ and the belief that the two witnesses have "implicated" them "in keeping with their attitude of being anti-police"⁶

Issue

The sole issue for determination is whether the application for bail by Martin Seaman, Delvin Challenger and Gemma Louis should be granted?

[16] At the hearing in chambers the submissions by learned counsel, Mrs. Zena Moore-Dyer, made reference to the affidavit in support and supplementary affidavits and then made the following submissions, as summarized by the court:

- (1) There was an absence of evidence respecting reasonable suspicion and circumstantial evidence.

³ See affidavits in reply of Martin Seaman and Delvin Challenger at paragraph 6

⁴ See affidavits in reply of Martin Seaman and Delvin Challenger at paragraph 4 in each case.

⁵ See affidavit in reply of Martin Seaman, Delvin Challenger and Gemma Louis at paragraph 5 in each case

⁶ Affidavits in reply of Martin Seaman and Delvin Challenger at paragraph 5

- (2) There was no evidence of the basic requirement of the applicants not attending trial. Cases cited were *Nordally v Attorney General* and *Thelston Brooks v Attorney General, Commissioner of Police*.
- (3) The prosecution has no reasonable suspicion of criminal offence.
- (4) There is no evidence to show that the applicants will not attend trial.
- (5) There must be identifiable evidence to show attempts by the applicants to flee.
- (6) Automatic inferences are forbidden by virtue of cases decided by European Court of Human Rights. Among the cases cited were: *B v Austria* A 175 (1900), *Matzenetter v Austria* (1969), *Neumeister v Austria* (No.1) 1968, *Tomasi v France* (1995), *W. Switzerland* A. 254 (1993) 17 EHRR 60, *Matter v France* 1997- II, p. 374, p. 43, *Morgani V France* (No. 1) (1995) 21 EHRR 34
- (7) The *Hurnam* case says that tampering with evidence and interfering with witnesses requires evidence of an identifiable risk.
- (8) The applicants were free for eight months and remained in the jurisdiction.
- (9) There is no evidence that Seaman drove off in a vehicle with the deceased on it.
- (10) The affidavit evidence must show evidence and the case law does not support detention. Since charges were preferred no attempt was made to leave the state or otherwise indicate that they will not attend there trial. Bail should therefore be granted

[17] In written submissions on behalf of the three applicants, Learned Counsel, Mrs. Zena Moore-Dyer makes reference to the fundamental right to liberty as set out in section 3 of the Constitution of the Commonwealth of Dominica. Particular emphasis is placed on sections 3 (1) and 3 (5) of the said Constitution. Reference is also made to section 9 (5) of the said Constitution relating the presumption of innocence, with reliance placed on the judgment of Madame Justice Georges Creque (as she then was) in the unreported case of **Thelston Brooks and the Attorney General and Commissioner of Police**⁷. In that case the learned judge referred to the decision of the Privy Council decision in **Davenaranath Hurnam v The State of Mauratius**⁸ in which Lord Bingham of Cornhill, speaking for the Board, provided some guidance with respect to consideration of bail and enunciated the principles which should guide the courts of Mauratius in exercising their discretion

⁷ Claim No. AXAHCv2006/0089

⁸ Privy Council Appeal No. 53 of 2004

to grant or withhold bail. In this connection learned counsel noted that the case of **Hurnam** was considered and applied in the case of **Thelston Brooks**⁹

[18] Learned counsel for the applicants in further submissions, cited the case of **Noordally v Attorney General**¹⁰ in which the "proper test" regarding the grant of bail was identified and its relevance even today. Learned counsel also noted that the test was applied in the **Thelston Brooks** case, and much earlier, in the case **R v Cymbalisty**¹¹ and **Reg v Dubois**¹²

[19] After quoting the reasoning on the proper test as applied in the **Thelston Brooks** case, learned counsel submitted the following:

- "10. In this case, the only objection to bail (as expressed in the affidavits opposing bail) is the seriousness of the offence. It is submitted that on the principle set out above, the other circumstances including the fact that the accused was 'out' some eight months before remand, knowing that a charge of murder was preferred and no attempt was made to leave the state or otherwise indicate that they will not attend their trial. Bail should therefore be granted to the accused.
11. Reference is also made to **Hurnam's** case where bail was granted since:
"It was not resisted on the ground that he was likely to abscond or would not appear to stand trial."
12. The Director of Public Prosecutions has not when all factors and the circumstances are considered has not shown substantial grounds for denying the Applicant bail"

