[2016] **JMSC Civ. 152**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV02350

IN THE MATTER OF the Charter of Rights of the Constitution

AND

IN THE MATTER OF Bail Act

AND

IN THE MATTER OF the residual powers of the Court

BETWEEN	**FABIAN HENRY**	**APPLICANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

Mrs. Jacqueline Samuels-Brown, Q.C. and Miss Marsha Grace Samuels instructed by Jacqueline Samuels-Brown, Q.C. for the Applicant

Mrs. Fairclough- Hylton instructed by The Director of Public Prosecutions for the Respondent

Heard: June 23, 29 and July 6, 2016

Bail Application

McDONALD J.

[1] Notice of Application for an Order granting bail was filed on June 8, 2016 supported by affidavits of Fabian Henry, Tameka Watson and Dr. Glenton Strachan. This application is opposed by the Crown.

[2] **The Law**

The Constitution of Jamaica establishes inter alia that every citizen has a right to liberty, freedom of movement, and when charged with a criminal offence, is presumed to be innocent until he has been proved to be guilty, or has pleaded guilty.

Section 13 of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act 2011 hereafter called "the Charter" has replaced Chapter III of the Constitution.

Pursuant to Section 13, 14(1), 14(3), 14(4) and 16(5) of the Charter the citizen is entitled as part of his general constitutional rights, to personal liberty, the right to freedom of movement, due process and the right to bail. These rights are not absolute however but are subject to conditions.

Section 14(4) of the Charter provides:-

Any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody."

[3] **Section 3 of the Bail Act provides:-**

(1) Subject to the provisions of this Act, every person who is charged with an offence shall be entitled to be granted bail by a Court, a Justice of the Peace or a police officer, as the case may require.

(2) A person who is charged with an offence shall not be held in custody for longer than twenty-four hours without the question of bail being considered.

(3) Subject to section 4(4) bail shall be granted to a defendant who is charged with an offence which is not punishable with imprisonment.

(4) A person charged with murder, treason or treason felony may be granted bail by a Resident Magistrate or a Judge.

(5) Nothing in this Act shall preclude an application for bail on each occasion that a defendant appears before a court in relation to the relevant offence."

[4] Section 4(1) states in part:

"4 – (1) where the offence or one of the offences in relation to which the defendant is charged or convicted is punishable with imprisonment, bail may be denied to that defendant in the following circumstances –

(a) The Court a Justice of the Peace or police officer is satisfied that there are substantial grounds for believing that the defendant, if released on bail would –

(i) fail to surrender to custody;

(ii) commit an offence while on bail; or

(iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;

(b) ....."

Section 4(2) sets out the matters which the Court must take into account in considering bail.

"(2) In deciding whether or not any of the circumstances specified in subsection (1) (a) exists in relation to any defendant, the Court, a Justice of the Peace of police officer shall take into account –

(a) the nature and seriousness of the offence;

(b) the defendant's character, antecedents, association and community ties.

(c) the defendant's record with regard to the fulfilment of his obligations under previous grants of bail;

(d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having failed to surrender to custody;

(e) whether the defendant is a repeat offender, that is to say, a person who has been convicted on three previous occasions for offences which are punishable with imprisonment; or

(f) any other factor which appears to be relevant including the defendants health profile."

[5] The burden of proof in bail applications is the civil standard of a balance of probabilities. See paragraph 31 of Brooks v the Attorney General Claim No. AXA HCR 2006/0089 (a decision of the Eastern Caribbean Supreme Court in the High court of Justice in the territory of Anguilla.)

The onus is on the party who opposes the grant of bail to show why bail should be denied.

In the consolidated constitutional cases of Claim No. 2010HCV05201 Adrian Nation v. The Director of Public Prosecutions and the Attorney General and Claim No. 2010HCV05202 Kerreen Wright v The Director of Public Prosecutions and the Attorney General delivered on July 15, 2011 – the Court declared inter alia that section 3(4A) as amended by the Bail (Amendment) Act 2010 is in breach of the Constitution and therefore void.

