BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2006/0262

IN THE MATTER OF Section 60 (4) of the Magistrate's Code of Procedure Act, Cap. 44 of the revised edition 1991 of the Laws of the Virgin Islands

AND IN THE MATTER of an Application for the grant of bail by MALCOLM MADURO

BETWEEN:

MALCOLM MADURO

Applicant

-and-

THE COMMISSIONER OF POLICE

Respondent

Appearances:

Mr. Hayden St. Clair Douglas for the Applicant
Mr. Terrence F. Williams, Director of Public Prosecutions for the Respondent

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2007: February 22
2007: March 13, April 18

JUDGMENT

[1] HARIPRASHAD-CHARLES J: This is the fifth attempt by the Applicant, Malcolm Maduro seeking bail pending his trial for the offences of unlawful possession of a controlled drug, inciting the supply of a controlled drug and blackmail.

Salient background facts

[2] On 28 October 2006, two of the witnesses in this case were the captain and crew on a vessel when they discovered a dinghy containing some bags floating in Sir Francis Drake

Channel. They tied the dinghy to their vessel and towed it into Cooper Island, a lonely island off Tortola with no police station or outpost. At Cooper Island, they searched for identification on the bags and having found none, one of them opened one of the bags and he spotted a number of shiny bricks in plastic bags. He became suspicious and immediately telephoned the Virgin Islands Sea & Air Rescue (VISAR). Subsequently, members of the Royal Virgin Islands Police Force arrived. The bags were taken to the Police Marine Base where they were examined. The bags contained 169 kilograms of a white powdery substance which was suspected to be cocaine with an estimated street value of $16.9 million.

[3] On 3 November 2006, one of the witnesses was at Cooper Island when he was approached by Mr. Maduro and another man demanding their cocaine declaring that there were 9 bags of cocaine and only 7 bags were turned over to the police. They inquired about the other witness and waited for more than 3 hours until he returned. Upon his return, they demanded their cocaine or the money if the cocaine was sold. One of the witnesses recognised Mr. Maduro as someone he knew for 6 years. They threatened the witnesses that if they did not get their cocaine then they would have "to do things the hard way" and they would see them soon. They subsequently left. The witnesses reported the alleged incident to the Police that same day.

[4] The Police saw Mr. Maduro at Cooper Island on 6 November 2006. He was invited to the police station and he went voluntarily. Later, he was arrested and charged with the offences of (i) Unlawful Possession of a Controlled Drug contrary to section 7 (1) of the Drugs (Prevention of Misuse) Act, 1995 (as amended), (ii) Inciting the Supply of a Controlled Drug contrary to section 6 (2) of the Drug (Prevention of Misuse) Act; and (iii) Blackmail contrary to section 225 of the Criminal Code, 1997.

[5] On 8 November 2006, Mr. Maduro appeared before the Magistrate. His application for bail was refused. The following day, he appeared before a Judge of the High Court seeking to be admitted to bail. His application was heard on 13 November 2006 and bail was refused. On 29 November 2006, he again appeared before the Magistrate. Mr. Douglas appearing

as Counsel for Mr. Maduro made yet another application for bail. The Crown objected to bail on essentially the following grounds: (i) Mr. Maduro was a flight risk; (ii) police investigations into the matter were incomplete; (iii) there were concerns that Mr. Maduro might interfere with potential witnesses and impede the investigation and (iv)the witnesses were concerned and afraid for their personal safety. Again, the Magistrate refused to admit Mr. Maduro to bail.

[6] The matter was adjourned to 29 January 2007. On that day, the Crown was not ready to proceed with the case and Mr. Douglas made another endeavour to persuade the Magistrate to admit Mr. Maduro to bail. The Magistrate adjourned her decision to 14 February, 2007 when once more, she refused to admit him to bail. On that occasion, it appeared that the Magistrate was of the opinion that she lacked jurisdiction to admit Mr. Maduro to bail since he had made a previous application to the High Court. She declared herself *functus officio*. The case was adjourned to 13 April 2007. It appears that the Crown is now ready to commence. In the interim, Mr. Maduro was remanded in custody.