Response

[20] The learned Director of Public Prosecutions, Ms. Evelina Baptiste, responded by addressing the constitutional rights to liberty, the common law rules relating to bail and the power to grant bail under section 58 of the **Magistrate's Code of Procedure Act**¹³

⁹ Loc cit

¹⁰ [1986]MR 204

¹¹ Manitoba Court of Queen's Bench, 1961

¹² [1959] 31. C.R.164

¹³ Chap. 4:20

[21] Further submissions, in summary, are the following:

- (1) In making a determination on an application for bail the court must consider the seriousness of the offence, the gravity of the offence and the penalty for the offence.
- (2) Reference was made to the dictum of Lord Bingham in the Hurnam case.
- (3) The court must look at the circumstances and the nature of the evidence. It has to be an overview of the evidence when all the evidence may not have been collected.
- (4) It was not agreed that all the court had before it was the evidence of ASP Cuffy since the deponent makes reference to evidence and photographs.
- (5) There is reasonable suspicion that an offence had been committed.
- (6) The evidence relates to the deceased being in custody at the Portsmouth Police Station, evidence of the deceased being beaten, the deceased was heard calling for help, evidence that the deceased could hardly walk, the deceased was heard asking to be taken to the hospital and the deceased being found later dead.
- (7) The autopsy report reveals the nature of the injuries to the deceased.
- (8) The evidence does not reveal any evidence of self-defence or any other defence.
- (9) The case of Cybalisty shows that each case turns on its own facts in applying the test with respect to bail.
- (10) Bail is secondary to the criminal matter.
- (11) In a bail application there can be no detailed evaluation of the evidence before the court.
- (12) No consideration of the public interest arises since it is not pleaded in the affidavit.
- (13) Strong inferences can be drawn from the police officers being on duty and the alleged incident took place in the police cell. Some officers had more than 20 years service. Witnesses were in the cells and the police had authority over them.
- (14) It is not in all cases that there will be evidence of flight risk in relation to the accused.
- (15) All matters considered it is reasonable to say that the accused will not be available for the trial.

Reply

[22] In reply learned counsel for the applicants make the following submissions:

- (1) The cases show that bail has been granted in a number of murder cases. Cases cited: **R v Rose** [1985] ALL England Report, **Nordally** case, **Cymbalisty** case and cases involving self-defense and provocation.
- (2) Reasonable grounds to infer must be based on evidence to satisfy that the test for bail.
- (3) Every person is entitled to have the benefit of the law and bail ought not to be denied to the applicants because they are police officers.
- (4) In **Casey v Director of Public Prosecutions** case No.174/2014 there was affidavit evidence as suggested in the **Thelston Brooks** case.
- (5) In this case there is no evidence to support an assertion of flight risk.
- (6) The autopsy report is governed by Part 32 of **CPR 2000**

Reasoning

[23] The fundamental right to liberty under section 3 of the Constitution of the Commonwealth of Dominica is not in doubt but it is not absolute. In like manner the right to bail though not a fundamental right was always recognized in law and enforced. Indeed one of the exceptions to the right to liberty captured by these words:

“(d) For the purpose of bringing him before the court in execution of an order of the court.”

[24] Central to the issue is the law relating to bail. And in this regard section 10 of the **Eastern Caribbean Supreme Court (Dominica) Act**¹⁴ contains a reception of law provision which reads thus:

“10. The jurisdiction of the High Court in all criminal proceedings shall be exercised with the Criminal Law and Procedure Act and any other law in force in the state”

[25] The word ‘law’ in the section is not defined so that it would encompass written as well as unwritten law.

¹⁴ Chap: 4:02

[26] Bail is generally regarded as a constituent of the civil law; under Part 58 of **CPR 2000** but section 58 (4) of the **Magistrate's Code of Procedure Act**¹⁵ also gives the High Court the power to admit a person to bail in any case. That apart, there is as yet no statutory provision in force in Dominica concerning bail.

