

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CRIMINAL)
AD 2007

In the matter of a Bail Application
by Thelston Brooks
AND
In the matter of
COP-v-Thelston Brooks for Murder

CLAIM NO. AXA HCR 2006/0089

BETWEEN:

THELSTON BROOKS

Applicant

AND

THE ATTORNEY GENERAL
THE COMMISSIONER OF POLICE

Respondents

APPEARANCES:

Mr. Clyde Williams and Ms. Ricki Camacho instructed by Ms. Paulette Harrigan, solicitor for the Applicant.

Ms. Vernetta Richardson, Crown Counsel, on behalf of the Respondents.

Date: 2006: December 18, 21
2007: January 15

JUDGMENT

[1] GEORGE-CREQUE, J.: On 18th December, 2006 I heard an application for bail made on behalf of the Applicant, a youngster who had recently turned his 17th birthday, and who is

resident and domiciled in Anguilla. He was arrested and charged on 11th November, 2006 with the offence of murder of another youngster who allegedly died from stab wounds following an incident which occurred sometime during the day prior, somewhere in or in the vicinity of the Ronald Webster Park following an inter-school football match. He was thereafter held on remand at Her Majesty's Prison in The Valley, Anguilla, there being no detention facilities for juveniles in Anguilla save and except the said prison which houses the general population of Anguilla's prisoners as well as other persons on remand.

[2] On 21st December, 2006 I made an order directing the Magistrate to admit the Applicant to bail on the terms and conditions stipulated in the order and indicated then that my reasons for so doing would be given in writing later given the importance of the matter not only to the applicant but to the community of Anguilla as a whole. I now do so.

[3] A review of section 67 of the Magistrate's Code of Procedure Act¹ which deals generally with the right of accused persons to bail appears to me to be an appropriate starting point. Section 67 states as follows:

'(1) Where the offence with which the accused person is charged is an offence punishable with a fine or with imprisonment for any term not exceeding 2 years, the accused person is entitled (my emphasis) to be admitted to bail as is hereinafter mentioned.

(2) Where an offence with which an accused person is charged is an offence, other than an offence mentioned in subsection (1) or (3), the Magistrate may (my emphasis) in his discretion admit the accused to bail as hereinafter provided.

(3) The Magistrate shall not (my emphasis) admit to bail any person charged with treason or murder.

(4) A Judge of the High Court may order the Magistrate to admit a person to bail in any case.'

[4] From this section it is clear that as the gravity of the offence and or the punishment increases, so does the limitation on the Magistrate's powers culminating in the total prohibition in respect of the offences of murder and treason. For the offence of murder

¹ Magistrate's Code of Procedure Act R.S.A. c M 15

which was previously punishable by death² the power to admit an accused to bail is vested in a judge of the High Court and is discretionary.

- [5] The Applicant, by his application, sought the exercise of that discretion in his favour for an order that he be admitted to bail on certain conditions. Generally, the prevailing practice is a denial of bail where the applicant is charged with murder which, following the abolition of the death penalty³ now carries, on conviction, a mandatory sentence of life imprisonment. It was and is thus, one of the most serious offences under the law.
- [6] The Applicant cited the basis for his application as being his constitutional right to liberty, and the presumption of innocence in reliance on sections 1, 3 and 9 of the Schedule to the Anguilla Constitution Order, 1982⁴ ("The Constitution"). Chapter 1 of the Constitution, in like manner as the constitutions of many other post – colonial Commonwealth countries in the Caribbean, deals with the fundamental rights and freedoms of persons protected thereunder. It is useful to set out, in part, those sections of The Constitution on which the Applicant relied.
- [7] Section 1 set out in general, the fundamental rights and freedoms of an individual and says in essence, that, subject to the rights and freedoms of others and the public interest, every person in Anguilla has the right, inter alia, to life, liberty, and the protection of law.
- [8] Section 3 then details the protection of the right to personal liberty and states in part as follows:
- "3 (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say—*
- (a)*
 - (b)*
 - (c)*

² The Caribbean Territories (abolition of death penalty for murder) Order 1991

³ See note 2 above

⁴ Anguilla Constitution Order, 1982 [S.I. 1982 NO. 334]

(d)

(e)

(f) *upon reasonable suspicion of his having committed or of being about to commit a criminal offence under the law of Anguilla;*"

[9] Section 3(5) goes on to state as follows:

"(5) Where any person is brought before a court upon suspicion of his having committed an offence, he shall not be thereafter further held in custody in connection withthat offence save upon the order of a court."