[6] In the instant case previous applications for bail have been made, the last being on March 10 and 11, 2016 in the St. Mary Circuit Court.

The Judge was unable to rule on the application and the case was traversed to the next circuit without a ruling. The Judge had requested cite of the relevant station diary but the diary produced did not include the records for January 25, 2014 but for another month.

R v Slough Justices Ex Parte Duncan and Another (1982) 75

Criminal Appeal Reports 384 is authority for the position that if a previous tribunal finds as a fact that substantial grounds exist to believe that the accused will fail to surrender to custody, commit an offence while on bail or obstruct the course of justice, then the subsequent tribunal must accept that finding unless new material is available for it to reconsider the granting of bail.

If there is no new material bail should be refused – [See paper presented on Theory and Practice of Applications for Bail by Mr. Justice Patrick Brooks, J/A on 11/17/2013]

Further the starting point for this court must be the finding of the position when the matter was last considered by the court.

See R v Nottingham Justices ex parte Davies (1980) 2 All ER 775

Is there any new material presented?

[7] I accept Mrs. Samuels Brown's, Q.C. submission that new material is before the court, namely –

The health of the accused referred to at paragraph 26 of his affidavit, the supporting affidavit of Dr. Strachan, and the station diary entries with entries made by Sgt. McLaughin himself and the debriefing entries.

[8] **Fail to surrender to custody/ risk of the Defendant absconding bail**

Mrs. Fairclough-Hylton submitted that when she looked at a notation made by the Crown Counsel in Court on 7th March 2016 the prosecutor had advised the Court

that she received information from investigating officer, Inspector Downer that the accused had attempted to escape custody on a visit to the St. Anns Bay Hospital when in custody at the Ocho Rios Police Station. The police got wind of the plan and thwarted them as a result the accused was transferred to the Horizon Remand Centre.

This court has not been told what the accused is alleged to have done. What was the plan, when was it and was there any attempt to carry out the plan? There is no evidence that the incident was recorded.

At paragraph 3 of Fabian Henry's affidavit he stated "that since March 10, 2014 when I was taken into custody, I was first held at the Ocho Rios Police Station and on April 11, 2014 was transferred to the Horizon Remand Centre in the parish of Saint Andrew" This is unchallenged. Over two (2) years has passed since the accused was removed to Horizon Remand Centre and there is no investigated report of this alleged incident. The allegation should have been tested and probed by the investigator in order to furnish specifics.

On the basis of what is before me I can't say that the accused is to be regarded as flight risk.

[9] **<u>If released would the accused interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.</u>**

Mrs. Fairclough-Hylton submitted that if the accused was to be admitted to bail, there is a likelihood that he would interfere with witnesses and that interference might in of itself result in the accused committing an offence on bail. She submitted interference with witnesses will amount to an offence.

The accused is charged along with Neville Anderson and Franklyn Anderson for murder of a Anthony Hudson committed on the 25th January 2014.

The threats alleged by the Crown were made:-

(1) By accused Neville Anderson to Roydell Oconnor to the effect “yu love yu life, so don’t fuck yourself.”

Mrs. Samuels-Brown, Q.C. questioned the relevance of this to the accused – and asked where is the nexus to Fabian Henry.

(2) Another threat was allegedly made to the father of O’Connor by a brother of one of the accused who asked for Roydell and said that he wanted to speak to him because a mack 11 was in Mr. Roydell’s possession and he wanted that as well as the gun missing.

Mrs. Samuels-Brown, Q.C. pointed out that the brother is not before the Court, and the alleged statement is of no relevance to this application. She said it points to Roydell being a gunman.

(3) An alleged threat was made to Crown witness Karen Wheatly, aunt of the deceased by accused Franklyn Anderson. This was reported to the Highgate Police Station.

(4) On the 9th December 2015 it was outlined in Court that the grandmother of the deceased was told by a brother of accused Franklyn Anderson that her daughter Karen Wheatly may have run away but a kill them a go kill her, she not going to get a chance to run away. This was reported to the Highgate Police Station.