[27] In the case of the Overseas Territory of Anguilla, Madam Justice Janice George-Creque (as she then was) in the case of **Thelston Brooks and The Attorney General and The Commissioner of Police** ¹⁶ identified and addressed a similar situation in relation to the jurisdiction. The following are her findings in this connection:

“[13] It is to be noted that Sections 3,5, and 10 (2) of Chapter 11 of the Constitution of Mauritius under consideration in Hurnam's case bear close analogy to Sections 1,3,9 (5) respectively of the Constitution. It is also to be noted that Anguilla does not have a Bail Act similar to the 1989 or the 1999 Act of Mauritius also under discussion in Hurnam. However the common law of England where the principles and practice relating to bail are centuries old was expressly brought into force by virtue of Section 8 of the Eastern Caribbean Supreme Court (Anguilla) Act. The jurisdiction of the High Court is to be exercised in accordance with the Criminal Procedure Act and in other law in force in Anguilla. This embraces the common law. Furthermore, the courts in the absence of specific legislation relating to bail, have in practice followed the principles set out in UK legislation relating to bail”

[28] The learned judge after an analysis of the Privy Council's decision in **Noordally v Attorney General** ¹⁷, in relation to the statutory provision in Mauritius, together with 'guiding principles' enunciated by the European Court of Human Rights relating to the grant of bail as well as other decided cases¹⁸ in this regard arrived at the following conclusion :

“The opinion, at ¹⁹ paragraph 16, referred to five grounds for refusing bail which are well recognized by the European Court of Human Rights as being in keeping with the European Convention for the Protection of Human Rights. The United Kingdom is a signatory to this convention which in turn made applicable to the Overseas Territories of the United Kingdom. The jurisprudence of the European Court recognizes, as stated by Lord Bingham, although not absolute, is a right which is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention. These grounds are as follows:

(I) the risk of the Defendant absconding bail,

¹⁵ Chap. 4:20

¹⁶ Claim No AXAHC2006/0089 at para 13

¹⁷ [1986] MR 204

¹⁸ *Jogessur v DPP* [1992] SCJ 65; *Dhoory v DPP* [1993] MR and *Boolaky v DPP* [1995] MR 56

¹⁹ This is a reference to Lord Bingham's opinion in the **Davendranath Hurnam v The State**, Privy Council No. 53 of 2004, [2005] UKPC 49

- (II) the risk of the individual interfering with the course of justice,
- (III) preventing crime,
- (IV) preserving public order
- (V) the necessity to protect the defendant."

[29] As noted before, in the **Thelston Brooks** case, the learned judge indicated that in the absence of a written law relating to bail in Anguilla said this:

"Counsel on both sides was content to adopt the principles emanating from the jurisprudence of the European Court of Human Rights as principles by which this court should be guided in the exercise of the discretion as to whether to grant or refuse bail. It was also accepted that the strength or weakness of the case against the suspects or defendants must also enter into the judgment."

Distinction between the colony of contentment by learned counsel on both sides and as such the common law must apply.

[30] Anguilla is still an "Overseas Territory" of Britain while the Commonwealth of Dominica is independent and sovereign. One immediate legal consequence of this fact is that Britain, having ratified the European Convention of Human Rights takes Anguilla within the fold of the Convention. On the other hand, there is nothing in the Laws of the Commonwealth of Dominica to suggest that Dominica has ratified the Convention. The further consequence is that decision of the European Court of Human Rights based on the Convention is not binding on the courts of Dominica. However both Anguilla and Dominica the English common law relating to bail apply.

Bail at common law

[31] It is widely recognized both at common law²⁰ and under statute that the proper test to be applied with respect to grant of bail is whether the defendant will appear for his trial and further that bail should not be used as a form of punishment. But while there is a right to bail the courts have denied bail with respect to certain felonies such as treason and murder. The courts in considering

²⁰ See for example: *R v Phillips* [1947] 32 CR App R 47; *Noordally v Attorney General* [1986] MR 204

the applications have regard to the nature of the accusation, the evidence in support of the accusation, the severity of the punishment. More recently, the public interest has been added.

The test respecting bail

[32] At paragraph 203 of Book I of **Archbold- Pleading, Practice and Evidence** 1996 the following is recorded:

"The proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial. *Re Robinson*, 23 L.J.Q.B 286.