[10] Section 9 details the provisions designed to secure the protection of law. Section 9(5) specifically encapsulates the time immemorial common law doctrine of the presumption of innocence and states that *"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty."*

[11] The notion that the provisions of the Constitution and in particular those provisions in which those fundamental rights and freedoms are enshrined are to be given a generous and purposive construction so as to ensure that those rights are meaningful, may now be taken as trite law.

[12] Accordingly, the exercise of a judge's discretion in admitting an accused person to bail calls for a balancing of the scales by weighing the interests of an accused person and his fundamental rights as guaranteed under the Constitution on the one hand, and the interest of the rights and freedoms of others and the public interest, being the sole qualifications on the said rights, on the other. Lord Bingham of Cornhill in delivering the opinion ('the Opinion') of the Privy Council in **Devendranath Hurnam -v- The State**⁵ on appeal from the Supreme Court of Mauritius, succinctly stated the proposition thus: *" ..the courts are routinely called upon to consider whether an unconvicted suspect or defendant should be released on bail, subject to conditions pending his trial. Such decisions very often raise questions of importance both to the individual suspect or defendant and to the community as a whole. The interest of the individual is of course to remain at liberty unless or until he*

is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried will inevitably prejudice him and in many cases his livelihood and his family. But the community has a countervailing interest in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence and that he does not take advantage of the inevitable delay before trial to commit further offences”

- [13] It is to be noted that Sections 3, 5, and 10 (2) of Chapter II of the constitution of Mauritius under consideration in **Hurnam’s** case bear close analogy to Sections 1, 3 and 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 Acts 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 in Anguilla⁶ and 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 any 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.
- [14] In **Noordally -v- Attorney General** ⁷ decided prior to the 1989 Bail Act of Mauritius it was stated that the proper test of whether bail should be granted or refused was whether the defendant will appear for trial and is not to be withheld merely as a punishment. This principle is as applicable now as it was centuries ago.
- [15] The Judicial Committee took the opportunity to consider and opine on other cases decided by the Supreme Court of Mauritius as well as by the European Court of Human Rights relating to the guiding principles to be adopted in the exercise of the discretion in the granting of bail to a suspect or a defendant.

⁵ Privy Council Appeal No. 53 of 2004, [2005] UKPC 49

⁶ See: the Common Law (Declaration of Application) Act R.S.A c 60 – brought into force in 1705

- [16] In respect of the decisions in a line of cases beginning with **Jogessur -v- the DPP**⁸, including **Dhooky -v- DPP**⁹ and **Boolaky -v- DPP**¹⁰ and decided after the 1989 Bail Act where, notwithstanding the courts' recognition of the discretion to grant bail, went on to express that the grant of bail in such cases was said to be contrary to 'invariable practice' (*Jogessur*) or 'well established practice' (*Dhooky*) or 'never allowed' (*Boolaky*) the Learned law lords opined that the court's discretion was in practice all but emasculated. They also pointedly noted, that the judgments in those cases made no reference to the general right to liberty, the specific right contained in section 5 (analogous to section 3 of The Constitution) or to the presumption of innocence.
- [17] Lord Bingham at paragraph 15 of the Opinion went on to say as follows: *"It is obvious that a person charged with a serious offence facing a severe penalty if convicted may well have a powerful incentive to abscond or interfere with witnesses likely to give evidence against him..... Where there are reasonable grounds to infer that the grant of bail may lead to such a result which cannot be effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail."*
- [18] In the said Opinion, it was made clear that the onus is not on the detainee, but is on the party seeking to deprive him of his liberty. It was further made clear that whilst the seriousness of the offence and the severity of the penalty, if convicted, provide grounds for refusal of bail, they do not do so in and of themselves, and are to be treated as factors to be taken into account in arriving at a determination as to whether in all the circumstances it is necessary to deprive the applicant of his liberty.
- [19] The Opinion, at paragraph 16, referred to five grounds for refusing bail which are well recognised 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 was in turn made applicable to the Overseas Territories of the United