[7] Mr. Maduro has now made yet another attempt to be admitted to bail pursuant to section 60 (4) of the Magistrate Code of Procedure Act, Cap. 44 which expressly states that "a Judge of the High Court may order a Magistrate to admit a person to bail in any case." The application is also made pursuant to the Civil Procedure Rules. CPR 58.1 outlines the procedure by which bail applications are made to the High Court. The English Supreme Court Rules expressly provides that where an application for bail is made to the High Court and refused, then another application cannot be made. Our Rules do not contain such an expressed provision and in my opinion, do not exclude such an application to be made again. In any event, Mr. Douglas submitted that since the refusal of bail by both the Magistrate and the Judge, there have been changed circumstances.

[8] Learned Counsel submitted that the investigation is now complete and Mr. Maduro has been served with the statements of the witnesses upon whom the Crown seeks to rely. According to Mr. Douglas, there can no longer be said that there is any possibility of impeding or interfering with the investigation since it is complete and in any event, Mr.

Maduro has pleaded not guilty to the allegations of threats and has denied the very making of those threats. Mr. Douglas adumbrated that it cannot be said that Mr. Maduro demonstrated any animosity against any of the witnesses at any time subsequent to that occasion out of which these charges arise.

[9] Mr. Douglas elaborated that Mr. Maduro has been incarcerated for the past four months and he has maintained the peace. Thus, the allegation of fear on the part of the Crown is a fanciful thought which is not couched in any hard facts that the Crown can rely on. He emphasized that this must amount to a changed circumstance as the Crown can no longer assert that there is fear of interference with the investigation and fear of threatening of the witnesses.

[10] Learned Counsel next submitted that the fact that the Crown was not ready on two previous occasions namely 29 January and 14 February 2007 respectively must be a relevant consideration in deciding whether or not to admit Mr. Maduro to bail.

[11] In summary, the changed circumstances that Mr. Douglas referred to can be encapsulated thus: (i) the investigation is now complete and as such, there cannot be the fear of interference with the investigation and (ii) the fear of threatening of witnesses is merely whimsical and the Crown has not produced any hard evidence to support it.

[12] Mr. Douglas relied extensively on the Anguillan case of Thelston Brooks and (1) The Attorney General and (2) The Commissioner of Police[1] and particularly, paragraph 12 of that judgment. This is what George-Creque J had to say:

> "…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 of the Privy Council in Devendranath Hurnam v The State[2]

[1] Claim No. AXA HCR 2006/0089 [unreported] –Judgment of George-Creque J. delivered on 15 January 2007.
[2] Privy Council Appeal No. 53 of 2004; [2005] UKPC 49.

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 the 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 witness or evidence, and that he does not take advantage of the inevitable delay before trial to commit further offences.*"

[13] In addition, Learned Counsel submitted that the Court must have regard to the following five grounds when considering whether or not a defendant should be admitted to bail namely:

(1) the risk of the defendant absconding;

(2) the risk of the defendant interfering with the course of justice;

(3) preventing crime;

(4) preserving public order; and

(5) the necessity of detention to protect the defendant.

[14] Mr. Douglas fought hard to persuade the Court to apply the reasoning of the learned trial judge in the Brooks case and admit Mr. Maduro to bail. Learned Counsel emphasized that even where a person charged with a serious offence, facing a severe penalty if convicted, may well have a powerful inducement to abscond or interfere with potential witnesses, the court could impose appropriate conditions which will seek to counter those situations. He concluded that this Court should admit Mr. Maduro to bail subject to the imposition of stringent conditions which it may consider appropriate in the circumstances.

[15] In his concise and eloquent submissions, the Learned Director of Public Prosecutions, Mr. Williams reiterated the reasons given by the Crown when it objected to bail before the learned trial judge on the first occasion. The gravamen of his submissions is that Mr. Maduro is a citizen of the United States of America with an American passport and he is also the owner of power boats which makes him a flight risk. Coupled with that, is the fact

that Mr. Maduro is charged with serious offences and he has threatened the principal witnesses who are in fear for their physical well-being.