The test should be applied by reference to the following considerations:

- (1) The nature of the accusation. *Rv. Barronet and Allan*, 1E&B.1;
- (2) The nature of the evidence in support of the accusation. *Re Robinson*, ante
- (3) The severity of the punishment which conviction will entail. *Re Robinson*, ante
- (4) Whether the sureties are independent, or indemnified by the accused person. *Hermann v Jeuchner*, 15 Q.B.D. 561; *Consolidate Exploration, etc, Co. v Musgrave* [1900] 1CH 37; *R v Porter* [1910] 1KB 369²¹

[33] The learning goes on to say that: "It is not usual to grant bail on charges of murder: *Re Barthelemy*, 1E&B.8. Also in **Reg v Dubois**²², Scott, Acting CJ after noting that the general rule is that a person committed for trial or a charge of murder will not be admitted to bail went on to say that: "There are certain cases, however, where a person committed for trial in a charge of murder has been granted bail where the judge considers the circumstances are such that it is reasonably certain that the accused will dully surrender himself for trial."

[34] In **Rv. Cymbalist** the Manitoba Court of Queen's Bench, upon an application for bail with the applicant, a former soldier then engaged in extensive farming and seeking to maintain his farm and thus preserve the same for his children's inheritance, the application was granted.

²¹ See also: *Rv Phillips* [1947] 32 CR App R 47; *Nordally v Attorney General* [1986] MR 204

²² [1959] 31 C.R 164

Application of the test

- [35] As noted above the test must be applied by reference to certain considerations. The first of these is the nature of the accusation. The accusation or charge involved is murder – a common law offence. The ancient definition given or rendered by Lord Lore is in these terms:

"Where a person of sound memory and discretion- unlawfully Killeth- any reasonable creature in being- and under the King's peace with malice aforethought, either express or implied."²³

- [36] The state in seeking give effect to its burden had filed an affidavit by A.S.P.Cuffy, statements by certain witnesses and the autopsy report prepared by Dr. Milagros Romero Fernandez at the Medical Laboratory, Princess Margaret Hospital.

- [37] Learned counsel for the applicants has cast grave doubt on the statements of witnesses filed as the contention is that according to Part 30.2 of CPR 2000 it is mandatory that evidence must be contained in affidavits. After an examination of Rules 11.2, 11.9 and 30.2 this submission follows:

"It is therefore mandatory that if the Applicant or Respondent is relying in evidence before the court, it must be contained in the Affidavit and if contrary to the Rule, the evidence is not contained in the affidavit, it cannot be accepted or inferred by the court.

The learned Director of Public Prosecutions cannot refer or rely to any evidence unless it is contained in her affidavit."²⁴

- [38] While learned counsel for the applicants is correct in so far as the law on the content of affidavits is concerned, the issue does not arise since ASP. Cuffy only relies in the statements for the purpose of identifying his source. Thus he is permitted to do in these interlocutory proceedings. The relevant portion of the affidavits opposing bail is drawn in these terms:

"10. During my investigation I was informed by Allison George a witness in the matter, who was detained at the Police Station in Portsmouth, while the deceased was there, and verily believe that sometime after that the deceased, was placed in the cells he was removed and was seen being beaten by the Applicant and the co-accused- Gemma Louis and Delvin Challenger. I am also informed that at about 4:35 am the accused Hayden Morgan found the deceased in the cell and he appeared dead."

²³ See: Archbold, 1966 at para 2467 and Archbold 2007 at para 19-1

²⁴ Submissions filed by Dyer & Dyer on 16th April 2015.

- [39] Also relevant is paragraph 12 of the said affidavit. It reads thus:

"12. I conducted custodial interview with the Applicant and the co-accused in the matter and in response to questions from me when the deceased was brought to the Portsmouth Police Station and placed in police cells he had no physical injuries."

[40] In so far as the autopsy report this is an exhibit to the affidavit (MC1) which is permitted by Part 30.4 (1) of CPR 2000. Even further, section 13 of the **Evidence Act**²⁵ permits the use of such a document.

[41] The following is contained at paragraph 11 of the affidavit in opposition:

"11. I was present when the Pathologist Milagros Romero Fernandez conducted the autopsy on the body of the deceased and later on she handed a copy of her report to me which I read. [The] report indicated that the deceased obtained fractures on the 8,9, 10, 11 and 12th ribs on his left side and fractured of the 3rd, 4th and 12th ribs on the right side, fractures of both sternum and clavicles, oedema of the lungs along with the other findings. I hereto attach a copy of the said autopsy report dated 7th day of August 2014 marked 'MC2'"

[42] Another aspect of the evidence relates to the police officers on duty between the hours of 8:00 pm on the 4th August 2014 and 8:00 am on 5th August 2014. ASP Cuffy deposes that it was Hayden Morgan, Martin Seaman, Delvin Challenger, Olan Vigille and Gemma Louis who at the material time was Supervision Subordinate Officer at the Portsmouth Police Station.