⁷ [1986] MR 204

⁸ [1992] SCJ 65

⁹ [1993] MR 340

¹⁰ [1995] MR 56

Kingdom.¹¹ The jurisprudence of the European Court recognises, as stated by Lord Bingham, *“that the right to personal liberty, 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,
- (ii) the risk of the Defendant interfering with the course of justice,
- (iii) preventing crime,
- (iv) preserving public order, and
- (v) the necessity of detention to protect the Defendant.

[20] The Eastern Caribbean Court of Appeal in **Attorney General of St. Lucia –v- Lorne D.C. Theophilus**,¹² although not dealing directly with the issue of bail but more on the point of the constitutionality of certain provisions in the 2004 Criminal Code of St. Lucia which created an absolute prohibition against the granting of bail in respect of offences such as rape, murder, firearms and drug offences where the penalty was imprisonment for five years or more, held that such a provision was unconstitutional, in that it took away the discretion of the court given by the constitution which enabled the court to determine whether the detention of a person should continue, i.e. whether the court may grant or refuse bail to a detainee. The Court noted that the Criminal Code 1992 of St. Lucia, whilst precluding a magistrate from granting bail to a person charged with treason or murder, did not preclude a judge from so doing in respect of such offences. The status which therefore prevailed in St. Lucia pre the 2004 Criminal Code accords with the current position in Anguilla. Sections 1(a), 3 (1) (3) (5) and 8(2) are in fairly similar terms to the corresponding provisions of The Constitution earlier referred. In **Lorne’s** case, Rawlins JA cited **Hurnam’s** case with approval and felt that the opinion of the Privy Council was instructive, having regard to the *“clear pointers which the Privy Council afforded to the interpretation of constitutional provisions which guarantee the right to personal liberty”*.¹³

¹¹ Anguilla is an Overseas Territory of the UK

¹² Civil Appeal No. 13 of 2005 (St. Lucia) – unreported.

¹³ See: Para 25 of Judgment.

[21] Counsel on both sides were content to adopt the principles emanating from the jurisprudence of the European Court of Human Rights as principles by which this court should also 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 suspect or defendant must also enter into the judgment. This however, does not call for a detailed examination of the evidence 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 a time when all the evidence may not very well have been collected and would be on any view, a most inappropriate course.

[22] I now turn to consider the case at bar in the context of these principles and having due regard to the provisions of the Constitution protecting the right to liberty and the protection of law.

The nature of the offence and the severity of the punishment

[23] As I noted earlier, murder is one of the most serious offences known to the law. Counsel for the Crown referred to the judgement of Edwards J in **Sharman Rosemond -v- P C Charles and Ors.**¹⁴ Although the issue in that case centred mainly around the question as to whether there was unreasonable delay in being brought to trial, at paragraphs 70 to 76 of the judgment, the principles regarding grant or refusal of bail were discussed. In paragraph 70, the criteria as applicable under the Bail Act 1976 (UK) were set out. At paragraph 85, the learned judge had this to say: *“The discretion of the Court to grant bail in murder cases must be exercised responsibly. This is a very serious crime and it is in the public interest that a person alleged to have committed such a crime and whose guilt may be proved should be available to stand trial within a reasonable time.”* With this statement there is no demur.

The evidence

[24] A person charged with murder and thus facing a sentence of mandatory life imprisonment must to be taken to provide a great incentive to abscond and not appear to take his trial.

¹⁴ Claim No. SLUHCV 2003/0985 - unreported

This factor however, must be weighed with others. I now turn to consider the nature of the available evidence. In the summary of facts provided by the prosecution, it becomes clear that killing of the victim from stab wounds occurred during a fight involving the victim, the accused and at least one other person who is also charged with the victim's murder. An eyewitness ("witness A") who was also in the fight, speaks of another person, (the co-accused) running towards the fight with a knife and stabbing the accused in his back. Witness A then ran away with the co-accused running behind him. Another witness (witness B) speaks of seeing words exchanged between the deceased, the Applicant and the co-accused, then the deceased and the co-accused beginning to fight. Witness A then joined in the fight and whilst the deceased and the co-accused were on the ground, the deceased was over the co-accused. He then saw the Applicant come from behind the deceased's back and saw stabbing motions to the deceased back. It is not clear whether the stabbing motions were made by the Applicant. Other witnesses also speak of at least four persons in the fight – the deceased, the Applicant, the co-accused and witness A; and that when witness A ran away, the co-accused ran behind him whilst the Applicant and the deceased remained fighting on the ground.