Mrs. Samuels-Brown, Q.C contended that these reports are unsubstantiated as there are no affidavits given.

I find that the four (4) threats alleged above do not have relevance to the bail application on behalf of Fabian Henry. Only the remaining threat makes reference to the accused, which is that the accused is alleged to have told the witness Roydell O’Connor, “keep yu mouth, nuh sey nothing to nobody because anybody who leak this a information yah, them a go get put up.”

This is alleged to have been said the same day as the murder.

[10] Mrs. Samuels-Brown, Q.C. asserted that the prosecutor has come before the court giving double and triple hearsay of what she has heard from the investigating officer – She said belief is irrelevant, the law stipulates that

evidence must be provided to show that there are substantial grounds for believing.

[11] **Crowns Case**

The allegations against the accused in respect of the death of Anthony Anderson are summarized at paragraph 9 of his affidavit, which reads:

> *"In summary the allegations against me are that on 25th of January 2014 the witness Roydell O'Connor who lives in Esher District in the parish of Saint Mary was at his premises when at about 9a.m. he heard an explosion. At this time he was completing the repair of a motor vehicle. After which he immediately then test drive the vehicle to the boxing plant which is five chains away and back. He washed his hands and went into the lane where he had heard the explosion coming from and entered the home of Neville Anderson on said lane. This was about five (5) chains away and back. According to Roydell O'Connor he went inside where he saw the deceased lying on the ground in a room in the home and according to him he saw me as well as Neville Anderson standing outside in the yard. He further alleges that he saw me with the deceased man's gun in my hand. He left shortly after. He further alleges that later that day between 4 and 5 o'clock he again saw me when I told him in a threatening way to keep his mouth shut."*

The evidence before this Court is circumstantial evidence and if accepted by a Court, it cannot be said to point in one direction and one direction only.

[12] There is no evidence of the accused being present or participating in the shooting.

[13] Mrs. Samuels-Brown, Q.C. said that assuming what O'Connor said is true, does it mean that Mr. Henry had the deceased's man's gun in his hand having obtained it in the course of self-defence? Does it means that Fabian Henry had disarmed the deceased man for the protection of another not because he is a policeman but a citizen entitled to so do.

She asserted that many different explanations are open – it is not an open and shut case; not excluding explanation as to him being an accessory after the fact.

On the other hand, the applicant in his affidavit at paragraph 3 stated that he did not know any Anthony Anderson. He did not kill any Anthony Anderson and he did not in any way contribute to his death. He has never participated in the murder of anyone. He is innocent.

[14] Another aspect of the Court's case concerns the entries in the station diary. It is the Crown's case that Roydell O'Connor heard an explosion at 9;00a.m. on 25th April 2014.

The certified copy of the entry in the Guy's Hill Police Station diary dated 10th April 2014 indicates that on 24th January 2014 at 7:10p.m. Constable Henry took over duties from W/Constable S. Brown-Thompson. Also that on the 25th January 2014 at 9:45a.m. he handed over responsibilities of station guard to W/Constable McKoy. These entries were made by the accused. There is also another entry on the 25th January 2014 at 9:46a.m. made by Sergeant McLaughlin which states that "Corporal McKenzie conducted muster and debriefing exercise at this location with Constable Stewart and Constable F. Henry. Both were commended for a job well done duty ended incident free."

The Defence has sought to rely not only on the entries made in the station diary as to when Fabian Henry started and ended duty but also on the entry made by Sub Officer i/c Sergeant McLaughlin.

Sergeant McLaughlin stated that as sub officer i/c his duty was to review entries in the station diary and sign off on them.

At the preliminary enquiry he was asked if Constable Henry handed over station guard duties at 9:45a.m., he replied no, he handed over at 8:00a.m. On further cross-examination he was asked.

Q. So your evidence-in-chief to us that Constable Henry would have performed his duties as station guard between the hours of 6p.m. and concluded at 8:00a.m. was incorrect.