[43] In so far as the approach of the court to the evidence in this context is concerned, this was set out by Madam Justice George-Creque in the **Thelston Brooks** case, and it is of infinite importance in this context. This is the reasoning and conclusion at paragraphs 2 of the judgment:

"It was also accepted that the strength or weakness of a case against the suspect or defendant must also enter into the judgment. This however, does not call for a detailed examination at this pre-trial stage but merely a preliminary overview of the available evidence, as to do otherwise would, in my view, be tantamount to a premature trial of the case at the time when all the evidence may not very well have been collected and would on any view, a most inappropriate course."

[44] Accordingly, the evidence before the court may be categorized as falling within a very compass consisting of 1. the applicants being on duty between 8:00 pm on 4th August 2014 and 8:00 am on 5th August 2014; 2. the deceased being arrested around 8:00 pm on 4th August 2014, and taken to the Portsmouth Police Station and placed in a cell therein; 3. other persons being also in other

²⁵ Chap 64 (25th April 1876)

cells; 4 evidence of the deceased being beaten and asking to be taken to hospital; 5. Cpl. Hayden Morgan finding the deceased dead on 5th August 2014; in cell #3 ;6 the pathological diagnosis consisting of i. severe traumatic hemorrhage of both lungs, ii. multiple fractures of the ribs in the right and left side with muscular hemorrhage, iii. fracture of the right clavicle and sternum bone, iv. diffuse subarachnoid hemorrhage and severe edema of the brain, v. kidneys with characteristic of shock; vi. severe congestion of all organs. And finally the opinion of the pathologist being: "It is my opinion that 48 year old Joshua Etienne died from severe diffuse traumatic hemorrhage of both lungs due to injuries to the throat."

[45] Within the narrow compass is where reasonable suspicion lies either on persons locked in cells or on the police officers on duty. There is no evidence of other persons present inside the police station at the material time. And the respondent is alleging that the reasonable suspicion falls on the applicants based on strong circumstantial evidence.

[46] Having regard to what Justice George-Creque said concerning delving into the evidence the court would simply juxtapose the following learning from Vol .11 (2) **Harlbury's Laws of England** at paragraph 1061 in the abstract concerning circumstantial evidence in relation to a charge of murder:

"Since most crimes are committed in secrecy, it is inevitable that, in a criminal trial, direct proof is often lacking and a great deal of the evidence is indirect or circumstantial. Ultimately, in the absence of evidence directly proving the facts in issue, the accused may be convicted solely on circumstantial evidence. In a case of murder, for example, there may be a conviction notwithstanding that the body is never found provided that there is sufficient circumstantial evidence to convince the jury that the facts cannot be accounted for on any rational hypothesis other than murder."

[47] It is common ground that at this stage the court is not concerned with guilt or innocence, but merely with the question whether the evidence as contained in the affidavits opposing bail sworn to by ASP Cuffy supports the allegation. The court considers that the answer rests in the affirmative.

[48] At this pre-trial the applicants in their affidavits in reply, apart from denying involvement with the beating of the deceased, though on duty, go on to make statements about the witnesses in the matter. In the case of Martin Seaman and Delvin Challenger they both depose as follows at paragraph 5 of their affidavit:

"I know that both Allison George and Keith Bruno are notorious criminals. I believe that they have implicated me in keeping with their attitude of being anti police. That I did not beat the deceased in front of the cells or at all."

- [49] In the case of Gemma Louis, she deposed that "the untrue statements of Mathew Cuffy are in an effort to have me remanded in prison without justification²⁶. And further, "Keith Bruno is a notorious criminal with a long record²⁷.
- [50] The court has no difficulty with the applicants denying beating the deceased but attacking Prosecution's witnesses in such terms leads to the reasonable inference that the purpose must be to weaken or discredit the evidence against them in the eyes of the court even at this pre-trial stage. Indeed these contentions go well beyond the overview of the evidence.
- [51] It is common ground that the punishment upon a finding of guilt of murder can be the death penalty or life imprisonment. It all depends on the gravity of the murder. This is a matter of law and as such no affidavit evidence in this regard is necessary.
- [52] The final consideration being the matter as to whether the sureties are dependant does not arise in this instance.