[25] The Applicant in an interview under caution admitted being on the scene and being involved in a fight with the deceased, that the deceased struck him first and he defended himself by fighting back. He said that the deceased was choking him while they were fighting and he was trying to get away. The co-accused came and took the deceased off the Applicant, then the deceased and the co-accused were fighting and the Applicant then helped to get the deceased off the co-accused. At this time it appears that witness A was also fighting and at one point witness A and the co-accused were fighting and the applicant and the deceased were fighting. The Applicant, it appears, was the last person fighting with the deceased who was not seen at any time with a weapon. He got up and ran home after the co-accused suggested they go home.

[26] The available evidence so far clearly raises issues of self defence and or indeed questions as to who was the aggressor. Further, there is a conflict in the evidence as to who may have had and/or who struck with a knife. These are matters which the prosecution must

overcome with the requisite degree of certainty. Whilst the results of scientific data are awaited, the probity of this case very much depends on the accounts of the eye witnesses to the incident. There is no dispute that the Applicant, the deceased and others were fighting and that at the end of the fight one of the fighters, the deceased, sustained stab wounds from which he died.

- [27] The Applicant was found and arrested at his home the day after the incident. Apart from referring to the seriousness of the charge and the severity of the punishment as providing an incentive to flee, the prosecution did not seek to suggest that there were any other matters in respect of which the Applicant may be considered a flight risk. There is no evidence that the Applicant attempted to evade his being arrested or that he attempted to flee. He went home after the incident and was found at his home the following day. He lives as he has done all his life with his parents at Cauls Bottom. Judicial notice may be taken of the fact that the island comprising the foreign twin territories of St. Martin/ St. Maarten lies a few miles across the waters and is easily accessible even by small boats plying the waters between Anguilla and that island. There is no evidence that the applicant sought to avail himself of this avenue.

Interference with the course of justice

- [28] The prosecution stated that a number of eye witnesses are minors who are reluctant to talk to the police and that if the applicant is granted bail they may not come forward. There is no evidence, however, that this is the case. Generally, the experience in cases of this kind is that witnesses tend to have some reluctance in coming forward, not because of threats being made upon them by a suspect but by virtue merely of strong family and friendly ties in a small community. Such a circumstance ought not, in my view, to militate against the Applicant. It is not being suggested by the prosecution that the Applicant is likely to threaten any prospective witnesses or otherwise interfere with evidence or obstruct the process of the collection of evidence. It is noted that investigations are still ongoing but nothing has been put forward to suggest that this process will be hampered by the Applicant if granted bail. The Applicant cooperated with the investigators based on his interview under caution.

Prevention of crime

[29] A police certificate in respect of the Applicant was shown to the Court. This showed that the Applicant has no criminal involvements or infractions of any kind. This is not disputed by the Prosecution. No evidence has been adduced tending to suggest that the Applicant has been or was suspected of being involved or engaged in criminal activity or that he will likely be engaged or involved in criminal activity if granted bail. He was up until July earlier in the year a High School student. He began working with one Gregory Martin of Xpress Trucking the same month that he finished High School. Mr. Martin has confirmed that he will continue to employ the Applicant in his business if bail is granted and ensure that he is supervised during periods of work. His parents, who from all accounts are responsible persons, have also stated their intention of ensuring that the Applicant is supervised whilst at home. The Applicant, based on the affidavit of his father, helps around the house and has regularly attended the St. Mary's Anglican Church for the past two (2) years and was recently confirmed there. I am also mindful of the Applicant's age. He has just turned 17.

