

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

145/11(2) R v PATRICK POWELL – MURDER

REASONS FOR DECISION IN BAIL APPLICATION

Crown: Mrs. Caroline Haye and Mrs. A. Feurtado-Richards instructed by the Director of Public Prosecutions

Defence: Mr. Patrick Atkinson Q.C., and Ms. Deborah Martin

Watching proceedings: Mr. M. Howell and Miss Wilcott instructed by Knight Junor Dowding and Samuels

Heard: November 7, 8, and 9, 2011

LAWRENCE-BESWICK J.

This is an application for the defendant, Mr. Patrick Powell, to be admitted to bail. The allegations briefly are that Mr. Powell shot the deceased, causing his death, in circumstances amounting to murder.

The prosecution alleges that Mr. Khajeel Mais, now deceased, was the only passenger in a taxicab being driven by a taxi operator (“the eyewitness”) when the taxicab collided with the motor vehicle being driven by the accused.

The prosecution will be seeking further to present evidence at the trial that thereafter whilst the eyewitness remained in the stationary taxicab observing the damage to the accused’s vehicle, he heard his passenger exclaim then heard an explosion like a gunshot and felt a liquid splash on him.

The eyewitness states that the defendant was the only person on the scene whom he saw with a gun.

The allegations continue that the witness then drove his taxicab away.

He could hear his passenger gasping.

Thereafter, according to the allegations, the defendant used his vehicle and chased the taxicab. Eventually, the eyewitness lost sight of Mr. Powell's vehicle and took his passenger to the hospital.

That incident occurred on July 1, 2011 and on July 11, 2011, Mr. Powell was taken into custody and charged with murder.

Submissions on Bail

The Crown opposes bail on these bases:

1. The accused is a flight risk;
2. The nature and seriousness of the offence and the aggravated nature in which it was committed;
3. The witness will be interfered with, either by the accused himself or by another on his behalf, with or without his knowledge.
4. Cogent, credible evidence of the identification of the defendant and of the damage to the X6 and the taxicab.

The defence on the other hand submits that Mr. Powell is willing to stand his trial and will present himself for his trial.

Entitlement to Bail

Section 14(4) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 provides:

"(4) 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."

Section 3(1) of the Bail Act reflects this entitlement and provides that:

"Every person who is charged with an offence shall be entitled to be granted bail by a court."

Denial of Bail

There are, however, circumstances in which bail may be denied, and Section 4(1) of the Bail Act specifies them to include where:

“the Court ... is satisfied that there are substantial grounds for believing that the defendant, if released on bail, would:

- (i) fail to surrender to custody,”*
- (ii)*
- (iii) interfere with witnesses”*

These are the circumstances relevant to this case.

Considerations in denying bail

Section 4(2) of the Bail Act specifies factors to be considered in deciding whether the circumstances exist where bail may be denied. Insofar as is relevant to this case it provides, that

- “(2) [T]he court shall take into account.....
- (a) the nature and seriousness of the offence;
 - (b) the defendant’s character, antecedents
 - (c)
 - (d)the strength of the evidence of his having committed the offence

Application to the instant case

With regard to the nature and seriousness of the offence, it is agreed that murder is a serious offence. Regarding the defendant's character and antecedents it is unchallenged that Mr. Powell has no previous convictions and is gainfully employed. The prosecution and defence, however, disagree about the strength of the evidence against Mr. Powell. It is not required that I analyse every piece of available evidence during an application for bail. I will now therefore highlight some of what the prosecution expects to rely on and the submissions in that regard.

The prosecution asserts that the eyewitness has known Mr. Powell for about 8 years and also knows his family and his activities. Further, the submission is that he had the opportunity to identify the defendant on the scene and did in fact use the opportunity to see and recognize the defendant with a gun in hand at the scene, firing at his taxicab and thereafter chasing the taxicab.

The defence counters that the witness gave two inconsistent statements reflecting a weak case against Mr. Powell. In the first statement dated July 5, 2011 the eyewitness does not identify any perpetrator and speaks of either an X5 or X6 motor vehicle being involved. Indeed the eyewitness is said to there assert that he did not look at the licence plate of the vehicle nor in the direction of the perpetrator. In his second statement dated July 8, 2011 the eyewitness speaks of an X6 motor vehicle and purports to identify a person known as "Nigger" as the perpetrator. The reason proffered for the difference between the two statements is that the eye witness was in fear for his life and did not want to say anything and hear it repeated on the streets. However, after giving the first statement, the eyewitness is said to have received information that a new detective was at

the police station and therefore decided to speak what he describes as the truth in the second statement.

It is of some great interest that there is no allegation that the eyewitness has had the opportunity to confirm in any way that the defendant in custody is in fact the person that he saw on the scene and knows as "Nigger".

In deciding whether the circumstances exist where bail may be denied, I therefore take into account, in accordance with Section 4(2) of the Bail Act that:

- a. the offence of murder is serious;
- b. the defendant has no previous conviction and is gainfully employed;
- c. the strength of the evidence of his having committed murder.

I consider the fact that there are two conflicting statements of the sole eyewitness and the reason that he purportedly gave for the difference in his accounts.

I am mindful of the fact that the prosecution also intends to rely on another witness as to hearing explosions which sounded like gunshots at the relevant time and as to seeing thereafter one car being chased by another. That witness does not purport to identify the defendant.

I note also that the prosecution intends to rely on a statement concerning a person described as the "baby mother" of the accused taking an X-6 for its back bumper to be sprayed on July 3. They argue that the results of scientific tests done on car paints support their case that there was a collision between the taxicab of the eyewitness and a car owned by the defendant and that a part of the bumper of that car was sprayed at a shop shortly thereafter.