Should bail be granted to the applicants?

- [53] In seeking to address this issue the court is guided by the following dictum of Lord Bingham uttered in the **Hurnam** case. This is what he said at paragraph 14:

"In other words, it is only in exceptional circumstances²⁸ that a detainee provisionally charged with a serious offence like murder, attempted murder, conspiracy to commit murder or drug trafficking will be released on bail, the more so if, as is the case with a small jurisdiction like Mauritius, the police, the prosecuting authorities and judges and magistrates (*judicial officers*) are fully conscious of the fact that the law and order situation is everyday deteriorating and the scourge of drug consumption and trafficking is rampant.

²⁶ At para 6 of her Affidavit in Reply

²⁷ At para 9 of her Affidavit in Reply

²⁸ Although the Criminal Justice and Public Order Act 1994 UK is not received in Dominica it is of some importance to note the trend that under section 25 (1) of that Act a court may only grant bail in relation to a charge of murder "if it is satisfied" that "exceptional circumstances" are shown. The section applies to murder, attempted murder, manslaughter, rape and a host of sexual offences.

We consider judicial officers in Mauritius who have firsthand knowledge of the prevailing local conditions regarding law and order and organized crime should have a margin of appreciation in exercising their discretion and deciding on the need for a detainee to be admitted to bail, taking into account all the public interest grounds for refusing bail..."

[54] This court considers that although the foregoing was said in a particular statutory context, it is equally applicable to a common law situation. And the fact that much earlier in the Canadian case of **Regina v Cimbalisty** the court also used the word 'exceptional' in the context of an application of bail for a charge of murder in issue.

[55] Further guidance is placed on another dictum of Lord Bingham in the same case that is closed to home. He said this:

"15. It is obvious that a person charged with a serious offense, facing a severe penalty if convicted, may well have a powerful incentive to abscond or interfere with witnesses likely to give evidence against him, and this risk will often be particularly great in drug cases. Where there are no reasonable grounds to infer that the grant of bail may lead to such a result which cannot be often eliminated by the imposition of appropriate conditions, they afford good grounds for refusing bail."

[56] Finally, the court is guided by the following legal equation concerning the test regarding admission to bail which Madam Janice George Creque ²⁹ is the author:

"Accordingly, the exercise of a judge's discretion in admitting an accused person to bail calls for a balancing of the sides by weighing the interests of an accused person and his fundamental rights as guaranteed under the Constitution on the one hand, and the interest and rights and freedoms of others and the public interest, being the sole qualifications in the said rights, or the other."

[57] Against the backdrop of the constitutional right to liberty, the exception thereto noted above, the law, the foregoing dicta and the considerations relevant to the test for the grant of bail, it is the determination of the court that the applications must be denied because:

- (a) The charge is that of murder being one of the most serious crimes known to law
- (b) The Prosecution has a strong case based on circumstantial evidence.
- (c) The case falls within a narrow compass of the deceased and other detained persons locked in cells and the applicants, who all admit their presence at the Portsmouth Police Station on duty between 8:00 pm on 4th August, 2014 and 8:00 pm on 5th August, 2014.

²⁹ See: Thelston-Brooks case, loc cit, at para 12

- (d) The death of Joshua Etienne (the deceased) within the period aforesaid.
- (e) The attack on the persons and evidence of witnesses for the Prosecution by the applicants leads to the reasonable inference that the action was aimed at discrediting the evidence in the eyes of the court, even at this pre-trial stage.
- (f) The court takes judicial notice of the fact that when the applicants were free for 8 months and did not attempt to leave the jurisdiction relates to a period when judicial review proceedings were instituted in the matter challenging the exercise of power by the Magistrate as a consequence all proceedings were stayed upon leave being granted to seek judicial review.
- (g) The absence of evidence respecting any intention or plan to depart is not fatal since each turns on its own facts. In the circumstances of the applicants, a reasonable inference can be drawn that the applicants have a powerful incentive to interfere with witnesses.
- (h) There is nothing in the affidavits deposited by the applicants to indicate that these applications are exceptional cases in the context of a murder charge

[58] Order accordingly.



Errol L. Thomas

High Court Judge (Ag)