Preservation of public order and detention to protect the Defendant

[30] I propose to deal with these two considerations together since to my mind they are interrelated. The investigating officer stated at paragraph 8 of his affidavit as follows: *"I am in receipt of information that there is likely retaliation from the friends of the deceased against the Applicant if released on bail."* The Prosecution therefore considers that (i) the release on bail is likely to threaten or disrupt public order and (ii) that the Applicant would be in danger of life and or limb if released on bail and thus his continued detention is necessary for his own safety. This statement by the investigating officer however, is a bald statement lacking an evidentiary basis. Save for this, nothing further has been adduced which may suggest that persons will or are likely to engage in further criminal activity whether by way of retaliatory action or otherwise or any evidence proffered, from which it may reasonably be deduced that the Applicant will suffer harm if released.

The standard of proof to be applied

[31] Counsel on both sides accept that the onus lies on the prosecution to show why detention of the Applicant should continue and not for the Applicant to justify why he should be allowed to enjoy his right to liberty. There is a divergence of view however, as to the standard of proof applicable. Counsel for the Applicant relied on **Winston Campbell –v- Davida Hamlet**¹⁵ a case in which there was considerable discourse as to the standard of proof to be applied in cases where professional misconduct or disciplinary proceedings were being considered. The dicta in this case seem to suggest that where what is alleged is tantamount to a criminal offence then the criminal standard of proof (i.e. proof beyond a reasonable doubt) should apply.¹⁶ Counsel for the Prosecution on the other hand relied on **R.-v- Governor of Canterbury Prison**.¹⁷ in which the dicta therein at page 132 says that the standard for determining bail applications is the civil standard (i.e. on a balance of probabilities). It is well established that the civil standard may be applied with lesser or greater strictness depending on the nature of the matter. I, for my part, consider that the civil standard ought to be the applicable standard to bail applications and not the criminal standard since in such applications there may be many factors and circumstances which though highly relevant may be incapable, at such an early stage of the proceedings, of proof beyond a reasonable doubt.

[32] Having considered all of these factors and circumstances in the round, I was persuaded that the balance lied in favour of the grant rather than the refusal of bail to the Applicant on conditions which I considered adequate in effectively eliminating any risks posed by the Applicant being at large. I accordingly ordered that the Magistrate admit the Applicant to bail on the following conditions:

- (a) The Applicant to report to the Headquarters of the Royal Anguilla Police Force, located at The Valley, Anguilla, every day between the hours of 9: 00 a.m. and 5:00 p.m.;

¹⁵ Privy Council Appeal No. 73 of 2001

¹⁶ See paragraph 20 - Opinion delivered by Lord Brown of Eaton-under- Heywood

¹⁷ [1990] 3WLR 126

- (b) The Applicant to surrender his passport and any other travel document to the Royal Anguilla Police Force, at Headquarters in The Valley, Anguilla;
- (c) The Applicant is restricted from entering into areas where any of the witnesses reside, or from attending any sporting activities in any of the public parks or recreation areas in Anguilla;
- (d) The Applicant is to reside at his parents' home located at Cauls Bottom, Anguilla;
- (e) The Applicant is restricted by a curfew in which he is to be at his parents' residence located at Cauls Bottom by 6:00 p.m. every night and forbidden to leave until 8:00 a.m. the next day unless in the event of a medical emergency at which time he shall be under the supervision of either of his parents Worrel Brooks or Udene Lake.
- (f) The Applicant continues to be employed by Mr. Gregory Martin as a construction worker.
- (g) The Applicant provides two (2) suitable sureties in the sum of EC\$200,000.00 one half of which shall be provided in cash.

This order was further stated as taking effect as from 2nd January, 2007.

[33] I take comfort in arriving at this conclusion from the judgment of Joseph Olivetti J in the case of **Knody Samuel -v- The DPP**¹⁸ in which a bail application in respect of a seventeen year old boy charged with murder on facts and circumstances fairly similar to the case at bar was considered. In that case, after considering the relevant principles, the learned judge also exercised her discretion in favour of granting bail to the accused on conditions.

[34] Finally, I express my appreciation to counsel on both sides for the assistance rendered on this important issue.

.....
 Janice M. George-Creque
 High Court Judge

¹⁸ Suit No. ANUHCV 2003/0083 (Antigua & Barbuda) – unreported