[16] Mr. Williams reiterated the applicable principles for the grant of bail laid down in the cases of Bolofo and Others v Director of Public Prosecutions [3] and Hussey v The State. [4] For present purposes, I do not think I need to advert to them as they are summarized to in various paragraphs of this judgment.[5]

Principles for granting bail

[17] In the absence of specific legislation relating to bail, the BVI Courts have in practice followed the general principles set out in UK Legislation.[6] The overall test is whether, should bail be granted, the defendant will appear to take his trial: see Re Robinson[7] and Noordally v Attorney General [8].

[18] In Hurnam, the Judicial Committee of the Privy Council took the opportunity to consider the general right to liberty vis-à-vis the law relating to bail culminating in the Bail Act of 1999. At paragraph 16 of the judgment, Lord Bingham stated:

> "The reasoning of the Supreme Court in *Noordally, Maloupe* (save for the penultimate sentence), *Labonne and Deelchand,* all cited above, is consistent with the jurisprudence on the European Convention, which recognises that the right to personal liberty, although not absolute …is nonetheless a right that is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention….The European Court has clearly recognised five grounds for refusing bail (the risk of the defendant absconding; the risk of the defendant interfering with the course of justice; preventing crime; preserving public order; and the necessity of detention to protect the defendant….But it has been insisted that a person must be released unless the state can show that there are "relevant and sufficient reasons" to justify his continued detention: *Wemhoff v Federal Republic of Germany (1968) 1 EHRR 55.* …The European Court has, realistically, recognised that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending (see, for

[3] [1998] 1 LRC 59.
[4] [1992] LRC (Crim) Law Reports 62.
[5] See paragraphs 13, 17 and 18.
[6] See the Bail Act 1999 [UK].
[7] (1854) 23 LJ QB 286.
[8] [1986] MR 204.

example, *Ilijkov v Bulgaria* (Application no 33977/96, 26 July 2001, unreported)), para 80, but has consistently insisted that the seriousness of the crime alleged and the severity of the sentence faced are not, without more, compelling grounds for inferring a risk of flight…"

[19] Having due regard to the principles emanating from the jurisprudence of the European Court of Human Rights, I now turn to consider the case at bar.

Application of the principles to the present case

[20] In an affidavit filed on 9 November 2006, Mr. Maduro chronicles his personal biography. He is 37 years old, born in St. Thomas, United States Virgin Islands making him a citizen of the United States of America. He has been resident in Tortola, British Virgin Islands since his birth and enjoys Belonger status. He is unmarried with 2 infant children; both of whom he supports financially. He is self-employed and operates his own charter business, Sunshine Powerboats.

[21] It is manifestly plain that the nature of the offences is very serious ranging from drug trafficking to blackmail. The offences, though serious, are still bailable. It is not analogous to murder for which it is highly uncommon to grant bail: Re Barthelmy.[9] Mr. Douglas is of the view that since a judge could grant bail in a murder case, as in the Brooks case, then this Court should not deprive Mr. Maduro a similar right to bail.

[22] In my opinion, a scrupulous analysis of the Brooks case clearly demonstrates a myriad of reasons which impelled the learned trial judge to grant bail to the youthful Mr. Brooks. Since much dependence was placed on the Brooks case, it is judicious that I review the facts. Thelston Brooks was a juvenile. The judge noted that on the date of the application for bail, he had just turned seventeen. He is domiciled and resident in Anguilla. He was arrested and charged on 11 November 2006 for murder of another youngster. The nature of the available evidence before the court is that the killing of the victim from stab wounds took place during a fight involving the victim, young Brooks and at least one other person

[9] (1852) 169 ER 636.

(the co-accused) who is also facing trial for the victim's murder.[10] At paragraph 26 of her judgment, George-Creque J. opined:

> "The available evidence so far **clearly** [emphasis added] 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 struck with a knife. These are matters which the prosecution must overcome with the requisite degree of certainty…."