It is undisputed that the accused has not handed in his firearm to the police. The prosecution submits that bullets were found to have killed the deceased and the bullets were of the type that could be used in the gun for which the defendant had a permit.

The prosecution's case is based in part on circumstantial evidence and they submit that the strength of their case is so great that the defendant, if bailed, will fail to surrender to custody because of that. At the same time it is unchallenged that the scientific reports say that there was a trace of gunpowder residue on the back of the hand of the deceased.

Should bail be denied?

Having taken those considerations into account, I balance them and now apply them as I determine if the circumstances exist where bail may be denied.

1. Will the defendant fail to surrender to custody?

The prosecution submits that Mr. Powell unexpectedly left the island after killing the deceased. The prosecution alleges further that Mr. Powell has a US passport and residence and is not likely to return to court to face this charge if he has the facility to leave these shores.

It is unchallenged that Mr. Powell was outside this jurisdiction when his attorneys-at-law enquired of the police as to whether they wished him to surrender into custody. It is also unchallenged that Mr. Powell returned to Jamaica at the time agreed by his attorneys-at-law, and the police, and that he immediately surrendered himself and his United States passport to the police.

The defence states that Mr. Powell owns a house in the United States and has a social security number which they assert would make him easily located if he chose to go overseas. At the same time, it is confirmed that Mr. Powell also owns a house here in Jamaica and according to the defence, his common-law wife and his children live here in Jamaica where he pursues his occupation of restoring and selling dilapidated houses.

The circumstances outlined do not satisfy me that there are substantial grounds for believing that the accused, if released on bail would fail to surrender to custody. He turned himself into custody and he has a house, business and family here in Jamaica.

2. *Will the defendant interfere with the witnesses?*

Section 4(1)(a) of the Bail Act provides that bail may also be denied if the court is satisfied that there are substantial grounds for believing that the accused - if released on bail - would interfere with witnesses.

The prosecution invites the court to so find in this case because of experiences that the witness complained about, which he says resulted in his decision not to attend an identification parade to identify the accused. The defence urges the court to find that the experiences are in no way related to the accused's action and in at least one instance, may have been the action of someone associated with the police or prosecution.

That instance is described as being where the witness is said to have been approached by two men who said they were police officers and said that they had seen the witness' statement where he had said he had not seen the killer. They warned him not to go to any identification parade and allow "them" to show him a picture to "set up" the defendant.

That exchange is said to have occurred on July 17. It is agreed that the defence did not have any statements in this matter until July 22, 2011, after the incident allegedly occurred. This would mean that the accused, according to the allegations placed before me, did not yet have access to the eyewitness' statement at the time of the alleged incident. The defence would not have known the contents of the statement and could not be in a position to use the unknown statement to interfere with the eyewitness.

The defence's submissions is that if any such exchange did occur it must have been at the hands of agents of the Crown who would be the only persons with access to the statement.

The prosecution also relies on the allegations of an incident on July 15 where the eyewitness, was accosted by 20 men at a gas station and was rescued by one man with a machete. There is no allegation linking the defendant to this incident.

The final incident which the prosecution invites the court to consider under the umbrella of interference with the witness is said to have occurred when a person purporting to be from the Observer newspaper arrived at the eyewitness' house and later an article was published in the newspaper concerning the incident.

There is no suggestion that the accused has any connection, or exerts any control over persons of the Observer newspaper or indeed persons who say they are from that newspaper.

The prosecution in relying on these circumstances has not provided me with substantial grounds for believing that the defendant if released on bail would interfere with witnesses. None of the circumstances of which the eyewitness complains has been linked to the defendant or to persons under his control.

It is to be noted that the prosecution indicates that the offer was made to the eyewitness to be put on the Witness Protection Programme. He has declined the offer to be so protected.

Conclusion

Having considered the law as stated in the Constitution and in the Bail Act, I conclude that the circumstances as presented to me are not such that bail may be denied. I bear in mind that Section 4(1) of the Bail Act specifies the circumstances where bail may be denied to include where:

“the Court ... is satisfied that there are substantial grounds for believing that the defendant, if released on bail, would:

- i) fail to surrender to custody,”*
- ii)*
- (iii) interfere with witnesses”*

I am not satisfied from the submissions and allegations presented to me that there are substantial grounds for believing that the defendant, if released on bail, would fail to surrender to custody or interfere with witnesses.

I bear in mind also that Section 14(4) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 provides:

“(4) 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.”

In my view sufficient cause has not been shown for keeping this defendant in custody.

I am fortified in my interpretation and application of the law by the pronouncements of the law by the Judicial Committee of the Privy Council in the Mauritian case of **Devendranath Hurnam v. The State** Appeal 53/2004 where the Board recognised the correctness of principles expressed surrounding the granting of bail in **Nooardally v. Attorney-General** [1986] MR 204 where the Court there held that “bail is not to be withheld merely as a punishment.”

Further, the learned Law Lords commended the approach of the Magistrate in **Hurnam** (supra), noting that he did not discount the seriousness of the offences but did not treat the seriousness as a conclusive reason for refusing bail. Rather, the Magistrate addressed the wider question whether, given the seriousness of the alleged offences, it was necessary to refuse bail in order to serve the ends for which detention before trial is permissible.

In our jurisdiction section 4 of the Bail Act states where detention before trial is permissible.

It follows therefore, according to the law as I understand it, that Mr. Powell in these particular circumstances is entitled to bail.

I offer him bail in the sum of ten million dollars (\$10 million) with one (1) or two (2) sureties with conditions:

1. to report to the Matilda's Corner Police Station every Monday, Wednesday and Saturday between 7a.m and 6p.m.
2. to be placed under curfew at his place of residence between 7:00 p.m. and 6:00 a.m.
3. to surrender to the Police all travel documents that he satisfies them that he possesses.