A. It was incorrect, I took it from the duty forecast. He said that the duty forecast simply schedules duties to be performed and the time. He was shown the station diary and identified the entry for 24th January 2014 which stated 7:10p.m. as the time Constable Henry began his duties at the Guys Hill Police Station as station guard and handed over at 9:45a.m. the following day.

He was also referred to the debriefing entry and the time of 9:46a.m. which he acknowledged. The prosecution did not re-examine on any of these points.

[15] Mrs. Fairclough-Hylton informed the Court that Inspector Dawson has informed her that there is to be an investigation into the station diary as a report was made to the sub officer i/c of the Guys Hill Police Station. He is unable to say the stage at which investigation has reached. This is because he has been transferred from St. Mary to Kingston. He is on sick leave, had surgery and is due to resume on 29th June 2016. He told the prosecutor that the investigating officer said that when he initially spoke to the Sergeant in charge of Guys Hill Police Station, at the time the Sergeant indicated that Constable Henry had left at 8:00a.m. in the morning hence reason for the investigation into the station diary. I place no weight whatsoever on the questioning of the authenticity of the entry in the station diary.

Sergeant McLaughlin gave evidence at the preliminary enquiry and if he wished to retract his evidence he could have done so in the form of a statement.

The matter came up again some three (3) months ago and there has been no challenge to undermine the credibility of what was in the diary. The entries are certified by the sub officer in charge McLaughlin and dated 10th April 2014.

The defence submits that the applicant has a good defence that he was on station guard duty at the time of the incident.

Roydell O'Connor's evidence is that he heard the explosion at 9 in the morning, and there is no dispute between the prosecution and defence as to what O;Connor is saying in his evidence.

[16] I accept Mrs. Samuels-Brown, Q.C. submission that the credibility of that account is in grave doubt having regard to what is contained in the station diary.

Furthermore paragraph 12, 13 and 14 of Fabian Henry's affidavit if accepted makes it clear that he could not as alleged have been in Esher District anytime close to 9 o'clock.

Paragraph 17 of the applicant's report speaks to him being at the Doctor's office until approximately 5p.m. The Doctor's affidavit speaks to the applicant remaining at his office from 2 – 5 p.m.

[17] There is no allegation that the accused will reoffend whilst on bail. In this regard the Court takes account of the applicant's past history and actual behaviour.

Paragraphs 22 and 23 of his affidavit address his education and work experience. In particular paragraph 23 states that having graduated from the Jamaica Police Academy in October 2008 he was immediately brought back to lecture in police laws and procedures as his first assignment. This was on the basis of his personal attributes and academic abilities including tertiary

experience and his deportment and good character. He held this assignment until October 2011 when he applied for a transfer.

[18] Undoubtedly a murder charge is a serious offence. I have considered the allegations and evidence against the accused and find that in this case the evidence is equivocal. I find on a balance of probabilities that the applicant has a good defence to the allegations implicating him in the offence charged.

I do not find that the Crown has established sufficient grounds for believing that if the applicant is released on bail he would fail to surrender to custody, commit an offence while on bail or interfere with witnesses or otherwise obstruct the course of justice.

The onus is on the Crown to justify the denial of bail and this must be done by providing cogent reasons to the Court.

[19] (1) Bail is granted to the Applicant in the sum of Two Million Dollars ($2,000,000.00) with one, two or three sureties.

(2) The applicant shall surrender all travel documents.

(3) A stop order shall be placed at all ports of exit for the Island.

(4) The applicant shall reside outside of the parish of St. Mary and in the parish of Trelawny with Aidian Dowding at Lot 402 Stonebrook Vista, Falmouth.

(5) The applicant shall report to the Falmouth Police Station every Monday, Wednesday and Friday between the hours of 6:00a.m. to 7:00p.m. until the completion of this trial or further order of the Court.

(6) The Applicant should have no contact with any of the persons who have given statements in this matter with the exception of Tameka Watson.

(7) Applicant Attorney-at-Law to prepare, file and serve this order.