[23] She insinuated that the Prosecution had not advanced any evidence to suggest that Mr. Brooks was a flight risk. Indeed, there is no evidence that he 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.

[24] The Prosecution opposed the application for bail on the ground that a number of eye witnesses are minors who are reluctant to talk to the police and that if Mr. Brooks is granted bail, they may not come forward. The learned trial judge pithily addressed this prosecutorial concern in the following manner:

> "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, to militate against the Applicant."

[25] The judge fastidiously considered the fact that Mr. Brooks cooperated with the investigations based on his interview under caution and that the prosecution had not advanced any evidence to demonstrate that he is likely to threaten any prospective witness, or otherwise interfere with evidence to thwart the smooth process of the gathering of evidence. There was also no evidence to intimate that Mr. Brooks has been or was suspected of being involved or engaged in criminal activity or that he is likely to become involved if granted bail.

[10] See paragraphs 24 and 25 of judgment for further details on the facts of the case.

[26] Except for the fact that Mr. Brooks was facing a murder charge, it is correct to say that the judge found that no other factor which militated against his admission to bail.

[27] In my judgment, the facts and surrounding circumstances in the case at bar are undeniably disparate from the Brooks case. As can be gleaned from the various affidavits in this application, the Prosecution's evidence in support of the charges, if found to be credible, does not appear to be whimsical or capricious. If Mr. Maduro is convicted, he faces varying lengthy terms of imprisonment.

[28] The Prosecution is troubled that if Mr. Maduro is released on bail, he is likely to threaten or disturb public order. Their concern has arisen out of statements from the prospective witnesses that they are in fear for their personal safety. There is available evidence that Mr. Maduro's accomplice is still at large and investigations are ongoing as to his identity and the identities of persons who have been telephoning witnesses and demanding a share of the cocaine that was found.[11] There is also evidence that Mr. Maduro has already interfered with the Prosecution's witnesses.

[29] In this regard, there are fundamentally two considerations that a court ought to concern itself with namely (i) whether the release of Mr. Maduro on bail is likely to threaten or disrupt public order and (ii) whether Mr. Maduro would be in danger to life and or limb if released on bail making his continued detention necessary for his own personal safety. Witnesses in this case are in fear for their physical well-being and safety. Two of them have submitted witness statements to this effect. There is evidence that Mr. Maduro's family owns quite a substantial part of Cooper Island and that he is a frequent visitor to that secluded island. Two of the witnesses are also frequent visitors as they are dive instructors.

[30] Like the Learned Director of Public Prosecutions, I myself have grave concerns about this case particularly where witnesses are in fear for their physical safety. Often, the courts are

[11] See paragraph 14 of affidavit of Detective Constable Vincent John sworn to on 13 May 2006.

unhurried in shutting the stable door and may reflect after the horse is gone. Correlatively, a court should not be a court of speculation.

The standard of proof to be applied

[31] It is well-established that in dealing with bail applications, the standard of proof is the civil standard (i.e. on a balance of probabilities): see the case of R v Governor of Canterbury Prison [1990] 3 WLR 126.

Conclusion

[32] Having considered all of the facts and surrounding circumstances, I am convinced that the balance lies against the grant of bail for Mr. Maduro. To top it all, Mr. Maduro is an American Citizen and is therefore considered a flight risk. To compound that fact, his line of business is dealing with motorboats and that makes it easier for him to traverse the waters and enter the US Virgin Islands and consequently mainland USA unobstructed.

[33] I have also found no changed circumstances since the last application to the High Court. Even if I were wrong to come to this conclusion, I am of the considered opinion that Mr. Maduro is a flight risk and the likelihood of interference with potential witnesses is overwhelming. Accordingly, I will dismiss the bail application with no order as to costs.

Postscript

[34] My own experience has been that cases in the Magistrate court in this Territory are dealt with expeditiously. The Crown is ready to proceed. So is the defence. It is now left to the Court to ensure that the wheels of justice revolve without delay since Mr. Maduro is on remand.

Indra Hariprashad-Charles
High Court Judge